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# CALIFORNIA REPORTER

*Covering Cases Reported in*

PACIFIC REPORTER

## 89 P.—91 P.

*Cite by Volume and Page*

*of the*

PACIFIC REPORTER

*Thus:*

89 P. 82

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

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Pacific Reporter, Vol. 89, Nos. 1-8; Vol. 90, Nos. 1-10; Vol. 91, Nos. 1-9, 11-13.

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Cal.Rep. 89-91 P.
2-1967

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# CALIFORNIA REPORTER

## 89 PACIFIC REPORTER

(150 Cal. 281)

## CHILDS et al. v. DE LAVEAGA. (S. F. 3,956.)

(Supreme Court of California. Jan. 18, 1907. Rehearing Denied Feb. 15, 1907.)

1. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE — STOCKHOLDER'S LIABILITY.

A creditor of an insolvent bank cannot maintain an action against the executors of a deceased stockholder for his proportion of the bank's indebtedness after a final decree for the distribution of his estate, though appeals from such decree so far as it determines the distributees, are pending.

2. SAME.

A judgment for defendant, in an action against an executor of a deceased stockholder of a bank, for the stockholder's proportion of the bank's indebtedness will be affirmed on appeal, on it appearing that the executor has been discharged on the entry of a decree finally distributing the estate of the stockholder.

Department 2. Appeal from Superior Court, Santa Clara County; **M. H. Hyland**, Judge.

Action by C. W. Childs and others against M. A. de Laveaga. From a judgment for defendant, plaintiffs appeal. Affirmed.

R. J. Welch, for appellants. Timothy J. Lyons, for respondent.

McFARLAND, J. Plaintiffs, as assignees of certain depositors in and creditors of the Union Savings Bank of San José, a corporation (now insolvent), brought this present action against the executors of the will of Jose V. de Laveaga, deceased, to recover a money judgment for an amount alleged to be such proportion of the said bank's indebtedness to plaintiffs' assignors as 100 shares of the capital stock of said bank, alleged to have been held by said de Laveaga, deceased, at the time of his death, bears to the whole capital stock of said bank. Judgment went in the court below for defendant, and from this judgment, and also from an order refusing to change the conclusions of law, etc., plaintiffs appeal. There has also been submitted by respondent a motion for an order of this court "dismissing the appeal of the appellants herein or affirming the judgment appealed from," which motion will hereinafter be considered.

The main facts of the case are these: The said Jose V. de Laveaga, deceased, died testate on August 14, 1894, leaving a considerable amount of property, which included 100 shares of the capital stock of said Union Savings Bank. The executors named in the will immediately qualified and commenced the administration of the estate. On October 2, 1894, they caused notice to creditors to be published calling for creditors against the estate to present their claims within 10 months thereafter. The time for the presentation of claims expired August 2, 1895; and thereafter on August 26, 1895, the court in which the administration was pending made and entered judgment adjudging that due and legal notice to creditors of the said decedent had been given and made. Thereafter the executors presented their final account, and on February 3, 1896, the court made an order settling, allowing, and approving said account "as and for a final settlement in the matter of said estate and the administration thereof." No appeal was ever taken from this order. Afterwards, on the petition of Maria Josefa Cebrian and others, claiming to be distributees of the estate, the court, on June 4, 1900, entered a final decree of distribution in said estate. By that decree the estate was distributed as follows: "The one-quarter thereof to said Maria Josefa Cebrian; the one-quarter thereof to said Maria Concepcion de Laveaga; the one-quarter thereof to said Miguel A. de Laveaga; and the one-quarter thereof to said Anselmo Jose Maria de Laveaga." In the decree it was adjudged that the account of the executors had been settled, and further: "That all the debts of said decedent and all claims against the estate of said decedent had been fully paid, satisfied and discharged before the filing of said petition for distribution of the said sisters of the said decedent, and all expenses and charges of administration up to the filing thereof had been fully paid, and all expenses and charges of administration up to the present time, and all taxes upon said estate, have been fully paid, satisfied and discharged." No appeal from this decree has ever been taken by the appellants in the case at bar, or by any person asserting a claim against the estate. An appeal was taken by the three first-named distributees, Maria Josefa Cebrian, Maria Concepcion de Laveaga, and Miguel A. de Laveaga, from that part of the decree which awarded one-fourth of the estate to the said Anselmo Jose Maria de Laveaga; the said appellants claiming that the trial court erred in distributing any part of the estate to the said Anselmo, and that the whole estate should be distributed in three equal parts to the said three appellants. There was also an appeal by one Dolores A. de Rivera, who claimed that she was entitled to distribution in the estate, and that the court erred in not so deciding. The original transcript in the case at bar shows that said two appeals were pending in the appellate court, and had not been disposed of when the present action was tried. At the time of the death of Jose V. de Laveaga the said bank was apparently not insolvent; indeed dividends were afterwards declared. And at the time of the death of said Jose plaintiffs and their assignors were not depositors in and creditors of said bank. They did not become such depositors and creditors for several years afterwards, to wit, "between December 29, 1897, and January 30, 1899." The bank became insolvent on January 30, 1899. The assignors of plaintiffs did not present any claim to the executors of the said estate within the time allowed therefor. They commenced the present action on January 2, 1901, which was after the said final decree of distribution above stated.

A number of questions are discussed by counsel, as, for instance, whether under any view plaintiffs herein could recover without having presented a claim within the 10 months allowed for that purpose; whether at the time the plaintiffs' assignors became creditors of the bank the said estate was liable for a proportionate share of the indebtedness of the bank to plaintiffs, or whether the heirs and devisees of the said deceased Jose were then the owners of the stock and liable for such proportion. But these and other questions raised are not necessary to be determined because, under our view, this action could not be brought and maintained after the said final decree of distribution. The estate was then closed so far as any claims against it are concerned. The appeals above noted merely attacked that part of the decree which determined who were the rightful distributees; and no matter how those appeals might be determined, the rights of the contesting distributees as to the proper distribution of the estate between them were the only matters involved. We think therefore that the judgment should be affirmed upon the original transcript. As before stated, the respondent moved for an order dismissing the appeal or affirming the judgment upon grounds stated in the motion. It appears from the papers filed on said motion that afterwards, on the appeal of said Dolores A. de Rivera, the appeal was dismissed; that on the said appeal of said Maria Josefa Cebrian and others the appellate court held that the court below erred in distributing one-fourth of the estate to said Anselmo, and reversed the judgment for that reason; and that after the remittitur went down the trial court made an amended decree of distribution by which the whole estate was distributed in three equal parts to the said three appellants. This decree was made and entered on the 25th day of March, 1904. It appeared further that the executors Thomas Magee and Daniel Rogers, had both died leaving M. A. de Laveaga as sole executor, and that on June 6, 1904, the court made an order releasing and discharging the said remaining executor, M. A. de Laveaga, and his sureties, and the estates of the deceased coexecutors, Thomas Magee and Daniel Rogers, from all liability to be thereafter incurred, and decreeing that "the said estate is fully distributed, and the trust of administration, and of said executors, is settled and closed." No appeal has ever been taken from this decree of final distribution or the said order discharging the executor. It appears, therefore, that there is no executor of said decedent nor any administration of the estate pending, and that no relief asked for by appellants could be made applicable or be enforced. We think, therefore, that the motion that the judgment be affirmed should, also, for the reasons set up in the motion, be granted.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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150 Cal. 395

## UNION SAV. BANK OF SAN JOSE v. DE LAVEAGA et al. (S. F. 3,924.)

(Supreme Court of California. Feb. 1, 1907.)

1. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATES.

An insolvent bank cannot maintain an action against the executors of a deceased stockholder for an assessment on the stock necessary for liquidation levied after a final decree for the distribution of his estate, appealed from only so far as it determines the distributees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1744.]

2. SAME.

A judgment for defendant, in an action against an executor of a deceased stockholder of a bank, for an assessment on stock necessary for liquidation will be affirmed on appeal, on it appearing that the executor has been discharged on the entry of a final order of distribution not appealed from.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1744.]

Department 2. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by the Union Savings Bank of San Jose against M. A. de Laveaga and others, as executors of J. V. de Laveaga, deceased. From a judgment for defendants, entered on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

E. M. Rea, for appellant. Timothy J. Lyons, for respondents.

LORIGAN, J. This is an appeal from a judgment entered upon demurrer sustained to the complaint.

The complaint alleged, among other things, that the plaintiff was an insolvent banking corporation in liquidation, heavily indebted and unable on June 7, 1901, to pay its indebtedness, and that an assessment on the capital stock of said corporation was necessary for purposes of liquidation; that on April 1, 1891, J. V. de Laveaga, deceased, subscribed for 100 shares of the capital stock of plaintiff corporation, of the par value of $100 each, and that a certificate for that number of shares was then issued to him; that said J. V. de Laveaga had in his lifetime paid but $30 to plaintiff on his subscription to said capital stock, and was indebted for the balance of $70 per share; that said J. V. de Laveaga died on August 14, 1894, leaving a last will which was duly admitted to probate, and the defendants were appointed and qualified as executors thereof; that said executors duly published notice to creditors, and that on February 1, 1896, the time for presenting claims against said estate had expired; that on June 7, 1901, the directors of plaintiff levied an assessment of $50 per share on the capital stock of said corporation, such assessment to become delinquent July 12, 1901, and that the assessment levied on the stock for which J. V. de Laveaga, deceased, had subscribed was $5,000, and was unpaid, and that the plaintiff had elected to recover the entire amount of the assessment by action. A demurrer to the complaint was sustained by the court below on the ground, as is conceded by both parties, that no claim against the estate of de Laveaga, deceased, had been presented by the bank to the executors. While respondents contend on this appeal that the ruling of the court in that respect was correct, and that the judgment should be therefore affirmed, they have also presented a motion for an order of this court, dismissing this appeal or affirming the judgment, upon the ground that appellant here is no longer a party or person interested in the estate of said Jose V. de Laveaga, deceased, or a claimant against said estate or the assets thereof or otherwise; that the administration of said estate has been final and definitely settled and closed; and that there is no executor of said decedent, or any administration of said estate, to which any relief asked for by appellant could apply or be made applicable or be enforced.

As a basis for the motion, it is shown that a final decree of distribution of said estate has been entered and the executors of the will of said deceased discharged and the estate closed. A motion similar to this was made in the case of Childs et al. v. M. A. de Laveaga et al., executors of the said J. V. de Laveaga. Both the Childs case and the present Union Savings Bank case involved a claim of liability on the part of the estate of J. V. de Laveaga, arising out of ownership by deceased in his lifetime of this same 100 shares of stock. In the Childs Case the action was by certain depositors of said Union Savings Bank to recover on the proportionate liability of said J. V. de Laveaga, deceased, and there, as here, the suit was brought against his executors. The motion was granted in the Childs Case, and must be also granted in this case. This action was not commenced until April 24, 1903. It appears from the documents filed in aid of the motion that prior to the commencement of this action, and on June 4, 1900, in the matter of said estate of J. V. de Laveaga, deceased, the superior court before which it was pending entered a decree of final distribution of the estate whereby all the estate was distributed to four distributees. The only appeal taken from the decree was by some of the distributees dissatisfied as to the portion of the estate awarded them. This decree of distribution was reversed by this court, and subsequently, on March 24, 1904, the superior court entered an amended decree of final distribution. Originally there were three executors of the will of deceased, two of whom died pending administration, leaving M. A. de Laveaga as sole executor. On June 6, 1904, the superior court made an order discharging the surviving executor and the estates of his deceased coexecutors, and decreed that the estate was fully distributed, and the trust of administration and of the executors settled and closed. No appeal was taken by any one from either the amended decree of final distribution or final discharge. The distribution of the estate and the discharge of the executors (the only persons sued in this action) is terminative of any right of action or right to a judgment by appellant in this case; there is no estate nor executors to represent it, and the further prosecution of the action cannot be of any avail or advantage to the appellant. See the opinion in Childs v. De Laveaga (filed on the 18th ult.) 89 Pac. 82.

Upon the showing made of the futility of any further prosecution of this action by the appellant, we think the judgment should be affirmed; and it is so ordered.

We concur: McFARLAND, J.; HENSHAW, J.

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150 Cal. 285

## WOLF v. BOARD OF SUP'RS OF SANTA CLARA COUNTY et al. (S. F. 3,850.)

(Supreme Court of California. Jan. 18, 1907.)

STIPULATIONS — OPERATION — INJUNCTION — DISSOLUTION—EQUITY—JURISDICTION.

Where plaintiff obtained a preliminary order restraining supervisors of a county, from passing any ordinance granting certain franchises and privileges to another defendant, etc., and thereafter, on the trial of the cause, it was stipulated that the entire matter should be submitted to the court as a whole—pleadings, motions, orders, and the evidence—and that the court should declare what the rights respectively of the parties were, the court was empowered of its own motion to make an order striking out from the preliminary order that part thereof enjoining defendant board from refusing to pass an ordinance necessary to grant such franchises and privileges to plaintiff.

Department 2. Appeal from Superior Court, Santa Clara County; S. F. Leib, Judge.

Action by E. Myron Wolf against the board of supervisors of the county of Santa Clara and others. From an order of the superior court modifying a preliminary injunction, plaintiff appeals. Affirmed.

E. Myron Wolf, in pro. per. J. H. Campbell, Dist. Atty., and C. W. Cobb, for respondents.

McFARLAND, J. This is an appeal by plaintiff from an order of the superior court modifying a preliminary injunction.

The material facts are these: It is averred in the complaint that the defendants, the board of supervisors, received bids for two proposed electric railroad franchises, the preliminary proceedings leading up thereto having been regular and in accordance with the statute on the subject; that plaintiff was the highest bidder and one Dunlap, who was the only other bidder, the lowest bidder in each case; that the said board accepted each of Dunlap's bids, and refused to accept either of the plaintiff's bids; that they refused to pass any ordinance awarding said franchises to plaintiff, and threatened to pass an ordinance awarding the same to Dunlap. The prayer of the complaint is that the board "be enjoined and forbidden from passing any ordinance or ordinances granting said petitions for franchise privileges to the said George T. Dunlap, and that they be required to desist from refusing to pass ordinances to grant said franchises and bar privileges to the plaintiff herein, and for such other and further relief," etc. The supervisors filed a demurrer to the complaint, and also an answer, in which they denied that they intend to grant the said franchises to said Dunlap, or to any other person, but have determined that they will not award said franchises to any person because the bids are not at all commensurate with the value of the franchises, and intend to readvertise said franchises for sale, etc. To this answer the plaintiff filed a demurrer. Neither of said demurrers has been decided by the court. After the filing of the complaint the court made the following preliminary order: "It is hereby ordered that, until further order of this court, said defendants, their agents, and servants, be restrained, and said defendants are hereby, and each of them is and their agents and servants are, and each of them is, hereby forbidden and restrained from passing any ordinance or ordinances, granting the petition of George T. Dunlap for the franchises and privileges mentioned in the complaint of plaintiff on file herein, and from refusing to pass the ordinance necessary to grant said franchises and privileges to E. Myron Wolf, the plaintiff herein." The bill of exceptions contains the following: "That thereafter the said cause came on regularly for hearing upon the demurrer and trial of the cause." And: "It was then, there and in open court, stipulated and agreed by and between the said parties, that the entire matter should be submitted to the court as a whole—pleadings, motions, orders, and the evidence—and out of and from the same the court should deduce and declare what the rights, respectively, of the parties hereto might be." And that: "Defendants' demurrer was argued, and evidence was then taken, and the cause was duly submitted to the court for its decision." After this submission, but before having finally decided the case, the court made the following order: "It is ordered that the following words, clause, and matter, to wit, 'and from refusing to pass the ordinances necessary to grant said franchises and privileges to E. Myron Wolf, the plaintiff herein,' be and the same are hereby stricken from the writ of injunction heretofore issued herein, and said writ of injunction is modified to the extent of striking out said words, clause, and matter therefrom, and said injunction is to that extent, alone, dissolved." This is the order appealed from.

The sole ground upon which appellant claims a reversal is the contention that the court has no jurisdiction to make the said order on its own motion because, as appellant contends, after a court has granted a preliminary injunction, it can be dissolved or modified only under section 532, Code Civ. Proc., which provides that: "If an injunction be granted without notice, the defendant at any time before the trial may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same." Whether this action is to be construed as merely giving to a defendant the right to, himself, move to dissolve or modify a preliminary injunction, and not touching the power of the court to dissolve or modify without any motion of defendant, or whether, as contended by appellant, it excludes all right of the court to so dissolve or modify except upon motion of defendant, is a question which, under our view, need not here be definitely determined. It may be said, however, that, while our attention has not been called to any decision of this court on the subject, there are strong reasons for holding that an ex parte order not in its nature permanent, and, as expressed on its face, to continue only "until further order of this court," may be dissolved or modified by the court on its own motion, whenever it becomes satisfied that the order was improvidently or erroneously made. And this has been held to be the law in other jurisdictions. We will notice one leading case. In Conover v. Ruckman, 33 N. J. Eq. 303, the vice chancellor had "of his own motion" dissolved a preliminary injunction, and the plaintiff had appealed. It seems that section 86, page 120, of the statutes of New Jersey contained a provision very similar to section 532 of our Code, relied on by appellant. The appellate court in the New Jersey case said: "The appellant assigned, as one reason for reversal, that the order dissolving the injunction was irregular, in that it was made without the eight days' notice of a motion to dissolve, prescribed by the eighty-sixth section of the chancery act. Revision, p. 120. This reason cannot prevail. If the equity judge has allowed an interlocutory injunction which afterwards clearly appears to him to have been improperly allowed, he may, of his own motion, recall it at any time. Inasmuch as it was in his discretion, in the first instance, to refuse the injunction, he may, in his discretion, set aside the allowance of it, if he is satisfied that it should not have been allowed. The section referred to has reference to applications to dissolve made by a party."

But, while we are inclined to agree with the court in the case above cited, we are of the opinion that the part of the bill of exceptions above quoted leaves no room, in the case at bar, for the said contention of appellant. It is there stipulated that "the entire matter should be submitted to the court as a whole—pleadings, motions, orders, and the evidence." This was a clear submission by the parties of all matters involved in the case, including among the "orders" the one granting the preliminary injunction.

The order appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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150 Cal. 376

## BROWN v. CROWN GOLD MILLING CO.

(S. F. 3,995.)

(Supreme Court of California. Jan. 29, 1907.)

1. WORK AND LABOR—COMPLAINT.

A complaint, in an action to recover for services, that states that plaintiff performed certain services for defendant, alleges their reasonable value, that they were rendered at the special instance and request of defendant, and were unpaid, is sufficient to warrant a recovery on quantum meruit, and an allegation of an express promise to pay plaintiff is surplusage which would not vitiate the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, § 41.]

2. SAME—EVIDENCE—INVALIDITY OF CONTRACT.

In an action to recover the reasonable value of services performed, that a contract claimed to have been entered into between the parties was so indefinite that it could not be made the basis of a recovery is immaterial, where evidence as to the contract was introduced to show the terms and nature of plaintiff's employment, and together with proof of its breach, was to be used as a basis of recovery of reasonable value.

3. MASTER AND SERVANT — DISCHARGE OF SERVANT—COMPENSATION—ACTION—RECOVERY OF VALUE.

Where an employé is discharged without cause during the term of his employment, he may regard the contract as rescinded, sue on a quantum meruit, and recover the reasonable value of his services as if the special contract of employment had never been made, whether the contract was valid or invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 50, 52.]

4. CORPORATIONS—DE FACTO MANAGER—AUTHORITY—EVIDENCE.

Evidence, in an action to recover the value of services rendered a corporation, considered, and *held* to show that the person engaging plaintiff's services was defendant's de facto manager.

5. SAME—RATIFICATION OF CONTRACT.

Where the majority of the directors have knowledge of the terms under which plaintiff is in the employ of the corporation, and do not promptly disaffirm the action of the person hiring him, their failure to act is a ratification of the contract of employment.

6. MASTER AND SERVANT—COMPENSATION—ACTIONS—EVIDENCE—CONTRACT.

In an action to recover for the value of services rendered a corporation, evidence of a statement made about four months after plaintiff's employment by defendant's manager who had employed plaintiff, concerning the terms of plaintiff's employment, is admissible, as tending to show a contract and its terms.

7. SAME.

In an action to recover the value of services rendered a corporation, under an agreement making compensation conditional on the success of the company, evidence that the company had not made expenses, and owed large amounts, was inadmissible, where plaintiff's contract was that he was to remain with the company until it was determined whether the business was a success, and plaintiff was discharged, and defendant did not undertake to show that its business was a failure.

8. EVIDENCE—PAROL EVIDENCE—CONTRADICTORY WRITINGS—RECEIPTS IN FULL.

Receipts in full may be explained by parol evidence showing the purpose for which they were made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1829, 2082.]

9. MASTER AND SERVANT — COMPENSATION — —ACTIONS—INSTRUCTIONS.

In an action to recover the value of services rendered in exploiting a machine manufactured by defendant, an instruction that if plaintiff rendered services outside the sphere of his employment at defendant's request he was entitled to recover a reasonable compensation for such services in addition to his specified salary is applicable to the evidence, where it is shown that plaintiff was engaged to show and explain the machine to visitors and answer criticisms in the press, and that, in addition to those duties, he acted as correspondent for defendant, classified ores, revised assays, wrote scientific articles, and acted as engineer and metallurgist for the company.

10. SAME — ADDITIONAL COMPENSATION — AGREEMENT.

An employé has a right to additional compensation for services rendered on request outside the sphere of his employment, although there was no express agreement to pay therefor.

11. SAME—INSTRUCTIONS.

In an action to recover the value of services by a discharged employé, instructions that if defendant agreed to pay plaintiff a stated sum per day until defendant could pay more, defendant had no right to discharge plaintiff without cause, and if he was discharged, he was entitled to the reasonable value of his services while in defendant's employ, and that where an employé has been wrongfully discharged or when his term of service is otherwise closed by defendant's action, he may sue on quantum meruit, do not take from the jury the question whether plaintiff's discharge was wrongful.

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by J. C. Brown against the Crown Gold Milling Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bigelow & Dorsey, for appellant. J. J. Scrivner and Thomas M. Diviny, for respondent.

LORIGAN, J. This action was brought by plaintiff to recover from defendant the reasonable value of certain services performed for it from August 1, 1900, to December 14, 1901. The case was tried before a jury, a verdict rendered for plaintiff for $2,955, and from the judgment entered thereon defendant appeals; the grounds urged for a reversal being presented upon a bill of exceptions accompanying the appeal from the judgment.

At the close of plaintiff's case defendant moved for a nonsuit, which was denied. This is the first error assigned, and, in order to properly discuss it, it is necessary to state portions of the pleadings and of the evidence offered under them by plaintiff. The complaint, after enumerating the various services performed by plaintiff at the instance and request of defendant, further alleged "that such services were so rendered and performed at the special instance and request of said defendant, and said defendant then and there promised and agreed to pay the plaintiff a reasonable compensation for the same," followed by an allegation of their reasonable value. The answer admitted the performance of the services as alleged, but averred that plaintiff had agreed to perform them for $15 per week up to August 3, 1901, and for $20 per week thereafter during the time claimed, which amounts had been paid him weekly and for which he had given receipts. The evidence on the part of plaintiff showed that the defendant was a corporation organized to exploit a patented machine for the concentration of ores, and was endeavoring to make the patent a success. It had a shop in the city of San Francisco where the machine was manufactured, operated, tested, and shown to those interested in such processes, and it was in connection with the exploiting of this machine that the plaintiff was employed. The plaintiff had been engaged in mining for over 30 years, his specialty being smelting—working in base metal ores which require concentration and smelting. He had acted as manager for mining corporations, understood the duties of one acting in a general advisory capacity as an engineer or metallurgist of such corporations—classifying ores, exploiting machines, composing and writing scientific articles, revising assays, and operating concentrators.

The agreement under which plaintiff entered into the services of defendant was claimed by him to have been made with L. B. Doe, at the time a director and vice president of the corporation, and, as plaintiff testified, its general manager, and to have been arrived at after negotiations between them taking place at different times. Plaintiff's testimony on the subject was, that he was sent for by Mr. Doe in June, 1900, for the purpose of writing a technical article to appear in a scientific paper setting forth the value of the defendant's concentrator above all others in the market. He prepared this, and at the request of Mr. Doe he wrote also an article on the merits of the machine—a prospectus—for presentation to possible stock buyers, and for general circulation, and delivered it to Mr. Doe at the office of the company. At that time Mr. Doe stated to him that the articles he had written were satisfactory and the suggestions made as to their process were invaluable; that the company would have to have some one to explain the machine; that none of the members of it were able to do so; that people came in and offered technical objections that they could not meet, nor could they describe the machine as the plaintiff had described it in his articles; that it was a new enterprise just starting in; that the company did not have a great deal of money and were not able to pay large salaries; that the company expected as soon as their plant was in operation that they could show it and explain it and extoll its virtues to visiting mining men; that they expected thereby to do a large amount of business, and expected it would increase the value of the capital stock, so that they could find a market for the treasury stock, and said that he would like to arrange for plaintiff to come there and explain the operation, merits, and advantages of the machine, and wanted to know what he would charge for such services. Plaintiff said he would consider the matter and let him know the next day. As to what occurred next day plaintiff testified: "The next day I called there, and, after some general conversation about the machine and the articles, and the best method of doing business, I told Mr. Doe that I had thought over the matter; that I was a speculative fellow, and liked to take chances of that kind; had made a great deal of money by taking chances of that kind in mining companies; and, considering the condition of the corporation, as he had stated to me, that I was willing to come there and only draw down enough money to live on. He wanted to know what that figure was, and I told him $75 a month; that I would come there and draw down in cash $75 a month, * * * and a call on a certain amount of the stock for the difference. Mr. Doe said to me, 'I don't think that the company would like to alienate any of the stock at the present time.' I said, 'Well, when the company succeeds—sells its treasury stock, then I can draw the other.'" Nothing was decided at this meeting, and plaintiff agreed to call next day. On the next day he went to the office of the company, when he and Mr. Doe resumed their negotiations. As to these further negotiations, the plaintiff testified: "Mr. Doe said to me he had talked with his partners, as he expressed it, and they thought that they couldn't afford to allow me more than $15 a week for the present as compensation. I hardly liked the word, and I said, 'Mr. Doe, a plain understanding hurts nobody. I am a thousand times obliged to you for making an opening. Now, I would like to know what my duties are going to be.' He said, 'Your duties will be to meet visitors coming in, explain the machine to them, meet their arguments against it, and answer any technical objection that they may bring out, and, if we need any—if there are any criticisms in the press, we will expect you to answer them, and things of that character.' 'All right,' I said. 'The duties are not onerous, but they require a wide field of knowledge to perform them, and I want you to understand as plainly as I can that $15 is not my compensation for doing this work.' 'Mr. Brown,' he said, 'why, I know that. That is no pay at all. That is no salary at all for a man of your ability. I know that, and,' he added, 'as soon as we sell our treasury stock or get any of our machines established—our business established—we will furnish you with a position as long as you live. We will see that you are amply compensated for the value of the services that you will render.' I said, 'Mr. Doe, that is perfectly satisfactory to me.' We walked over to the desk where Mr. Wood [a director and general manager of the manufacturing department of defendant] was working before a window, and he called Mr. Wood over to him and said: 'Mr. Wood, I have arranged with Mr. Brown to come here. He is to draw down $15 a week.' 'That is satisfactory,' said Mr. Wood, and he turned his back and walked away." In this last conversation, Mr. Doe stated that it would take the company about six months to get into a condition to sell their stock, at which time the company was to fix the salary of plaintiff, and he was then to be paid the difference between the amount he was to draw and what would be a handsome remuneration for his services, considering the circumstances under which he went into the company's employment; that this salary, when fixed, was to date from the time plaintiff went to work, the company to be credited with the amount drawn by plaintiff for living expenses; that the plaintiff was to remain with the defendant until it was proven whether the enterprise was a failure or not; if the company was unable to establish its business—if it was an absolute failure—then the plaintiff could claim nothing against it. The plaintiff went to work under these terms, but, finding that $15 per week was insufficient to support himself and family, applied to the company for $20 per week, which was allowed him; his salary, however, was never fixed, although he often demanded that it should be; and, after remaining with the defendant for the period alleged in the complaint—some 16 months—he was, without cause, discharged by the defendant.

We have stated the testimony of the plaintiff with reference to the terms of the contract only to illustrate the points made on motion for the nonsuit. This motion was based, first, upon the claim that there was a material, fatal variance between the allegations of the complaint and the proof; that the complaint alleged an unconditional positive promise to pay plaintiff a reasonable compensation for his services, while the evidence showed that such promise was not unconditional, but contingent upon the sale of treasury stock of the defendant, or the success of the corporate enterprise. There is nothing in this point. If it shall appear that in law plaintiff, on a complaint stating a common count, was entitled to recover under the agreement shown to have been made with him by the defendant, we think the complaint is unobjectionable for that purpose. The claim of appellant is that the complaint states an express promise to pay plaintiff a reasonable compensation for his services. But, as the complaint states that plaintiff performed certain services for the defendant, alleges their reasonable value, that they were rendered at the special instance and request of the defendant, and were unpaid, it states all the facts that were required to be stated on quantum meruit. From these facts, which were all that were necessary to be alleged, the law raised a promise to pay. It was not necessary to allege any promise, and such an allegation was a mere conclusion of law from the facts stated. The allegation of an express promise was surplusage, and that surplusage will not vitiate a pleading is elementary. Wilkins v. Stidger, 22 Cal. 236, 83 Am. Dec. 64; Abadie v. Carrillo, 32 Cal. 173; De la Guerra v. Newhall, 55 Cal. 21. Appellant relies upon the cases of Owen v. Meade, 104 Cal. 179, 37 Pac. 923, and Nichols v. Randall, 136 Cal. 426, 69 Pac. 26, in support of its contention; but these cases are not in point. In Owen v. Meade, the complaint alleged an express agreement to pay $1,000 as attorney's fee in a certain action. The proof was that the promise of defendant to pay was not unconditional, but contingent. This was held to be a fatal variance, and properly so, because, as the court said: "There is a wide and essential difference between the two contracts, and proof of one will not support a finding that the other was made. The plaintiff's allegation of an absolute promise was not sustained by proof of the contingent promise, and evidence in relation to such contingent promise was not relevant to the issues made by the pleadings." Neither has Nichols v. Randall any relevancy. In that case the plaintiff alleged that he deposited with the defendant certain moneys to be loaned by defendant for him, and that defendant guarantied him 9 per cent. interest upon said money; that defendant did not loan said money, but used it in his own business, and subsequently repudiated the trust. The evidence on the part of plaintiff tended to show that defendant had sold lands which he held in trust for plaintiff, and fraudulently misrepresented the price obtained and appropriated the proceeds. As a special contract, to wit, that the money was deposited with defendant to be loaned by defendant was pleaded, the evidence introduced had no tendency to support this allegation, and hence there was a material variance. The pleadings and proofs in both cases were radically different from those in the case at bar. In the cases particularly referred to, the actions were brought on an express contract, and sought to be sustained by proof of a contingent or implied contract. Here the action is brought, not upon an express contract, but upon a quantum meruit to recover the reasonable value of services. The contract, which was shown by the evidence of plaintiff to have been made, was not proven for the purpose of recovering upon it, but for the purpose of showing that it was entered into between himself and the defendant, its terms, and a breach of it on the part of defendant by discharging him without cause, for the purpose of recovering on a quantum meruit the reasonable value of the services he performed under it prior to its breach. This disposes of the point relative to the alleged variance between the allegations and the proof urged as a ground for a nonsuit.

In addition, it was urged upon said motion that there was no evidence in the case to sustain plaintiff's alleged cause of action. In this regard it is insisted that the contract claimed to have been entered into between plaintiff and defendant was so indefinite and uncertain in its terms that it could not be made the basis of a recovery. But this is not an action upon the contract. It is not an action for specific performance of the contract, or for damages for its breach. The complaint here, as we have said, is upon a common count for the recovery of the reasonable value of services performed. Evidence of the making of the contract was for the purpose of showing the terms and nature of plaintiff's employment under it, supple mented by proof of its breach by defendant as a basis for the recovery of the reasonable value of his services. Reynolds v. Jourdan, 6 Cal. 108; Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127. Under such circumstances it is immaterial whether the contract is void for uncertainty or not. As plaintiff is not suing upon it, these infirmities are of no moment.

Now, as to the law upon this subject. It is the general rule that where an employé is without cause discharged by his employer during the term of his employment, he may regard the contract as rescinded, and sue upon a quantum meruit, and recover the reasonable value of his services, as if the special contract of employment had never been made. 2 Ency. of Pl. & Pr. 1011, note; Reynolds v. Jourdan, supra; Adams v. Pugh, 7 Cal. 151; Hartman v. Rogers, 69 Cal. 643, 11 Pac. 581; Castagnino v. Balletta, supra. This he may do when no question could arise as to the validity of the contract, and, independent of the other remedies, he has, namely, to regard the contract as broken and immediately sue for damages for its breach, or to treat the contract as still subsisting, and, at the expiration of the term, bring suit for the entire sum agreed to be paid. Where, however, the contract between the employé and the employer is void for indefiniteness or uncertainty, or for other reasons, neither of the last two remedies was available to him because they can only exist where there is a valid contract, and where there is not his only remedy is to sue upon a quantum meruit. It is held that such an action will lie where services have been rendered upon a contract which was void under the statute of frauds. Patten v. Hicks, 43 Cal. 509. And by parity of reasoning the same rule must be applied where the contract is void for uncertainty. That it is so applied is supported by the authorities generally, but attention need only be particularly called to the recent case of Davidson v. Laughlin, 138 Cal. 320, 71 Pac. 345, in support of such right of recovery. In the case cited the contract was to employ the plaintiff as defendant's agent at a reduced salary during the construction of a building, in consideration of a promise to employ him as agent in its management at a stipulated increased salary after its completion. After the building was completed, plaintiff was discharged and brought suit to recover the reasonable value of his past services. The point made on appeal from a judgment in favor of plaintiff was that no recovery could be had because the contract was indefinite. This court said: "As to the questions of law involved in the case, it seems clear that as the agreement of appellant to employ respondent as agent of the building after its completion, at the agreed compensation, was the consideration of the latter's agreement to take $60 per month for his previous services, the failure of appellant to so employ respondent was a breach of the contract which released the latter therefrom, and authorized him to treat it as rescinded, and to recover for his services what they were reasonably worth. This, of course, is the general rule applicable to such a case, and it is too elementary to need reference to authorities. It is contended, however, that the rule does not apply in the case at bar because the contract for permanent employment was only for an indefinite time; that it cannot be specifically enforced, and that it could be terminated by either party upon reasonable notice. But this is not an action to compel a specific performance of the contract for employment after the completion of the building, nor to recover compensation for his services after such completion, nor to recover future profits which respondent might have earned after that time if appellant had complied with his said promise of future employment. The action is for services rendered prior to the time when the future employment at $150 was to commence. It is based upon the theory that appellant's promise of the future employment was the consideration of respondent's promise to do the previous work for a compensation much less than its real value; that each of said promises was part of the contract, and that appellant's refusal to perform his said promise abrogated the contract and entitled respondent to recover the reasonable value of his past services. This theory is well founded in legal principles, as it is in consideration of justice and fair dealing." In the light of this authority, we think the contention of appellant needs no further discussion. It is true respondent contends that the contract is not subject to the charges of indefiniteness and uncertainty urged against it. This matter we do not discuss, because, within the rule stated, even if indefinite and uncertain, and for that reason void, plaintiff would not thereby be precluded from recovery for the reasonable value of the services rendered by him under it. This disposes of the alleged error in denying the motion for a nonsuit.

Upon the further points urged. Various specifications are made of insufficiency of evidence to sustain the verdict. Among others, it is contended (and this is the only one requiring consideration) that there was no evidence that L. B. Doe was the general manager of defendant, or had any authority or power to make any contract with the plaintiff. It is true that at the time plaintiff was employed there was no resolution or record of the board of directors by which Mr. Doe, or any one else, was constituted manager of the corporation, or by which any one was authorized to employ or discharge men. Mr. Wood at that time had been appointed manager of the manufacturing department, but his duties had not been defined. Mr. Wood was patentee of the process, and engaged in constructing the machines. He was not the general manager of the company, but only manager of this department. As testified to by Mr. Hockett, the secretary of the board: "The resolution appointing Mr. Wood manager of the manufacturing department is the only resolution on record concerning Mr. Wood. There was no resolution passed appointing him general manager or manager of the testing and sampling department." It was in the testing and sampling department that plaintiff was employed; a department distinct from the manufacturing department. If Mr. Doe was not the general manager when plaintiff was employed, the company had none until Mr. Miller was appointed, or rather his appointment approved after Mr. Doe retired from the defendant. It is conceded law that in order to bind a corporation by his acts, it is not necessary that any resolution should be passed appointing a general manager. It will be sufficient if it be shown that he was manager de facto, and we think there was sufficient evidence in the case from which the jury might find that at the time plaintiff was employed, Mr. Doe was such manager. There is nothing in the point made in this connection that the contract of plaintiff was made with Mr. Wood, manager of the manufacturing department. Plaintiff was not employed in his department, but in the testing and sampling department. Under the evidence, the jury were warranted in viewing the conversation with Wood, after plaintiff was employed by Doe, as merely a statement to him by Doe, because all the parties were in the office, and as also explaining to Wood why, thereafter, the plaintiff would be found employed there. Aside, however, from the evidence warranting the jury in finding Mr. Doe was the de facto general manager of defendant when the contract with plaintiff was made, there was also in the case sufficient evidence from which the jury could find that the majority of the board of directors of the defendant were advised of the terms under which the plaintiff was in its employment under his agreement with Doe. As they had such knowledge, it was their duty promptly to disaffirm the action of Mr. Doe, if it was unauthorized. Not having done so, they are deemed in law to have ratified it. The majority of the board having knowledge of the facts, it was not necessary to conclude the corporation in favor of plaintiff, that his employment should be ratified at a regular meeting of the board. It was sufficient that the majority of the board individually were advised of the terms of the employment of plaintiff by Mr. Doe, and took no measures to disaffirm as directors that employment. Pixley v. W. P. R. R. Co., 33 Cal. 184, 196, 91 Am. Dec. 623; Crowley v. Genessee Mining Co., 55 Cal. 273, 275; Gribble v. Columbus Brewing Co., 100 Cal. 69, 72, 73, 34 Pac. 527; Scott v. Superior Sunset Oil Co., 144 Cal. 140, 77 Pac. 817.

The next error assigned is upon a ruling of the court on the admission of evidence. A witness called in chief for the plaintiff, testified that he had a conversation with Mr. Doe, some four months after the employment of plaintiff, in which Mr. Doe stated that if everything turned out all right with the company, that plaintiff had a life position with it; that defendant proposed to take care of him, give him a life position, and make up for the services he was then performing. It is claimed that the defendant could not be bound by the statement of Doe. But Doe was the general managing agent of defendant when this conversation was had; the employment of plaintiff was a continuous one; the statement of Doe was with reference to the services of plaintiff as he was then performing them, and the evidence was at least admissible, as tending to show that an agreement with reference to such employment of plaintiff was made between Doe as manager and plaintiff, as the latter claimed it was, and also to show the terms of such agreement. It is claimed, too, that the court erred in rejecting testimony offered upon behalf of defendant. Inquiry was made of certain witnesses for the purpose of showing that defendant, in the conduct of its business, had not made money; that it had not made expenses; that there were certain outstanding notes of the company in large amounts which had not been paid. Objections to these questions were sustained, and appellant claims erroneously. We do not see that these matters were relevant to any issue in the case. The agreement with plaintiff was that he should remain with the company until it was determined whether the business enterprise in which it was engaged was or was not an absolute failure. Under the contract, plaintiff could not be discharged so as to defeat a claim for compensation, unless for cause, or in the event that the business enterprise was in fact a failure. Defendant did not undertake to show that the business was a failure. On the contrary, the evidence on its part showed that the company was still pushing the enterprise and expected to make it successful. The evidence offered and excluded could only tend to show that the business had not yet reached a profit-making stage. This was not material. The business might have been on a fair way to success or be established, and the company not yet making money, or be heavily indebted. A showing as to defendant's financial condition could not defeat plaintiff's claim. It could only be done by showing that the enterprise was a failure, and as the evidence offered had no tendency to show that, it was properly rejected.

We now approach a consideration of certain instructions, the accuracy of which are challenged by appellant.

As to the first complained of: Upon the trial the defendant offered in evidence various receipts given by plaintiff to defendant. They were each for one week's salary as plaintiff was receiving it, either $15 or $20, and recited that they were "in full for above account." Defendant asked for an instruction telling the jury, in effect, that each receipt must be regarded as a deliberate admission that the rate of compensation stated therein was the rate expressly agreed on; that the acceptance of the amount specified in such receipt was equivalent to an express contract fixing his compensation at the rate actually paid him. The court refused to give such instruction, and instructed the jury: "That a receipt is never conclusive; it is always open to explanation, and the purpose for which it is given may be shown." No error was committed by the court in refusing to give defendant's instruction, and in instructing the jury as it did. The evidence of plaintiff showed that these receipts were given for his living expenses under his contract with defendant, whereby he was to receive a larger compensation when a successful stage in carrying on the business of defendant was attained. Appellant's instructions were framed on the theory that payment to plaintiff as evidenced by these receipts was in full for all services rendered during each week. This, however, ignores the other part of the contract claimed by plaintiff, that such payments were only to be in full in the event that the business enterprise of defendant should turn out to be a total failure. Otherwise he was to be paid more per week. The terms of a receipt are to be construed by a consideration of all the circumstances under which it was given. What was intended by giving it, and what its effect is, are matters to be determined by the jury from all the evidence on the subject. The general rule is that receipts in full (as those in question were) may be explained by parol evidence showing the purpose for which they were given. Winans v. Hassey, 48 Cal. 635; Simmons v. Oullahan, 75 Cal. 508, 17 Pac. 543; Cowan v. Abbott, 92 Cal. 100, 28 Pac. 213; Hardin v. Dickey, 123 Cal. 513, 56 Pac. 258.

In the next instruction complained of, the court told the jury, in effect, that if they believed from the evidence that the plaintiff was employed by defendant for the sole purpose of exploiting a certain specific machine—that is, explaining it and its mode of operation, and the results produced by it, to persons inquiring concerning it, and meeting arguments and objections made against it—and also find from the evidence that these services were to be rendered at a specified sum per week, which was paid, still if they found that during the term of his employment plaintiff, at the request of defendant, rendered certain services outside the sphere of his employment, he was entitled to recover a reasonable compensation for such services, although there was no express agreement to pay therefor. No exception can be taken to the instruction as embodying a correct principle of law. It is claimed, however, by appellant, that it had no application to the facts in the case at bar; it being insisted that the extra services which plaintiff claims to have performed were all in connection with the operation and success of the machine relative to which he was employed. But whether these services which were claimed to have been extra were so, or were in the line of plaintiff's employment, were matters for determination by the jury, and their verdict must be deemed conclusive on the subject. The plaintiff testified that the services he was engaged to perform were to explain the concentrating machine to visitors, meet arguments and technical objections against it, and answer any criticism in the press. This was admitted by Mr. Doe. In addition to this service, it is alleged in the complaint, and admitted by defendant in the answer, that plaintiff acted as correspondent for the defendant, and made official statements, classified ores, composed and wrote scientific articles, revised assays, and acted in a general advisory capacity as the engineer and metallurgist for the company in the construction and operation of its dry milling and concentrating sampling plant. Notwithstanding that the performance of these services were admitted, they were testified to upon the trial by plaintiff, and it was further testified to by him that they were services rendered outside of the sphere of his particular employment, and rendered almost on every occasion at the express request of the defendant. The defendant did not attempt to show that the performance of these services was embraced within plaintiff's employment of explaining its concentrating machine. The jury might well find from the evidence that, in their nature, these services were without the sphere of plaintiff's employment, and, so finding, the plaintiff would be entitled to an award of a reasonable compensation therefor. An employé in a particular service has a right to compensation for services rendered on request outside of the sphere of his employment, although there is no express agreement to pay therefor. 20 Am. & Eng. Ency. of Law (2d Ed.) 19.

It is next insisted that the court erred in instructing the jury, in effect, that if they found the agreement between plaintiff and defendant was that plaintiff should go to work for $2.50 per day until the company was in a condition to pay more, or until it got in a more prosperous condition, "then the defendant had no right to discharge the plaintiff without cause," and the plaintiff is entitled to recover the reasonable value of his services while in the employ of defendant, and erred also in an instruction "that where a servant has been wrongfully discharged during the term of his service, or where the term of service is otherwise closed by his employer's action, the employé may treat the contract as rescinded and sue on a quantum meruit for the reasonable value of the services performed." The principal criticism as to the accuracy of the first instruction referred to is in the use by the court of the words "then the defendant had no right to discharge plaintiff without cause"; that this was an assumption by the court that plaintiff's discharge by defendant was wrongful, and that it took away from the jury the question as to whether it was or not, and, in any event, assuming that it was intended as declaring a principle of law, it was erroneous. But the instruction does not pretend to be an assumption of anything. It was intended to lay down a rule of law, and, as announced, did not take from the jury the question whether the defendant's discharge of plaintiff was wrongful or not. Jurors are supposed to have in mind the evidence and the questions at issue in a case before them, and to apply the instructions of the court to that evidence and those issues. Without discussing whether there was any evidence showing that any reasonable cause existed for discharging plaintiff for misconduct, under respondent's claim that there was not, and conceding that there was, that matter was undoubtedly in the minds of the jury and they applied the instruction to the subject. The instruction informed them that if they found the other facts stated by the court as to the contract to be true, and that plaintiff was wrongfully discharged, they should find in his favor. The reasonable view antithetically which the jury must have taken of the instruction was that if they found that plaintiff was rightfully discharged, as claimed by defendant, they should not return a verdict in his favor. As the jury by their verdict necessarily found that the plaintiff was wrongfully discharged, that is, that he was not guilty of the misconduct which the defendant claimed warranted it, we do not see how the defendant was injured because the court did not make its instruction more specific in terms. It was subject to a reasonable application by the jury to the evidence, and if defendant wanted it more clearly and definitely stated, it should have asked the court to make it so. The same reasoning applies to the other instruction complained of in its use of the language "wrongfully discharged during the term of his service." Nor do we perceive any valid objection to the use in this last instruction of the expression "or when his term of service is otherwise closed by the employer's action," when considered in connection with the words quoted immediately preceding. This meant, and the jury must have so understood it as meaning, that where an employer, for any other reason than for cause, prevents an employé from discharging his duties under his contract with his employer, such employé may treat the contract as rescinded, and sue on a quantum meruit for the reasonable value of the services performed. This we have seen is correct as a proposition of law. It is claimed that the court erred in rejecting some and modifying other instructions tendered by defendant. We have examined them, and think that no error was committed regarding them.

This disposes of all grounds urged for reversal which merit consideration. No error appearing in the record, the judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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150 Cal. 346

## MILWAUKEE MECHANICS' INS. CO. v. WARREN et al. (S. F. 3,603.)

(Supreme Court of California. Jan. 19, 1907. Rehearing Denied Feb. 18, 1907.)

1. APPEAL—OBJECTIONS NOT RAISED IN LOWER COURT.

Where, in an action to recover on a bond, an order appointing a referee to make an accounting and take evidence and report the same to the court was made, and an account was rendered by the referee subject to instructions of the court as to certain matters, the parties, after going to a hearing upon the understanding that the report of the referee was before the court as making a prima facie case, and that further evidence was being heard for the purpose of confirming or setting aside the particular items of the report, could not object that, as the referee never stated a final account, there was no evidence whatever before the court, and nothing upon which a finding could be predicated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1328.]

2. INSURANCE—PRINCIPAL AND AGENT—CONTRACTS—CONSTRUCTION.

Where defendants were appointed general agents for the term of one year by plaintiff insurance company, under an agreement providing that, as compensation for their services, they were to receive 35 per cent. of the gross premiums received by the company in their territory "after deducting all return premiums, rebates, and reinsurance," defendants were chargeable with 35 per cent. of return premiums on policies written during the agency and paid by the company after the termination thereof.

3. SAME—BONDS—PRINCIPAL AND SURETY.

Such commissions on return premiums were chargeable against the sureties on the defendants' bonds as well as against defendants.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the Milwaukee Mechanics' Insurance Company against A. M. Warren and others. Judgment for defendants, and plaintiff appeals. Reversed.

E. W. McGraw, for appellant. Reddy, Campbell & Metson (Campbell, Metson & Campbell, Edward K. Taylor and Thomas H. Breeze, of counsel), for respondents.

SLOSS, J. On March 10, 1894, the plaintiff, an insurance corporation, entered into a written agreement with the defendants A. M. Warren and J. B. Lanktree, whereby said Warren and Lanktree were appointed general agents of the company for the Pacific Coast from April 15, 1894. One of the conditions of the appointment was that the agents should give to the plaintiff a bond in the sum of $20,000 to secure the due performance of their duties, and such bond was accordingly executed and delivered by A. M. Warren and

J. B. Lanktree as principals and J. D. Maxwell, A. A. Warren, and Wm. P. Jones as sureties. The agency terminated on May 1, 1895, and this action was brought on the bond to recover $12,976.07, claimed to have been collected by Warren and Lanktree for the plaintiff and to be due from them upon the termination of the agency. The defendant A. M. Warren was served, but did not appear, and his default was never entered. The defendant A. A. Warren was never served. The defendants Lanktree, Jones, and Maxwell appeared and answered, denying that Warren and Lanktree had failed to account for and pay over to the plaintiff any moneys received by them for it. Findings and judgment went in favor of the defendants who had appeared. The plaintiff moved for a new trial, which was denied, and now appeals from the judgment and from the order denying its motion for a new trial.

On the appeal from the judgment the plaintiff contends that some of the findings are insufficient in form, and that there is a failure to find upon one material issue. In the view which we take on the other appeal we consider it unnecessary to pass upon these points.

The motion for new trial was based on the alleged insufficiency of the evidence to sustain the findings, to the effect that the defendants Warren and Lanktree "did account for, pay over, and deliver to said company and its authorized agents all of the money that came into their hands which belonged to the said company, and every part and portion thereof, over and above all commissions and allowances due to them, said Warren and Lanktree, and over and above all payments made by them for said plaintiff," and "that said Warren and Lanktree did not collect, receive, or retain, and that they do not retain, and did not at the time of the commencement of this suit retain, the sum of $12,976.07 of the moneys of plaintiff, or any sum or moneys whatever belonging to said plaintiff." An examination of the statement on motion for new trial convinces us that these findings have no substantial support in the evidence.

The agreement under which Warren and Lanktree were acting for the plaintiff, after stating that said Warren and Lanktree have been appointed by the said Milwaukee Mechanic's Insurance Company as its general agents and supervisors for its Pacific Coast Department, contained the following stipulations: "(2) All agents' commissions, salaries, clerk hire, office, traveling, and adjusting expenses, rents, and telegrams to be paid by said Warren and Lanktree, excepting taxes, board fees, costs of litigation, and all company blanks, policy registers, expressage for supplies to agents only, and other supplies necessary to the business, which are to be paid and furnished by the said company and which are to remain the property of said company. (3) As compensation for such services as general agents and supervisors, the said Milwaukee Mechanics' Insurance Company agrees to pay to or allow Warren and Lanktree to retain 35 per cent. of the gross premiums received by said company in the territory hereby denominated the Pacific Coast department, after deducting all return premiums, rebates, and reinsurances. (4) The said Warren and Lanktree agree to * * * keep accounts of agents, collect and remit all balances of accounts, as collected, and for moneys received by them, to the company by draft. Said Warren and Lanktree to give a good and sufficient bond with approved sureties for $20,000 thereby securing the said company for all premiums reported and moneys received in their department. No premiums to be left uncollected and unpaid for a longer term than ninety days from the first of the month following the month in which they were written. (5) A contingent commission of 5 per cent. of all the net profits realized by said company from business done within the territorial limits and places aforesaid; said net profits to be ascertained by deducting from gross premiums on policies and certificates of insurance underwritten for said company on property located within the territorial limits and places aforesaid, the amounts paid out and allowed by said company for losses, commissions, return premiums, reinsurances, cancellations, licenses, taxes of any kind, and all other local and general agency expenses. The said contingent commission shall be computed and paid on the 15th day of October, 1895. If this contract shall not be renewed, the contingent commission then due on the above date shall be computed by said company by charging up to loss account 50 per cent. of the premiums upon policies then in force, and at the expiration of all policies of insurance in force, after deducting for any losses and return premiums, the balance, if any, shall be paid to Warren and Lanktree. This contract to remain in force for the term of one year, to wit, from the 15th day of April, 1894, to the 15th day April, 1895, with the privilege to either party hereto to terminate the same at any time by giving sixty days' notice." The bond sued upon was in the sum of $20,000, and, after reciting the appointment of Warren and Lanktree and their duty to keep true and accurate accounts of the property of the company coming into their hands, and of their receipts and disbursements on account of the company, provided that if "the said A. M. Warren and J. B. Lanktree shall well and truly perform all and singular the duties of general agents of said company, and shall account for and pay over and deliver to the treasurer of the said company, or to such other person as the said company, or its authorized agent, may direct, all such moneys, property, documents, supplied books and papers, and stationery of the said company, as shall come to and be in their possession, or actual control at the time, and in the manner which may now or hereafter be provided by charter or rules of the said company, or by direction of its board of directors, or of the president or acting president of the said company, * * * then this obligation shall be void, otherwise of force."

From the statement on motion for a new trial it appears that, when the case came on for hearing, the plaintiff offered in evidence the deposition of G. W. Mansfield, superintendent of agencies of the plaintiff company. Mr. Mansfield testified that he came to San Francisco in the early part of April, 1895, to examine the condition of the company's affairs and its general agency. Up to the 15th of May he was endeavoring to secure from Warren and Lanktree a statement of their accounts with the company. On the 17th of May, on arriving at the office of Warren and Lanktree, he was informed that the vault of that firm had been entered during the night, and the books of account had been cut and multilated to such an extent as to make it impossible to state an accurate account from them, and no complete statement of account was in fact ever given by Warren and Lanktree. The witness produced copies of the monthly accounts which had been sent to the company at its home office by Warren and Lanktree during the continuance of the agency. These accounts showed the total amount of business written, the premiums due on the same, the commissions credited to Warren and Lanktree upon the basis of the total business written, and the expenses chargeable to the company. They did not show the amount of premiums actually collected. Plaintiff then called as a witness one Thomas, bookkeeper for Warren and Lanktree, who testified to some extent regarding the mutilated books, pointing out in detail the pages that had been removed from such books. At this point in the trial the court made an order appointing George W. Reynolds referee, "to make an accounting and take evidence and report the same to the court." This order was made on May 12, 1898. No further proceedings appear to have been had in court until January 21, 1901, when, as appears by the statement, the hearing was resumed, and there was presented and read to the court a report of the referee. This report points out at considerable length the difficulties encountered by the referee in the making up of an account between the parties; such difficulties arising from the mutilation of the books and from a loose method of keeping the accounts of Warren and Lanktree. Accompanying the report the referee submitted to the court several tabulated statements showing the condition of the accounts between the plaintiff and Warren and Lanktree, so far as the referee was able to trace them. These statements, however, were declared by the referee not to be final, but to be subject to the instructions of the court as to certain points involved in the taking of the accounts. As they stood, the statements of the referee showed that Warren and Lanktree were indebted to the plaintiff in the sum of something over $9,000. Thereupon the referee was questioned at great length by counsel on both sides and by the court, and at the close of his examination other witnesses were called and the case was finally submitted to the court.

The contention of the respondent is that inasmuch as the case was referred to the referee to state an account, and as he never did state a final account, there was no evidence whatever before the court and nothing upon which a finding in favor of the plaintiff could be predicated. Probably it would have been better practice, in view of the fact that a reference had once been made, for the court to either resubmit the matter to the referee, with instructions to make a final report based upon such directions as to the manner of making the accounts as the court might see fit to give, or if the court decided to hear the matter itself, to vacate the order appointing the referee, and proceeed to take testimony. Neither of these steps was taken. What seems to have been done was that the referee made his partial or qualified report, and then testified as a witness regarding the items of his account, and that upon this testimony and that of other witnesses the court made its findings. If this procedure was irregular, we think the respondents are in no position to take advantage of such irregularity. No objection was made by them to the course followed. All of the parties in the lower court appear to have proceeded upon the theory that the referee's statements of account attached to his report were to be taken as a prima facie showing of an indebtedness of some $9,000 due from Warren and Lanktree to the plaintiff, and that further testimony—i. e., that of the referee himself and of other witnesses—was to be taken to increase this apparent balance or reduce it, as the case might be. After the referee had submitted his report a colloquy took place between court and counsel; the court stating in effect that the report of the referee made out a prima facie case in favor of the plaintiff to the extent of $9,000, and that counsel for defendants could take up, one by one, the items charged against Warren and Lanktree, and seek, by eliminating some of them, to reduce or extinguish this apparent balance. The only answer made to this by counsel for defendant was a request for a continuance before commencing the examination of the referee. The continuance was granted, and, when the hearing was resumed, the referee was cross-examined on the lines indicated by the court. At a later period in the proceedings the court repeated substantially the same suggestion without dissent from either party. And still later the court said to counsel for plaintiff: "Now, Mr. Reynolds has presented his report, and he has made a prima facie case for you to an amount that I understand is satisfactory. Now why not let Mr. Campbell [counsel for defendants] have him as a witness?" No objection was made by counsel for the defendants to any of these statements of the court. He acquiesced in them and proceeded to examine the referee and the other witnesses on the lines suggested. There can be no question that the case was tried in the court below upon the theory that the report of the referee was properly before the court, and that the written statements of the referee, as well as his oral declarations in court, were evidence in the case. The defendants, having permitted the trial to proceed and the case to be submitted for decision upon this theory, are bound by it, and cannot be permitted to raise for the first time on appeal an objection which could have been obviated if made in the court below. It has often been held by this court that where both parties have in the trial court treated a certain question of fact as being in issue, and offered evidence regarding it, the point that there was no such issue presented by the pleadings is waived, and cannot be raised on appeal. Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275; Klopper v. Levy, 98 Cal. 525, 33 Pac. 444; Burnham v. Stone, 101 Cal. 164, 35 Pac. 627; Illinois T. & S. Bank v. Pacific Ry. Co., 115 Cal. 285, 47 Pac. 60; Barbour v. Flick, 126 Cal. 628, 59 Pac. 122; Willey v. Crocker Woolworth National Bank, 141 Cal. 508, 75 Pac. 106. The principle governing these cases is applicable here. Strictly speaking, the referee's partial report and his explanations regarding it may not have been proper as evidence, but they were admitted without objection, and were treated by both sides as evidence in the case. If the defendants had excepted to the report of the referee when it was presented, or had made any objection to the referee being examined as a witness to establish any of the items in the account, or had asked that the matter be resubmitted to the referee, with instructions to report a full account, the plaintiff could have protected itself by taking steps to have the hearing proceed in a manner conforming completely to the proper practice. After both parties have gone to a hearing in the lower court upon the understanding that the report of the referee was before the court as making a prima facie case, and that further evidence was being heard for the purpose of confirming or setting aside the particular items of that report, it would be the height of injustice to permit the respondents who assented to that procedure to now claim that the method pursued was not the proper one, and that there was in fact nothing before the court. 21 Ency. Pl. & Pr. 664.

It appears from the record that in a number of instances, where policies had been written by Warren and Lanktree, return premiums were paid by the company after the termination of Warren and Lanktree's agency. In making up his statements of account, the referee charged to Warren and Lanktree 35 per cent. of these return premiums, and there was a good deal of discussion in the lower court as to the propriety of this charge. Under the contract, it is clear that Warren and Lanktree were chargeable with these payments. The agreement under which they were appointed general agents provided that as compensation for their services they were to receive 35 per cent. of the gross premiums received by the company in their territory "after deducting all return premiums, rebates, and reinsurances." The term of their agency was one year. It is a matter of common knowledge that most policies of fire insurance are written for a term of not less than one year, many extending over three years. In the natural course of business, therefore, policies written after the day upon which the agency commenced would extend beyond the duration of the agency. The insured had a right to surrender their policies at any time prior to the expiration of the period of insurance, and to receive a return of a proportion of the premium corresponding with the unexpired term. Civ. Code, § 2617. In Warren and Lanktree's own accounts and in those of the referee they had been credited with 35 per cent. of the full amount of the premiums on insurance written by them. Under the terms of their contract they were, however, entitled to this 35 per cent. only, on the amount of the premiums "after deducting all return premiums, rebates, and reinsurances." Certainly it was never understood by the parties that, if Warren and Lanktree wrote a policy on the day before the expiration of their agency, they would be entitled to retain 35 per cent. of the entire amount of the premium, even though on the day after they ceased to be agents the policy was canceled by the insured and the company compelled to return the greater part of the premium. It was necessarily in the contemplation of the parties that return premiums might be payable after the termination of the agency, and the right of Warren and Lanktree to retain 35 per cent. of the premiums on any business written by them was always subject to the contingency that the policy might be canceled, and that they might, therefore, be liable to the company for 35 per cent. of the amount refunded by the company upon such cancellation. See American Steam Boiler Ins. Co. v. Anderson, 6 N. Y. Supp. 507, 57 N. Y. Super. Ct. 179. If it be said that under this construction there could be no final settlement of account on the termination of the agency, it may be answered that the contract plainly shows that such immediate settlement was not within the purview of the parties at the time the contract was made.

Under paragraph 5 Warren and Lanktree were entitled to a contingent commission on the profits of the company, to be computed and paid on the 15th day of October, a number of months after the termination of the contract. Again, by paragraph 4, they were allowed 90 days within which to collect premiums. Clearly then it was in the contemplation of the parties that their relations should not be capable of final adjustment immediately upon the close of the agency.

These commissions on return premiums are chargeable against the sureties on the bond, as well as against the principles. It is true that by the terms of the undertaking the sureties made themselves liable only for the payment by Warren and Lanktree of such moneys, etc., of the said company "as shall come to and be in their possession or actual control." They could not be charged with premiums earned, but not collected. But, where premiums had actually been collected, the proportion of them that belonged to the company was to be determined by the contract of agency, and, as we have seen, such proportion was to be computed by deducting, as commissions of the agents, not 35 per cent. of the gross premiums, but 35 per cent. of the balance remaining after payment of "return premiums, rebates and reinsurance." While the sureties were liable only for moneys actually received by Warren and Lanktree during their agency, the amount payable by Warren and Lanktree out of such moneys could not be ascertained at the termination of the employment, but might be increased by subsequent cancellations, and consequent reduction of the commissions apparently earned.

In this view of the rights of the parties under the contract and bond, the statements and testimony of the referee, together with the testimony of the other witnesses, make it clear, and that without any conflict, that Warren and Lanktree were indebted to the plaintiff in a considerable amount for money actually received and unaccounted for. Just what that amount was it is not proper here to attempt to state, since upon this appeal we can go no further than to order a new trial. It is sufficient here to say that the careful analysis of the evidence presented by the appellant in its brief shows that under any view of the testimony there was an indebtedness of several thousand dollars due from the defendants to the plaintiff. The respondents do not attempt to point out any error in these calculations, but content themselves with the claim, heretofore disposed of, that there was no evidence at all before the court, and argue as to the actual figures presented by the referee and other witnesses that the statements presented were so confused that no conclusion could be reached from them. With this view we cannot agree. The court had before it statements of all of the transactions of Warren and Lanktree as agents, and these statements, if examined in the light of the contract and the bond, were sufficient to enable the court to arrive at a determination of the amount due from Warren and Lanktree and their sureties to the plaintiff. That some amount was so due is, as we have said, clear, and is practically not disputed by the respondents. The court below, therefore, erred in finding that Warren and Lanktree had fully performed the conditions of their contract, and that there was nothing due from them. Upon a new trial the state of the account between the plaintiff and Warren and Lanktree should be determined in view of the construction which we have herein given to the contract.

Something may be said regarding other points which may arise on a new trial. As to reinsurances, we think only those effected during the agency of Warren and Lanktree should be considered as operating to reduce their commissions, and, as we understand appellant's brief, it claims no more than this.

Under the terms of the bond the defendants were not chargeable with premiums on business written by Warren and Lanktree, where such premiums were not collected by Warren and Lanktree, but came into the hands of their successors. Under the contract of agency, however, Warren and Lanktree were entitled to a credit of 35 per cent. of such premiums; i. e., of so much of said premiums as might remain to the company after deducting return premiums, whenever paid, and premiums paid for reinsurances effected by Warren and Lanktree.

There appears to have been a good deal of discussion at the trial regarding commissions paid by Warren and Lanktree to subagents. We see no reason why this item should be taken into account at all. Under paragraph 2 of the contract the subagents' commissions were to be paid by Warren and Lanktree. Where a subagent acting for them wrote a policy and remitted to them the premium, deducting his commission, such agent was acting not as the agent of the company, but as the agent of Warren and Lanktree, and, as between the latter and the company, Warren and Lanktree were chargeable with the whole premium, and were to be credited with 35 per cent. of the whole. The commission of the subagent was a matter between Warren and Lanktree and such subagent, with which the company had no concern. Where, however, in closing up business written by Warren and Lanktree, the premiums for which had not been collected prior to the termination of their agency, the company collected not the full premium, but so much of it as remained after deducting the commissions of the subagents due them by their agreement with Warren and Lanktree, such commissions were properly chargeable to Warren and Lanktree as one of the items of expense which, under paragraph 2 of the contract, they were to pay.

By proceeding in accordance with the views herein indicated, we think it will be possible on a new trial, notwithstanding the mutilation of the books of Warren and Lanktree, to state and prove an account which will show with substantial exactness the relation of the parties.

The judgment and order appealed from are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

150 Cal. 498

## In re PAINTER'S ESTATE. (S. F. 4,436.)

(Supreme Court of California. Feb. 7, 1907.)

1. Wills—Construction—Specific Devise.

Testator gave land described by street and number and by boundaries to his brothers, and other land similarly described to his sons. By a codicil he revoked the devise to his brothers and gave the property to his children, "together with all the real estate I may hereafter accumulate, as well as moneys at interest, etc., not otherwise appropriated." *Held*, that the devise to the children of the lands described was a specific devise, and not chargeable with the payment of general legacies, under Civ. Code, §§ 1357, 1359, 1360, 1362, defining specific devises, especially where, at the time of the making of the will, the testator had sufficient personal property to satisfy the general legacies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1805, 1936–1938.]

2. Same.

A testator gave to his sons real estate described, and provided that a part of the income should be paid to a brother and sister until his sons became of age. The sons were of age at the death of the testator. *Held*, that the gift to the brother and sister did not take effect.

3. Same—Suit to Construe Will—Evidence—Admissiblty.

In a suit involving the construction of a will, a paper dated prior to the execution thereof and in the handwriting of the testator, which purports to contain a statement of the assets and liabilities of a partnership of which he was a member, is admissible as a declaration of testator's belief as to the status of the business.

4. Appeal — Admission of Evidence — Review.

Where no exceptions were taken to the admission of evidence, the action of the court cannot be reviewed on appeal.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition by J. Milton Painter and others, as legatees under the will of Jerome B. Painter, deceased, for an order requiring the executor and executrix to make payment of their legacies; and petition by the widow and sons of the testator, asking for a partial distribution to them of property belonging to the testator. The application of the first petitioners denied, and application of the widow and sons granted; and the first petitioners appeal. Affirmed.

Pringle & Pringle, for appellants. M. B. Kellogg and Francis J. Heney, for respondents.

SLOSS, J. Jerome B. Painter died on the 6th day of February, 1883, leaving a will and codicil, which were admitted to probate by the superior court of the city and county of San Francisco on the 13th day of April, 1883. The administration of the estate has been pending in said court ever since the last-mentioned date. In March, 1898, J. Milton Painter, Theodore P. Painter, Adaline Mininger, Grace Mininger, J. Milton Painter, as executor of the will of Margaret Painter, deceased, Josephus Painter, by his guardian, J. Milton Painter, and Thomas B. Cochran, claiming as legatees under the will, petitioned the superior court for an order requiring the executor and executrix to make payment of their legacies. The executor and executrix answered, setting up certain grounds of opposition to the prayer of this petition. At the same time the widow and sons of the decedent filed a petition asking for the partial distribution to them of certain real property belonging to the decedent. This petition was opposed by the parties who had asked for the payment of their legacies, and a hearing was had upon both applications together. The court made findings, and upon them denied the application of the first petitioners for payment of the legacies to them, and granted the application of the widow and children for partial distribution. From both these orders, appeals are now prosecuted.

Jerome B. Painter's will was executed on the 11th day of March, 1864, while the codicil bore date March 11, 1874. The provisions of the will, so far as material to the present controversy, are as follows:

"(1) I give and bequeath to my brothers, J. Milton Painter and Theodore P. Painter, all my share, right, title and interest of, and in and to, the copartnership of Painter & Co., the stock thereof, its business, good will, and all interests of whatsoever nature connected with them as partners (except real estate), debts due us, and moneys out at interest, for their own use and benefit, upon the express condition that they assume all debts standing against the concern, and pay off that certain mortgage on property southwest corner of Washington and Sansome streets.

"(2) I also give and bequeath to them, my brothers, J. M. Painter and T. P. Painter, aforesaid, that certain building and lot of land in which our business has been conducted, known as Nos. 510 and 512 Clay street, and more particularly described as being on Clay street, commencing on the north side 73 feet west from Sansome street, thence west 15.9x91.8 feet deep, with the proviso, that a certain mortgage on the same property, given by me to Miss Charlotte Rhodes for $5,000 as part of the purchase money, bearing interest at seven per cent. per annum, will be assumed by them, both interest and principal, and paid as they may become due.

"(3) I give and bequeath to my sons, Albert and Walter, that certain building and lot of land on Clay street, known as Nos. 318, 320 and 322, and more particularly described as follows: [Here follows a particular description.] The property to be kept fully insured and in good repair from the moneys received from the rents thereof, and the building to be rented or let to the best advantage, as well for the revenue to be derived from it as for the future safety and well condition of the building and property. The balance of the rents, after paying the above necessary expenses, to be apportioned as follows: One-sixth to be regularly sent to my mother, as her share, so long as she may live; and one-sixth to my sister Adaline and brother Josephus, to be equally divided between them, so long as they may live, but should either die, then the sum apportioned to revert to my wife, as long as she remains my widow; but should she again marry, then to revert to my children, Albert and Walter. Should either of my children die, the whole of this property, and rents as apportioned, to go to the remaining one. The balance of the rents, viz.: two-thirds to go to my wife, as long as she remains my widow, to be used for her support and maintenance, and that of my aforesaid children, and they to be properly educated with the best of a good English education. * * * The total rents of this property to revert to my children, as each becomes of age, namely, twenty-one years, to be used by them for their own particular benefit and free use, with my very particular injunction that they never see or know that their mother, aunts, uncles—more particularly their grandparents, or their uncle, my brother Josephus—is in want of any of the necessaries, comforts, or even ordinary luxuries of life, without their cheerfully and cordially administering to their wants. * * *

"(4) I give and bequeath to my beloved wife, and mother of my children, all my remaining property, as per schedule annexed, or which may be remaining, not in the schedule annexed, but unbequeathed, for her sole use and benefit.

"(5) I give and bequeath the sum of one thousand dollars each to the San Francisco (Protestant) Orphan Asylum, and the Ladies' Relief and Protection Society of San Francisco; also, one thousand dollars to my uncle, John H. Pearsol, of Lancaster, Pennsylvania; and one thousand dollars to my niece, Grace (daughter of my sister Adaline), the latter sum to be placed out securely until she attains her lawful age (together with the interest accruing on the same) when she shall receive the said sum, principal and interest, for her sole use and benefit; but, in case of her death, the same to go to her mother, my sister Adaline. I also give and bequeath to my mother and sister Adaline, and brother Josephus, one thousand dollars each; also, one thousand dollars each to my brothers, J. Milton and Theodore.

"(6) I appoint as my executors to this my last will and testament, my wife, and my brothers J. Milton and Theodore, either or all of them to serve as they may wish, without the necessity of giving bonds or security whatever, as I have implicit faith in their integrity."

At the time of the execution of this will the testator had only the two children, Albert and Walter, named therein. During the next ten years four more sons were born to him, and on March 11, 1874, as has been stated, he executed a codicil to his will reading as follows:

"My sons Edgar, Arthur, Oscar and Jerome, being born to me since the making of the foregoing will, I hereby further will that they share and share alike with their brothers Albert and Walter in all properties held by me at the time of my death, and I hereby revoke the second clause of my will bequeathing to my brothers that property known as Nos. 510 and 512 Clay street, between Montgomery and Sansome streets, San Francisco, and that it be placed for distribution among my sons when the youngest becomes of twenty-one years of age, like my other property mentioned herewith: All those certain parcels of land, with improvements, in south line of Washington street, between Battery and Front streets, 20 feet x 60 feet deep, known as No. ———. Also, southwest corner of Sansome and Washington streets, 45 10-12 feet x 67 feet; also, northeast corner of Powell and Filbert street, 68 9-12 feet on Powell by 137 feet on Filbert street; also, southeast corner of Powell and Jackson streets, 48 feet on Jackson by 90 on Powell street; also, lot on Broadway street known as No. 729, 21 by 137½ feet, together with all real estate I may hereafter accumulate, as well as moneys at interest, etc., not otherwise appropriated.

"I also substitute my brother-in-law, Mr. R. B. Dallam, to act in place of my brother J. Milton Painter, as administrator to my will, without his giving bonds, etc. I also revoke clause 4th of this will and direct that my wife share with my sons, and they with her in all property, she one-half and they all the other one-half equally among them."

After the execution of the codicil and prior to the death of Jerome B. Painter a seventh son, Eugene, was born. From the bill of exceptions, it appears that in a prior proceeding between the same parties the superior court made a decree (which has become final) construing this will and codicil. In any consideration that is now to be given to the terms of these instruments, the matters thus adjudicated are to be taken as conclusive, and to this extent the question before us is limited and narrowed. We shall point out hereafter the portions of that decree which have a bearing on the present controversy.

The legacies, payment of which was sought by the appellants, are those mentioned in paragraph 5 of the will, and the proportion of the rents bequeathed by paragraph 3 to the testator's mother, brother, and sister. The petitioner, Cochran, claims as assignee of John H. Pearsol. It is admitted here, although it was in issue in the lower court, that at the time of the hearing there was not in the hands of the executrix and executor sufficient personal property to pay the legacies bequeathed by paragraph 5, and the main question for determination is whether these legacies are payable out of the real estate devised by the will and codicil, and distributed by the decree of partial distribution appealed from. If the legacies given by paragraph 5 of the will are chargeable against such real estate, the order denying the application for their payment and the decree distributing such real estate to the devisees are alike erroneous. (The rent bequests of paragraph 3 stand on a different ground and will be separately discussed.)

The contention of the respondents is that the real estate was specifically devised to them by the codicil and that therefore such real estate is not chargeable with the payment of general legacies. As to how far, if at all, specific legacies or devises can be made to pay general legacies, the provisions of the Civil Code are by no means free from doubt. Section 1357 defines the various kinds of legacies, to wit: Specific, demonstrative, annuities, residuary, and general. Section 1360 provides: "The property of a testator except as otherwise specially provided in this Code and the Code of Civil Procedure, must be resorted to for the payment of legacies in the following order: (1) The property which is expressly appropriated by the will for the payment of the legacies. (2) Property not disposed of by the will. (3) Property which is devised or bequeathed to a residuary legatee. (4) Property which is specifically devised or bequeathed." Taking this section alone, it would seem that, in the absense of any property embraced in one of the three classes first named in the section, property specifically devised or bequeathed should be resorted to for the payment of general legacies. Such rule would, however, be entirely contrary to the rule at common law and in force, so far as we know, in all American jurisdictions. The respondent contends that the fourth subdivision of section 1360 should be read "Property which is not specifically devised or bequeathed," the word "not" having been, as is claimed, omitted by inadvertence. The point was discussed by this court to some extent in Estate of Neistrath, 66 Cal. 330, 5 Pac. 507, and the purport of the decision seems to be that, reading section 1360 together with sections, 1357, 1359, and 1362, the effect of the various provisions is to make specific devises and specific legacies free from any contribution to the payment of general legacies. The question has not again been brought to the attention of this court, except in Re Ratto's Estate (Cal.) 86 Pac. 1107, in which it is said: "In the Estate of Neistrath, 66 Cal. 330, 5 Pac. 507, the court leaves it somewhat doubtful whether by said section 1360 the Legislature intended to subject specific devises to the payment of general legacies; but we need not consider that question here." While, as was said in the Ratto Case, the former decision did leave the question somewhat doubtful, we think it was intended by the court in the Neistrath Case to hold specific legacies or devises not chargeable with the payment of general legacies, and shall adhere to this construction of the Code. It may be remarked that in this case it is expressly conceded by the appellants that, "if this real estate is specifically devised, these general legacies found in clause 5 of the will cannot be charged upon such real estate."

Section 1357 of the Civil Code declares that "a legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator." While this definition refers in terms only to legacies, and not to devises, we have no doubt that in this state the question whether a testamentary gift is specific or general is to be determined by the same tests where the subject of the gift is real as where it is personal property. It is true that in England devises of real estate have always been regarded as specific. This resulted from the early statutory rule that a will disposed only of the real estate owned by the testator at the date of the execution of the will. And while the English courts have continued to treat all devises as specific, notwithstanding the later statute whereby wills may pass all real property owned by the testator at the time of his death (18 Am. & Eng. Ency. Law [2d Ed.] 720), it has generally been held in the United States that statutes making wills speak as of the time of the testator's death have the effect of permitting devises to be general, at least as to after-acquired property (Id.; Kelly v. Richardson, 100 Ala. 584). Such statutes are in force in this state. (Civ. Code, §§ 1312, 1332), and the Legislature has in other ways evidenced its intent that real and personal property taken under a will should stand on the same footing. By sections 1358, 1359, and 1360 of the Civil Code, the property of decedents is made liable for the payment of debts and legacies, regardless of its character as real or personal. Sections 1359 and 1360 both speak of property "specifically devised or bequeathed," and, in using the term "specific" indifferently as applied to realty and to personalty, must be taken to use it in the same sense as to both.

A specific legacy (or devise), then, is one of "a particular thing (or parcel of land), specified and distinguished from all others of the same kind belonging to the testator." That the codicil undertakes to devise particular parcels of land, "distinguished from all others of the same kind belonging to the testator," would seem to admit of no doubt, since the various parcels devised are definitely and particularly described. If the devises covered merely the land so described, the appellants would hardly undertake to contend that such devises were not specific. They rely, however, on the words immediately following the description; i. e., "together with all real estate I may hereafter accumulate, as well as moneys at interest, etc., not otherwise appropriated." The argument is that this, read in connection with the last clause of the codicil, is in effect a gift of the residue to the wife and sons of the testator, and that therefore the particular enumeration of certain pieces of property which form a part of the residue does not make the gift of those parcels specific. That the effect of the codicil is to bequeath and devise the residue of the testator's estate to his wife and sons is, if not entirely clear upon the face of the instrument, conclusively settled as to all parties to this controversy by the former decree construing the will and codicil. In that decree we find it adjudged, inter alia, that "all the property of said deceased subject to his testamentary disposition at the time of his death, not in the said will and codicil otherwise specifically provided for, is, by the terms of said will and codicil, divided between his wife and sons." And no doubt it is the general rule that the enumeration of specific articles in a residuary clause will not necessarily make the bequest specific as to such articles. 18 Am. & Eng. Ency. Law (2d Ed.) 716. This rule has been repeatedly applied to wills which purported to give certain specified property, "and all the rest and residue of my estate," etc. Le Rougetel v. Mann, 63 N. H. 472, 3 Atl. 746; England v. Vestry, 53 Md. 466; Walker's Estate, 3 Rawle, 229. The same rule applies where the gift is of "the rest and residue of my estate, including all my household furniture, ornaments, books, pictures, and utensils." In re Martin, 54 Atl. 589, 25 R. I. 1. See, also, Stehn v. Heyssen, 102 N. W. 1074, 124 Wis. 583.

On the other hand, a different conclusion has been reached where language was used indicating an intent to separate a specific gift from a residuary gift to the same legatee or devisee. In Clarke v. Butler, 1 Meriv. 304, the testator bequeathed all his household lease in London and all his household goods and furniture at Sawbridge, "and as to all my plate, linen, china, pictures, live and dead stock and all the residue of my goods, chattels and personal estate" to a legatee. It was held that the gift was specific as to the lease in London and the household goods and furniture at Sawbridge. In Fitzwilliams v. Kelly, 10 Hare, 866, the testatrix devised certain leaseholds and her shares in the Chelsea waterworks, "and also her stocks, funds and securities for money, and all other her personal estate and effects whatsoever." The leaseholds and shares were held to be specifically bequeathed. In Langdale v. Esmond, 4 Ir. Eq. 576, the will gave the "remainder of my books and paintings, together with the residue of my property"; and the gift of the books and paintings was treated as specific. See 18 Am. & Eng. Ency. Law (2d Ed.) 716, and Hill v. Hill, 11 Jur. (N. S.) 806. In Dauel v. Arnold, 66 N. E. 846, 201 Ill. 570, the will contained the following clause: "Also all my bank stocks and effects in the State Bank of Colfax, valued at $6,300, and also including the several sums due me, or which may be due from my children as heretofore specified, or which may be due me from any sources whatever, and any other property or effects, real or personal of whatsoever kind, which I now have or may have, I devise and bequeath to my wife. * * *" The court held that the legacy of the bank stock was specific, saying "the gift is specific if the specific things are so enumerated as to distinguish them from the residue, as by the use of such words as 'together with,' 'as well as,' 'and also,' and the like."

In short, the question is purely one of construction. The testator's intent is to be determined in each case from a consideration of the particular language employed. A bequest or devise of the residue of an estate is general, because such residue is not ascertainable at the time the will is made. The fact that, in giving such residue, the testator describes, as included in it or forming a part of it, certain specific property owned by him, does not alter the character of the residuary gift. But where the language used indicates an intention to make two distinct gifts, one of specific property and the other of the residue, the specific legacy or devise is not rendered general by the fact that there is a gift of the residue to the same person. We think the language of this codicil brings it within the principle of the cases last cited. The testator indicated, as plainly as language could do it, his intention to give to his wife and his sons the particular parcels of real estate described in the codicil. That he added to this gift the words, "together with all real estate I may hereafter accumulate," etc., did not make the preceding enumeration a mere part of the residuary gift. On the face of the will and the codicil alone, the court below rightly construed the devises of the real estate described in the codicil as specific. In this connection we may notice the finding of fact that at the time of the execution of the codicil the decedent owned sufficient personal property to pay all the general legatees mentioned in the will and codicil. This finding it attacked as unsupported by the evidence. The fact declared in it is merely probative. Whether or not the testator, when he made his will, had sufficient personal property to satisfy the general pecuniary legacies, without resort to the land described in the will, is a circumstance bearing on his intent. If he had no such property, there would be less reason for holding the devises specific, since it will not be presumed that he intended to make general legacies which could not be paid, except out of the realty, and then devised the realty so that it could not be applied to the payment of those legacies. The ultimate fact in issue, however, is whether or not the devises are specific, and it may well be that the finding as to this fact could stand, even though it should be held that there is no evidence to support the probative finding as to the personal property owned by the testator at the date of the codicil. We are of opinion, however, that the evidence justified the conclusion reached by the court regarding the testator's property.

He owned, at the date of the codicil, a one-half interest in the firm of Painter & Co. We shall not undertake to review the complicated mass of testimony that was given regarding the business and condition of this partnership. The relations between the estate of the decedent and the surviving partner have been the subject of litigation which has lasted many years. It is enough for the purposes of this case to say that, if we concede the correctness of the contention of appellants that Jerome B. Painter was largely indebted to the firm on what is called in the record the "School Land Account," there was still sufficient evidence to justify the view that his share of the partnership assets was enough to pay this indebtedness and leave a surplus which would be adequate to discharge the legacies given by paragraph 5 of the will. The court found that all the real property of which the decedent was seised or possessed, or in which he had any interest, except that owned by the firm of Painter & Co., is particularly described in the will. It is urged that the evidence shows that the decedent owned lots 1399 and 1401 in "Gift Map No. 2," Harvey's addition to the city and county of San Francisco. But there was also evidence justifying the conclusion that this property, although standing in the name of J. B. Painter, was in fact owned by the firm of Painter & Co.

It is claimed that the court erred in denying to Adaline Mininger and to Josephus Painter any right to participate in the rents derived from the buildings Nos. 318, 320, and 322 Clay street. It is argued that the gift of a share of these rents, in paragraph 3 of the will, was specific, and that it had been conclusively determined by the former decree construing this will that the codicil did not revoke the specific legacies given by the will. But whether or not this gift of a portion of the rents was specific, and whether or not it was revoked, it was, by the terms of paragraph 3, merely a gift of such rents until the testator's sons, Albert and Walter, should reach the age of 21 years. Both were over this age when the testator died, and hence this gift to Josephus Painter and to Adaline Mininger never took effect.

The appellants assign as error the ruling of the court admitting in evidence a paper dated 1863, shown to be in the handwriting of the decedent, and purporting to contain a statement of the assets and liabilities of Painter & Co. Doubtless such paper was not competent evidence of the condition of the firm's affairs, but it appears to have been offered merely for the purpose of showing the belief of J. B. Painter as to the status of the business. If his belief regarding his property was material, which does not seem to be disputed by appellants, we think his declaration, written or oral, was properly admitted as some evidence of such belief. 16 Cyc. 1183. See Kyle v. Craig, 125 Cal. 107, 57 Pac. 791. The ruling admitting in evidence a "schedule of personal property," dated 1864, is attacked; but, as no exception was taken, the action of the court cannot be reviewed.

Some other points are made on the admission of testimony; but none of them, even if well taken, is of sufficient importance to justify a reversal.

The orders appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

(150 Cal. 440)

## MACKINTOSH v. AGRICULTURAL FIRE INS. CO. (S. F. 3,498.)

(Supreme Court of California. Feb. 6, 1907. On Rehearing March 8, 1907.)

1. INSURANCE—FORFEITURES—CHANGE OF INTEREST.

There is not a change of interest in the insured property, which under a fire policy works a forfeiture, where a contract for purchase thereof is given, which amounts to a mere option, with rights of possession for experimental purposes, subject to free access and management by the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 795, 799.]

2. SAME—CHANGE OF POSSESSION.

There is not a change of possession of the insured property, which under the fire policy works a forfeiture, where one, given an option to purchase, is given right of possession for experimental purposes, subject to free access and management of the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 823.]

3. SAME—INCREASE OF HAZARD—WRITTEN AUTHORITY—WAIVER.

Notwithstanding the provision in a fire policy that, unless otherwise provided by agreement indorsed thereon, it shall be void if the risk is increased, and that no agent of the insurer shall have power to waive a provision of the policy except in writing indorsed thereon, insured has the right to increase the hazard by operation of a smelter on the premises, where for a consideration a general agent gives permission therefor, and attempts to indorse it on the policy, but states the "within smelter," when the smelter was not described therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1020, 1023, 1024.]

4. SAME—WATCHMAN CLAUSE—OPERATION OF INSURED WORKS.

Under a fire policy, providing: "Permission granted for the above-described works to remain idle, it being warranted by the assured that at all times when the above works are idle or inoperative * * * watchmen shall be * * * on duty at night"—a watchman at night is not required, where the works are operated during the day, and it is not shown that it was usual or customary to operate such works at night.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 748, 759.]

5. SAME.

There is an operation of the works, so that a watchman is not required, under the provision of a fire policy on smelter works, giving permission for such works to remain idle, that, when the above works are idle or inoperative, watchmen shall be on duty at night, though none of the insured furnaces are operated, but only a small furnace, put up, under a shed near the main building, by one to whom insured had given an option for purchase of the premises, and which he was operating daily, with a force of five or six men, for the purpose of testing the slag and ore on the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 759.]

Beatty, C. J., and Sloss, J., dissenting on rehearing.

In Bank. Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by Charles H. Mackintosh against the Agricultural Fire Insurance Company. Judgment for defendant. Plaintiff appeals. Reversed and remanded for new trial.

Campbell, Metson & Campbell and Thomas H. Breeze, for appellant. Goodfellow & Eells, for respondent.

SHAW, J. The action is upon a policy of insurance. The judgment was given for the defendant. The appeal was taken from the judgment within 60 days after its rendition, and the record is accompanied by a bill of exceptions. The insurance company, in defense, alleged that there had been four several violations of the terms of the policy by the insured, without the consent of the company, and that the policy had been forfeited thereby, to wit: (1) That there had been a change of possession of the property; (2) that there had been a change of interest in the property insured; (3) that there had been an increase of hazard which was prohibited by the conditions of the policy; (4) that the property insured was idle and inoperative, and the insured had failed to keep a watchman constantly on duty, as the policy, in that event, required. The findings were in favor of the defendant on all these points. There was no substantial conflict in the evidence, and no serious dispute about the facts. The findings were manifestly based upon the court's conclusions as to the meaning and legal effect of the policy and the subsequent transactions of the parties. The decision of the case depends on the question whether or not the findings were justified by the evidence.

1. The first two defenses may be considered together. The change of interest and possession, if any, arose out of a proposed sale by the plaintiff to one G. W. Baker, after the issuance of the policy. A written agreement was executed between them; Mackintosh being the party of the first part, and Baker being the party of the second part. It recited that the price of $22,000 for the property and certain slag and ore situated thereon had been agreed on, and that Baker was desirous of buying it at that price. It thereupon declared that he agreed that he would "purchase said premises and property" for said price, "in the following manner, that is to say: It is agreed between the parties hereto that the said party of the first part shall execute to the said party of the second part a good and sufficient deed of the premises above mentioned and described, together with a bill of sale of the slag and ore situated thereon, and place the same in escrow with A. M. McDonald to be delivered to the party of the second part upon the payment of the said sum of $22,000 on or before sixty days from the date hereof. In case the said $22,000 is not fully paid within sixty days from the date hereof as aforesaid, said premises shall be vacated by the Vulcan Smelting & Refining Company *and surrendered by the party of the second part free and clear of all incumbrances* of whatsoever kind or nature made or suffered by the said Vulcan Smelting & Refining Company, and shall also surrender to the party of the first part the product of all ores smelted or reduced in its furnace from said slag-dumps while occupying the same. It is further agreed between the parties hereto that, *during the time the party of the second part is in possession of said property, the said party of the first part or his agent A. M. McDonald shall have free access to said property and its management in every respect, the same as though to all intents and purposes the work was being done by him, instead of by the party of the second part,* and during the time said work is carried forward the said party of the second part shall in every way protect said property and premises from any encroachments or depredations or damage of any kind, and not endanger the said premises by fire, or from any other cause. The sum of $400 is hereby acknowledged to have been received upon this contract by the party of the first part, and the further sum of $173 is to be paid to A. M. McDonald upon demand, which said sum, *in case of purchase*, is to be credited as part of the purchase price, and *in case of default is to be considered as rent of the premises during the occupation of the party of the second part*, as herein stated, and forfeited to the party of the first part. Time is of the essence of this contract. This contract shall not be assigned by the party of the second part until payment is made." (The italics are ours.)

Baker was acting in the premises as agent of the Vulcan Company. Prior to the execution of this agreement, a previous agreement had been made between the same parties, whereby Baker had obtained an option for 60 days for the purchase of said premises and property. That time had expired, and this agreement was made for the purpose of renewing the option. Under the previous agreement, Baker had taken possession of the premises and put up thereon a small six-ton smelting furnace, which he had been operating, for the purpose of testing the slag and ore upon the premises, in order to be the better able to determine whether or not he desired to purchase the same at the price fixed. In pursuance of the agreement quoted above, it was understood that Baker should remain in possession of the premises for the purpose of making such further test of said slag and ore as he might deem necessary to enable him to determine what he desired to do in regard to the purchase of the property. When the time expired, Baker surrendered the property and refused to purchase.

Taking the circumstances thus surrounding the parties and the language of the contract together, we are of the opinion that it was not an absolute agreement on the part of Baker to purchase the property, but was simply an option whereby he had the privilege of purchasing the same at any time within the 60 days mentioned, by payment of the price as therein provided. There was therefore no change of interest in the premises by virtue of the contract. The title, interest, and estate in the property remained in Mackintosh, subject to be divested only by the payment of the money as provided in the contract. Upon failure to pay the money as provided therein, without any further act whatever on the part of Baker, the privilege to purchase, which he had obtained under the contract, ceased, and the property then remained free from any right in him whatever. All that he possessed, prior to the payment of such purchase money, was a mere right at his option to purchase or not. This right did not create an "interest" in him, within the meaning of that term as used in the policy of insurance. The change of interest referred to in the policy, in view of the well-known rule of construction applied to insurance policies requiring them to be construed most strongly against the insurer, refers to some change of interest which would make the loss, in case of destruction, fall upon the buyer, so that by such change the original policy holder would lose his interest in maintaining the property and protecting it from fire. It does not refer to a mere right which another party may acquire which does not change the risk in case of loss, nor give the third party more than a mere option to purchase the property. This rule regarding the change of risk might be different if it were not for the qualified character of the possession which was given to Baker under the arrangement between the parties. Baker was to have possession of the property merely for the purpose of operating the smelter in order to test the slag and ore, and the seller, notwithstanding such possession, was to have "free access to said property and its management in every respect the same as though to all intents and purposes the work was being done by him," instead of by Baker. Under these circumstances, a loss by fire, occurring before the exercise by Baker of his option, would fall upon Mackintosh. If it was caused by the negligence of Baker, Mackintosh could recover from him the damage, both by reason of the express covenant in the contract and by the general principles of law requiring him to exercise ordinary care in the use of another's property. This emphasizes and illustrates the proposition that the loss would be caused by the destruction of the property of Mackintosh. If it were the property of Baker, Mackintosh would suffer no damage. The contract could not have been enforced by Mackintosh as a contract of sale and purchase. The terms of the policy required a change of interest in order to work a forfeiture. This contract cannot be construed to have passed any interest whatever in the property to Baker, but merely a prospective right to obtain an interest. The interest would pass when he exercised the option, and not before.

The same considerations apply to the contention that there was a change of possession of the premises which Baker was holding under the owner, Mackintosh. He had no exclusive right to the property, and it further appeared that, during the occupancy of Baker, a watchman was kept on the property who was under employment and was holding for the seller, Mackintosh. Such common possession did not work the change of possession which would be required to avoid the policy. Furthermore, as will be hereafter seen, we think the conduct of the agents of the company was such as to waive any forfeiture on the ground of this particular change of possession.

2. The next defense is that there was an increase of hazard caused by the acts of the insured which, by the terms of the policy, would cause its forfeiture. This increase of hazard arose from the erection upon the premises of a certain six-ton furnace by Mr. Baker, which was used by him for the purpose of testing the slag and ore upon the premises. This was erected some time in January, 1901, two months prior to the agreement above recited between Mackintosh and Baker. Before the erection of this smelting furnace, and before making the arrangement whereby Baker was to have possession of the works and operate the furnace for that purpose, the plaintiff's agent called upon the general agent of the defendant company, and explained to him the circumstances and the proposed erection and operation of the furnace thereon for the purposes mentioned. The agent caused a rate to be fixed, and thereupon, gave permission to erect said furnace and operate the same for 60 days, charging $4.20 for the privilege. This permission expired upon the 16th of March following. The agreement above quoted was executed on

that day, and thereupon the parties again called upon the general agent of the insurance company and explained their desire for a renewal of the permission and the purpose to continue the operation of this six-ton furnace for smelting the ore and slag on the premises. Thereupon the agent stated that it would be satisfactory to the company, and gave the desired permission, again charging the additional sum of $4.20 for the privilege of so doing, which sum was paid, and the policy delivered to the agent for the proper indorsement. The policy provides that, "unless otherwise provided by agreement indorsed hereon or added hereto," the policy should be void if the hazard be increased, or if any change, other than by the death of the insured, takes place in the interest, title, or possession of the property. It further provides that: "No officer, agent, or other representative of the company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions or conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The indorsement made upon the policy by the general agent of the company was as follows: "In consideration of $4.20 additional permission is hereby granted to operate the within described smelter for a period of forty-five days from this date. [Signed] Edward Brown & Sons, General Agents." At the time this permission was given, the six-ton smelter was on the premises, but it was not mentioned or described in the policy. The indorsement therefore did not upon its face give permission to operate the six-ton smelter, although doubtless it was so intended. We must consider the case upon the theory that no sufficient indorsement was made of the permission agreed upon and paid for. It is apparent from all the evidence that the parties all acted on the belief that the indorsement gave them permission to operate the six-ton smelter, without invalidating the policy, and that the general agents of the company knew they so believed. It will be perceived that the general agent of the company was made fully acquainted with the increase of hazard and the change of occupation or possession contemplated by the parties, and that he agreed that the same might be done, and undertook to attach to the policy the required written permission for the contemplated changes. It further appears from the evidence that the parties in reliance upon this arrangement, proceeded to operate the six-ton smelter and maintain the divided possession whereby Baker continued to operate the smelter and occupy the premises in conjunction with the watchman employed by the plaintiff.

The effect of such limitations upon the power of agents to waive the conditions in a policy has been a frequent subject of decision in the courts. The doctrine is well settled that such stipulations and limitations in a policy regarding the powers of agents, and the manner of waiving its conditions, do not preclude a waiver by the conduct of authorized agents in regard to future operations upon the premises. In 3 Cooley's Briefs on Insurance, p. 2607, with respect to limitations of this character, it is said: "Even this limitation will not prevent an insured from relying on a parol subsequent waiver by an authorized agent or officer, as 'there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing,'" Orient Ins. Co. v. Knight, 197 Ill. 190, 64 N. E. 339; Hanover F. & I. Co. v. Dole, 50 N. E. 772, 20 Ind. App. 333; Home Ins. Co. v. Gibson, 72 Miss. 53, 17 South. 13; Wilson v. Commercial Ins. Co., 51 S. C. 540, 29 S. E. 245, 64 Am. St. Rep. 700; Lamberton v. Conn. F. I. Co., 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222; Renier v. Dwelling H. I. Co., 74 Wis. 89, 42 N. W. 208. And, again, with respect to subsequent changes, it is said: "If an insurer, or authorized agent, consents to changes which are required to be indorsed on the policy, and promises to make the necessary indorsement, having access to the policy for this purpose, but fails to make the indorsement through mistake, oversight, or neglect, the insurer will be bound, if not by waiver, at least by an estoppel in pais." 3 Cooley's Briefs on Ins., 2617. To this point very many cases are cited. And further on this subject, in the same work (page 2658), it is said: "If an insurance company, with knowledge of facts vitiating a policy, by its acts, declarations, or dealings leads the insured to regard himself as protected by the policy, or induces him to incur trouble or expense, such acts, transactions, or declarations will operate as a waiver of forfeiture, and estop the company from relying thereon as a defense to an action on the policy." The permission to operate the six-ton smelter was made in consideration of the additional rate charged and paid. It was, in effect, a new contract executed between the parties, a contract which the law does not require to be in writing. Knarston v. Manhattan L. I. Co., 140 Cal. 57, 73 Pac. 740. The agent who made this new contract was a general agent of the company, and had authority to issue and deliver policies. "Agents authorized to issue and deliver policies are regarded as having the same power to waive conditions in policies as the companies themselves, and can therefore waive conditions and forfeitures." 3 Cooley's Briefs, p. 2479; Id., pp. 2504, 2505. This rule includes all persons empowered to conclude contracts of insurance without first referring the negotiations to their principals, such as those who have "full power to effect contracts of insurance, to fix rates of premiums, to consent to changes, to make indorsements, and cancel policies." Id., p. 2480. Such limitations do not prevent the making of new contracts by the company or its authorized agents. Home Ins. Co. v. Nichols, 72 S. W. 440; Home Ins. Co. v. Gibson, 72 Miss. 58, 17 South. 13. And, as a general rule, a subsequent parol waiver by a general agent of conditions in a policy are valid, although the policy requires them to be in writing. Farnum v. Phœnix Ins. Co., 83 Cal. 261, 23 Pac. 869, 17 Am. St. Rep. 233; 3 Cooley's Briefs, pp. 2601, 2602–2608. Waivers such as that here made, constituting, as they do, a new contract upon a sufficient consideration, need not be evidenced by a writing, and need not be indorsed on the policy, no matter what limitations or conditions are expressed in the policy, provided, always, they are made by an agent who would otherwise have authority to make the contract. 3 Cooley's Briefs, p. 2695.

In Gladding v. Insurance Co., 66 Cal. 6, 4 Pac. 764, the agent who attempted to waive the conditions was a local agent, and not, as here, a general agent, who, for contractual purposes, impersonated the company itself. The general remarks contained in the opinion in that case cannot be deemed authority, so far as they indicate a lack of power in the general agent to waive such conditions by acts amounting to a new contract, or an estoppel, and without indorsement upon or attached to the policy. In Shuggart v. Lycoming Fire Ins. Co., 55 Cal. 408, and Enos v. Sun Ins. Co., 67 Cal. 621, 8 Pac. 379, it was held that a mere local agent was without such authority, unless specially empowered. This is the substance of the decision of the Supreme Court of the United States in Northern Ass'n Co. v. Grand View B. A., 183 U. S. 308, 22 Sup. Ct. 153, 154, 46 L. Ed. 213. In the present case, it clearly appears that the agents who gave the permission and made the written indorsement, were the general agents of the company with full powers. This, indeed, is not controverted. The failure to accurately describe the six-ton smelter in the slip attached to the policy was the fault of the defendant, and any attempt on its part to avoid the policy because of such failure would at once create an estoppel which would prevent the company from taking advantage of the misdescription. We are therefore of the opinion that the company waived the forfeiture which otherwise might have been caused by the increase of risk and partial change of possession in this case, and that it is now estopped from claiming such forfeiture after having knowingly allowed the parties to act in the belief that they had received the privilege which they were exercising and for which they had paid the additional premium.

3. The remaining defense is that the plaintiff has violated the following clause in the policy: "Permission granted for the above described works to remain idle, it being warranted by the assured that at all times when the above works are idle or inoperative, one or more watchmen shall be constantly on duty at night." At the time of the fire there was a watchman, in the employ of the plaintiff, on the premises, whose duty it was to keep guard and watch against danger from fire. The fire occurred on April 2, 1901, near midnight, and at that time, instead of being on watch, he had gone to bed and was asleep. We think, under these circumstances, it must be admitted that the plaintiff was guilty of a violation of this condition, if, as a fact, he was bound, under the other circumstances attending the case, to keep a watchman constantly on duty during the nighttime. The obligation to keep a watchman on duty would not be observed by having a man asleep upon the premises. Because of this failure of the watchman to keep on duty, the policy would be void, unless the works were neither idle nor inoperative at the time of the fire, within the meaning of the above clause. This clause did not require that the plaintiff should have been running the works day and night. What is contemplated by such a clause is the ordinary operation of the works during usual and customary hours. Whitney v. Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116; Halpin v. Phœnix Ins. Co., 118 N. Y. 165, 23 N. E. 482; Kansas, etc., Ins. Co. v. Metcalf, 53 Pac. 68, 59 Kan. 383. There was no evidence that it was usual or customary to operate such works at night, and the presumption is not that such is the case, but the contrary. Code Civ. Proc. § 1963, subds. 20, 28. The effect of such proof would be to establish a forfeiture, and, consequently, the burden was on the defendant to prove the usage or custom. In the absence of such proof, we must conclude that the policy did not require that there should be a watchman on duty at night during times when the works were in operation during the day.

From the 16th of March until the night of the fire, the six-ton furnace erected by Baker under a shed on the premises 30 feet from the main building was in daily operation in the smelting of slag and ore. This operation required the work of five or six men on the premises. In connection with this work, they were using one of the boilers belonging to the works and the water pipes and tools of the plaintiff, and were occupying the buildings for the storage of ore and other materials. The six-ton furnace was a smelter and was used to smelt the slag and ore in a manner substantially the same as that pursued in the use of the fifty-ton smelters covered by the policy. These four large smelters were not in use, nor was any other part of the buildings occupied in the work, except as above stated. Under these circumstances, we think the works were not "idle or inoperative," within the meaning of the policy. Forfeitures are not favored in law. It was not necessary that the works should be kept in full operation, or that all the furnaces should be kept going every day. A comparatively slight operation would suffice. The operation in good faith of one of the original furnaces would, so far as we can perceive, as effectually serve to prevent danger from fire at night, which was the object to be attained, as the full operation of all. Doubtless, if Mackintosh himself had built an additional smelter on the grounds, and had operated the works with that alone, leaving the others idle, it would have been a sufficient performance of the obligation to run the works when there was no night watchman. The increase of risk by the erection and operation of the six-ton furnace, as we have seen, was waived. That point being disposed of in that way, it is of no consequence, and does not change the legal rights of the parties, that the furnace in use was not one of the four which were insured, nor that it was used by the plaintiff in person, but by Baker under the direction of the plaintiff, or by his permission. There was a substantial operation of the works, which is all that was required. Bole v. New Hampshire F. I. Co., 159 Pa. 55, 28 Atl. 205; City, etc., Mill Co. v. Ins. Co., 72 Mich. 654, 40 N. W. 777, 16 Am. St. Rep. 552; Prieger v. Exchange M. I. Co., 6 Wis. 104. In McKenzie v. Scottish U. & N. Ins. Co., 112 Cal. 548, 44 Pac. 922; and Brehm L. Co. v. Svea Ins. Co., 79 Pac. 34, 36 Wash. 520, 68 L. R. A. 109, there was no operation of the premises at all comparable to that here shown, and those cases are not in point. As the works were not idle or inoperative, the necessity for a night watchman did not exist, and the fact that one was employed, but failed to watch, did not affect the validity of the policy.

The findings are not sustained by the evidence, and the judgment is therefore erroneous.

The judgment is reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

On Rehearing.

PER CURIAM. Rehearing denied.

SLOSS, J. I dissent.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. It is conceded that there was no watchman on duty, but it is held that the works were in operation. This conclusion, in my opinion, is opposed to any reasonable construction of the policy.

I dissent, also, from the doctrine that the parties to a written contract cannot bind themselves by a stipulation that it shall not be altered except by an agreement in writing. By such a stipulation they merely import into the particular contract the beneficent principle of the statute of frauds, thereby protecting themselves from the consequences of false claims of alterations.

I deprecate especially the disposition of courts to deprive insurers on slight and insufficient grounds of the benefit of proper stipulations and conditions inserted in their policies for the legitimate and laudable purpose of compelling the insured to protect the insured property from unnecessary and easily prevented hazards. The necessary effect of such a course of decision is to increase premium rates, and the final result, in the long run, is that careful and honest policy holders pay for the losses of the reckless and dishonest.

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(150 Cal. 453)

## MACKINTOSH v. AMERICAN FIRE INS. CO. (S. F. 3,497.)

(Supreme Court of California. Feb. 6, 1907. Rehearing Denied March 8, 1907.)

INSURANCE — FIRE POLICY — WATCHMAN CLAUSE.

Under the provision of a fire policy on a smelter, that, during such time as the works are idle or not in operation, whether closed for repairs, or during the absence of workmen, or otherwise, a watchman shall be on duty constantly, day and night, where the works are operated during the day, and it is not shown that it is usual or customary to operate such works at night, it is not necessary that there be a watchman at night.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 848–850.]

In Bank. Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by Charles H. Mackintosh against the American Fire Insurance Company. Judgment for defendant. Plaintiff appeals. Reversed and remanded for new trial.

Rehearing denied; Beatty, C. J., and Sloss, J., dissenting.

Campbell, Metson & Campbell, G. W. Baker, and Thomas H. Breeze, for appellant. Goodfellow & Eells, for respondent.

PER CURIAM. Appeal from a judgment for defendant in an action upon a policy of fire insurance.

The property destroyed was covered by various policies in addition to the one sued upon in this action, and actions were brought upon these different policies. In one of these cases (Mackintosh v. Agricultural Fire Ins. Co.), judgment went for the defendant, and that judgment has just been reversed by this court. See opinion filed in Mackintosh v. Agricultural Fire Insurance Co. (S. F. 3,498) 89 Pac. 102. The present case presents the same facts as those considered by the court in the Agricultural Company's Case. It is true that the phraseology of the "watchman clause" differs somewhat in the two cases. In the Agricultural Case the policy read: "Permission granted for the above-described works to remain idle, it being warranted by the assured that at all times when the above works are idle or inoperative, one or more watchmen shall be constantly on duty at night." In this case the policy contained the following: "Warranted by the insured that, during such time as the within-described buildings or works are idle or not in operation, whether closed for repairs, or during the absence of workmen, or otherwise (except as otherwise herein provided), one or more watchmen shall be on duty constantly, day and night, in and immediately about the said buildings or works, and, if the said buildings or works shall at any time remain shut down for more than thirty (30) days, notice shall be given this company, and permission to remain so shut down be obtained and indorsed hereon, or this policy shall be null and void." But it is not claimed by the appellant that this clause has, so far as the points raised on this appeal are concerned, any different effect from that of the clause in the agricultural policy, and we think the views expressed by us on the other appeal are equally applicable here.

For the reasons stated in the opinion in Mackintosh v. Agricultural Fire Insurance Company, the judgment is reversed, and the cause remanded for a new trial.

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(150 Cal. 557)

## PEOPLE ex rel. CITY OF LOS ANGELES v. LOS ANGELES INDEPENDENT GAS CO. (L. A. 1,705.)

(Supreme Court of California. Feb. 13, 1907.)

GAS—GAS COMPANIES—FRANCHISES—FORFEITURE.

Where a gas company acquired a franchise under Const. art. 11, § 19, providing that, in the absence of public works for supplying artificial light, any corporation shall have the privilege of using the public streets for laying pipes to supply the city and its inhabitants with gas or other illuminating light, etc., and such company exercised no control over its gas furnished to consumers after it had passed through its meters, it was not subject to a forfeiture of its franchise because some of the gas had been used by its patrons for heating purposes.

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Quo warranto by the people, on relation of the city of Los Angeles, against the Los Angeles Independent Gas Company. From a judgment for defendant, and from an order denying plaintiff's motion for a new trial, it appeals. Affirmed.

U. S. Webb, Atty. Gen., and W. P. Mathews, and J. S. Chapman, for appellant. Lynn Helm and Lee, Scott, Bailey & Chase, for respondent.

McFARLAND, J. This is a proceeding in the nature of quo warranto, brought by the people of the state, on the relation of the city of Los Angeles, for the purpose of ousting and excluding the defendant, a corporation, from exercising a certain franchise. The main averment of the complaint is that defendant "has usurped and is unlawfully exercising the franchise of laying pipes in the public streets and alleys of said city of Los Angeles for carrying gas for heat and power, and of supplying and distributing, by means of said pipes, gas for heat and power to a large number of the inhabitants of said city." Judgment was for defendant, and plaintiff appeals from the judgment, and also from an order denying its motion for a new trial.

The material facts of the case, found by the court and supported by the evidence, are these: A year or two before the commencement of this action defendant had laid pipes under certain streets of the city of Los Angeles, through which it supplies illuminating gas for the use of the inhabitants of that city. It claimed the right and franchise to do this under section 19 of article 11 of the state Constitution. This section provides, in substance, that in any city where there are no public works for supplying water or artificial light any individual or corporation shall, under the direction of the superintendent of public streets, and under such regulations as the municipality may prescribe, "have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and inhabitants either with gas light or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof." The respondent complied with all the provisions of said section. It procured the gas with which it supplied the inhabitants of the city from another corporation, called the "Los Angeles Suburban Gas Company," which furnishes defendant with illuminating gas, and this gas, without any chemical or other change, is supplied to defendant's customers. When used, it necessarily generates both light and heat. The gas is delivered to the consumers at certain meters on their premises, and after it passes beyond the meters it is the property of the consumers, and defendant has no further control over it. Some of these consumers use the gas, not only for illuminating purposes, but also for heating and cooking, and a few—not more than "one in fifty"—use it for heating purposes exclusively. It may be assumed that defendant knew that some of the gas furnished by it was used for heating as well as for illumination. And the contention of appellant is that the franchise of having pipes in the streets has been forfeited because the gas furnished by it has not been used for illumination alone, but has been used also for the other purposes above mentioned. This contention is, in our opinion, not maintainable. Indeed, this court has determined the matter adversely to appellant's contention by its decision in Re Johnston, 137 Cal. 115, 69 Pac. 973, and in Denninger v. Recorder's Court, 145 Cal. 629, 638, 79 Pac. 360. In each of those cases the franchise of a party under said section 19 of the Constitution to maintain pipes in the streets for distributing illuminating gas was attacked on the ground that the gas was being used for heating as well as for illuminating purposes. In the Johnston Case the court said: "The suggestion on the part of the respondent that it is the purpose of the corporation herein to supply gas through its pipes for other purposes than light, even if founded upon fact, does not deprive it from exercising the right conferred upon it by the Constitution, or authorize the municipality to prevent it from enjoying that right. Even though the pipes, when laid, may be available for other purposes than supplying gaslight, the corporation is not thereby deprived of the right which the Constitution has given it to lay its pipes in the streets, nor can it be required as a condition of exercising that right to declare that the gas to be supplied by it shall be used exclusively for illumination, or is to be supplied solely for such use. It may be added that it is not made to appear that the streets will be subject to any other or greater obstruction than is requisite for the supplying of gas for illuminating purposes." In Denninger v. Recorder's Court, 145 Cal. 638, 79 Pac. 364, the court say: "Section 19 of article 11 does not directly confer upon any individual or company the right to lay pipes and conduits in the streets of a city in order to supply gas for cooking and heating purposes, but only so far as may be necessary for supplying the city and its inhabitants with gas light. The same gas, however, which furnishes light also serves for cooking and heating, and the pipes and connections necessary for the one purpose make the gas available for the other purposes without subjecting the streets to any additional burden. It was accordingly held in Ex parte Johnston, 137 Cal. 122, 69 Pac. 973, that an intention to permit the use of gas for other than illuminating purposes afforded no ground for prohibiting the laying of the pipes by a party claiming the benefit of the constitutional grant." The burden and servitude, if any, which is imposed on the streets and public by the laying of the pipes is accomplished as soon as the pipes have been laid and the surface of the street restored to its proper condition; and that burden is in no way increased by the fact that the use of the gas carried through the pipe is not confined to illumination. Its use by some persons for heating purposes is a great convenience to those persons, while it is not a grievance to any one; and such use affords no just or legal reason for depriving respondent of its franchise.

Appellant contends for a reversal because it contends the findings are inconsistent. We do not see any inconsistency in the findings, and, at all events, none that are material. The fact is that there is only one material question in the case, and that is: Has the respondent forfeited its franchise because some of the gas distributed by it through its pipes has been used for heating purposes? This question is amply presented by the transcript, and it is not evaded by the minor points made by appellant. There is nothing in the other points which calls for special notice.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

150 Cal. 37

## TRADERS' INS. CO. OF CHICAGO, ILL. v. AACHEN & M. FIRE INS. CO.

(S. F. 3,660.)

(Supreme Court of California. Jan. 28, 1907. Rehearing Denied Feb. 27, 1907.)

INSURANCE — REINSURANCE — AVOIDING RELEASE—MISTAKE.

Plaintiff reinsured part of its risk with defendant, and then, on defendant's request, placed such reinsurance with another, commencing on a certain day, on which day it returned to defendant its written obligation. On the day previous, unknown to them, the insured property was burned. *Held*, that the release, not being made in contemplation of a prior loss, was made under a mistake of fact, against which relief would be granted.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Traders' Insurance Company of Chicago, Ill., against the Aachen & Munich Fire Insurance Company. From an order granting defendant a new trial, plaintiff appeals. Reversed.

Charles W. Slack, for appellant. Van Ness & Redman and T. C. Van Ness, for respondent.

SLOSS, J. On the trial of this action the plaintiff had judgment according to the prayer of its complaint. The defendant moved for a new trial on the grounds of errors of law occurring at the trial and insufficiency of the evidence to justify the decision. The motion was granted, and the plaintiff now appeals from the order granting a new trial. It is not claimed by the respondent that the court below made erroneous rulings of law which would justify the making of the order complained of. The facts in the case appear without substantial conflict, and the question before us, therefore, is simply whether upon these facts plaintiff was or was not entitled to judgment.

The plaintiff and defendant are corporations engaged in the business of fire insurance. On the 16th day of January, 1901, the plaintiff issued its policy of insurance to the Menan Milling Company, insuring said company in the sum of $3,000 from the "16th day of January, 1901, to the 16th day of January, 1902, against loss or damage by fire to a building and grain elevator situated at Menan, Idaho. On January 21, 1901," the plaintiff, desiring to be reinsured in part, offered $1,000 of the risk to the defendant, the Aachen & Munich Fire Insurance Company, and that company delivered to plaintiff a "covering note" in the sum of $1,000. This covering note or memorandum contained the following language: "From January 21, 1901, at noon. Insurance under this covering note to cease twenty days from this date at noon, or at such time prior thereto as this company's policy may be issued on above described risk. Dated at San Francisco, January 21, 1901." The plaintiff subsequently sent a formal application for reinsurance to the Aachen & Munich Insurance Company, and this was accepted and signed. On January 25, 1901, the defendant requested the plaintiff to place the reinsurance elsewhere. Thereupon the plaintiff made application to the Norwich Union Fire Insurance Company, which issued a covering note or memorandum which by its terms was to cease "ten days from January 25 at noon, or at such time prior thereto as the policy of this society may be issued on above named risk." On the same day, January 25, 1901, the plaintiff returned to the defendant the covering note which it had issued to plaintiff, and the application which plaintiff had made to the defendant was destroyed. It was subsequently learned that on January 24th, the day before the cancellation, the building and elevator in question had been damaged by fire, causing a loss on account of which plaintiff was obliged to pay, under its policy, the sum of $2,450 to the Menan Milling Company, and it was further obliged to pay $102.45 as necessary expenses of adjustment. At the time when the covering note was surrendered and canceled neither the plaintiff nor the defendant had any knowledge of the fact that a fire had occurred. On learning this fact, the plaintiff tendered to the defendant the premium for the reinsurance, and demanded payment of $850.82, the proportion of the loss represented by defendant's covering note. On defendant's refusal to accept the tender or to make the payment, this action was commenced; the plaintiff praying that the cancellation of the covering note be set aside, and demanding judgment for $850.82.

The plaintiff contends that, having surrendered the covering note under a mistake of fact, it is entitled to be relieved from this mistake, and to recover from the defendant the amount which was actually due when the covering note was canceled. Such was the view originally taken by the learned judge of the trial court, but upon motion for a new trial he appears to have come to the opposite conclusion. We think the result first reached was the right one. On the 25th of January, 1901, when the covering note was surrendered, the defendant was under a fixed liability to the plaintiff amounting to $850.82. The plaintiff, not knowing that such liability had accrued, surrendered it to the defendant in exchange for a release of the obligation to pay a much smaller sum as premium. It goes without saying that the covering note would not have been delivered for cancellation if the plaintiff had been aware that the loss had already occurred. It makes no material difference whether we say that the plaintiff consented to the cancellation in the belief that the insured property had not been burned, or, adopting the language of the respondent, say that the plaintiff acted in ignorance of the fact that a loss had occurred. In either view its consent was given through mistake and was therefore subject to rescission. Civ. Code, §§ 1566, 1567. "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed." Civ. Code, § 1577. If the plaintiff did not act under a "belief in the present existence" of the property insured it was at least in "unconscious ignorance" of the fact that the property had been injured by fire. That the occurrence of a fire destroying or injuring the property insured was a fact material to the contract (i. e., of cancellation) is manifest. There would seem, accordingly, to be no reason why the party who acted under the influence of such mistake should not be permitted to be relieved from the effect of its action upon offering to place the other party in the position which it occupied before. It is a familiar doctrine that one who has parted with money or property under a mistake of fact may recover what he has parted with, in the absence of circumstances which would render such recovery inequitable as against the defendant. In this case the success of the plaintiff would not subject the defendant to any loss which in equity and justice it ought not to suffer. The sum recovered would be merely the amount which the defendant had, for an adequate consideration, agreed to pay on the occurrence of the event which has actually taken place. The defendant would be deprived of nothing except the right to set up a release of an existing liability given by a creditor who was not aware that any liability existed, and who would not have given the release if it had been aware of the existence of the liability. It is argued the cancellation of the covering note was intended to operate as a surrender of all liability, past as well as future. This is no doubt true, but it does not answer the point that the plaintiff was acting under a mistake of a material fact when it consented to the cancellation. Not knowing that a loss had occurred, it intended and agreed to wipe out all liability, but it would not have so agreed had it known the facts. Plaintiff's application to be relieved from the consequences of its action presupposes that, unless so relieved, the defendant's liability on the covering note would be absolutely extinguished.

The respondent contends, further, that, while the appellant surrendered the covering note in ignorance of the fact that a loss had occurred, it did so knowing that a loss might have occurred. No doubt it was open to the plaintiff to consent to cancel the reinsurance, agreeing at the same time to take the chance of any loss that might have occurred in the meanwhile. "Where parties knowingly predicate a settlement upon uncertain or contingent matters or circumstances, and where the consequent risk which each is to encounter is taken into consideration in the stipulation assented to, the contract will be valid notwithstanding the mistake of one of the parties." 20 Am. & Eng. Ency. of Law (2d Ed.) 815. This principle is applied in cases where a policy is issued insuring property from a date anterior to the execution of the policy. The insurer is bound to pay a loss occurring between the date fixed for the commencement of the insurance and the actual execution of the policy although the fact of such loss was not known when the policy was issued. And this stands upon the ground that the risk is one expressly contracted for. Ins. Co. v. Hallock, 27 N. J. Law, 645, 72 Am. Dec. 379. But the facts of the present case do not bring it within this rule. We see no reason why the intent to surrender an accrued claim, the existence of which was not known, should be imputed to the plaintiff in the absence of an express understanding to that effect; and there is nothing here to evidence such understanding. In this respect, as in its main features generally, the case bears a close resemblance to Riegel v. American Life Ins. Co., 140 Pa. 201, 21 Atl. 392, 11 L. R. A. 857, 23 Am. St. Rep. 225. There the defendant had issued to Riegel, the plaintiff's intestate, a policy of insurance for $6,000 on the life of one Leisenring. Reigel died after paying the premiums for some years. The plaintiff his widow and administratrix, in order to be relieved from the burden of the annual premiums, surrendered the policy to the company, taking in exchange a paid-up policy for $2,500. In fact, although the fact was not known to either the plaintiff or the company, Leisenring had died before the exchange of policies was made. It was held that the mistake under which both parties had acted entitled the plaintiff to be relieved from the exchange and to be reinstated to her rights on the original policy. This view was restated by the court on a second appeal. Reigel v. American Life Ins. Co., 153 Pa. 134, 25 Atl. 1070, 19 L. R. A. 166. It is argued by the respondent that in the Riegel Case there was no consideration for the surrender by plaintiff, she being then under no obligation to pay further premiums, whereas here plaintiff was by the cancellation relieved from its existing liability to pay a premium. But this distinction does not affect the principle upon which the Riegel Case was decided. As was said by the Supreme Court of Pennsylvania on the second appeal: "In many cases prominence is given to failure of consideration resulting from mutual mistake or ignorance of material facts, but entire failure of consideration is not an essential ingredient in any case."

Much stress is laid by respondent on the dealings between the plaintiff and the Norwich Union Fire Insurance Company; it being claimed that plaintiff transferred its reinsurance from the defendant to the Norwich Union, and that this conclusively shows plaintiff's intent to release defendant from any possible liability, past or future. But the covering note of the Norwich Union did not begin until January 25th, and could not cover a loss occurring on the 24th. If plaintiff intended to substitute the new insurance for the old, such intention was based on the belief that no loss had yet occurred. And, while the plaintiff subsequently applied to the Norwich Union for a policy running from January 16, 1901, the undisputed testimony shows that this application was never acted upon or accepted. Even if it could be said that the Norwich Union did reinsure $1,500 of the risk from January 16, 1901, such reinsurance was not effected until January 29th. At that time the transactions between plaintiff and defendant had been closed, and a subsequent dealing between plaintiff and a third company could not destroy the rights vested in plaintiff upon the surrender of the covering note to defendant on January 25th.

The order appealed from is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

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150 Cal. 341

## HARDY et al. v. MARTIN et al.

(S. F. 4,006.)

(Supreme Court of California. Jan. 19, 1907.)

1. WITNESSES — CONFIDENTIAL COMMUNICATIONS — ATTORNEY AND CLIENT — TERMINATION OF RELATION.

Under Code Civ. Proc. § 1881, subd. 2, providing that an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment, letters written by complainants to their attorney with reference to a conveyance of land to decedent, and containing admissions regarding facts sought to be established on the trial of a suit to vacate the same, were inadmissible over complainants' objection, though the relation of attorney and client did not exist at the time the conveyance was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 747–751.]

2. Appeal—Prejudicial Error.

Where, in a suit to set aside a deed, certain letters written by complainants to their attorney, containing admissions, were erroneously admitted in evidence over complainants' objection, and they could not be said to have been without effect on the decision in favor of defendants, the error was prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153–4157.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Suit by Lilian B. Hardy and another against Ada C. Martin, as administratrix of the estate of Robert C. Chambers, deceased, and others. From a judgment in favor of defendants, and from an order denying complainants' motion for a new trial, they appeal. Reversed.

Dorn, Dorn & Savage, for appellants. Aylett R. Cotton (L. A. Redman, of counsel), for respondents.

SHAW, J. This is an action to set aside a deed, alleged to have been procured by the fraud and undue influence of the deceased, Robert C. Chambers. The plaintiffs are the nieces of the deceased wife of Robert C. Chambers. Their mother died in 1875 when they were small children. In 1884 Chambers was married to their mother's sister, Eudora A. Chambers, and from that time until her death in 1897, and afterwards until their respective marriages, the plaintiffs lived with Robert C. Chambers as members of his household and family. In 1896 Chambers conveyed to his wife the property in dispute. She had made a will in 1884, devising all her property to her said husband, in trust, for the equal benefit of the two plaintiffs and their grandmother on their mother's side, Mrs. Tolles, which trust, however, was to cease with respect to the plaintiffs when they respectively became 18 years of age. They arrived at that age several years before the death of Mrs. Chambers, and, consequently, upon her death, they each became seized of an undivided one-third of her estate in their own right and entirely free from the trust. The charge is that after the death of Mrs. Chambers, and while he was executor of her will, Robert C. Chambers obtained from them a conveyance of their shares in the real estate described in the complaint, consisting of about 46 acres of land, situate in Butte county in this state, and referred to in the evidence as the Palermo property, and that said conveyance was obtained from them by means of fraud, undue influence, and without any consideration. The fraud charged consisted of promises that he would make a will giving them a substantial part of his estate, which was large and valuable, and that he would also, during his lifetime, give them sums of money for their use, which promises, it is alleged, he had no intention of performing. The undue influence alleged arose from the long residence of the plaintiffs during their tender years as members of the family of said Chambers, and the mutual affection and esteem which arose therefrom, whereby they had learned to trust him and have great confidence in him. The action was tried by the court, and findings and judgment were given in favor of the defendants. The plaintiffs appeal from the judgment, and also from an order denying their motion for a new trial.

From the statement used on the motion for a new trial, it appears that after the death of their aunt, Mrs. Chambers, the plaintiffs had employed an attorney to look after their interest in the estate, and that from that time until the execution of the deed in controversy, said attorney had advised them from time to time concerning the same, and had been consulted by them during negotiations leading up to the execution of the conveyance, and that while these were pending they had each written to him several letters relating to the matter, containing some admissions in regard to the facts sought to be established on the trial of the case. Upon the trial, the defendants offered these letters in evidence. Objections were made on the ground that they were confidential communications between attorney and client, and on that ground inadmissible. The objections were overruled and the letters admitted, to which the plaintiff excepted, and this ruling is assigned as error. We are at a loss to perceive on what ground the evidence was admitted. Section 1881, subd. 2, Code Civ. Proc., provides that: "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." That these letters were those of the client to an attorney, concerning the very matter of the controversy for which he was employed in their behalf, appears from the contents of the letters, beyond question. That the statements therein contained constituted material evidence in the cause was also apparent; indeed, it is not disputed. It seems to have been claimed that the relation of attorney and client did not exist, or rather that it did not continue down to the moment of the execution of the deed, and, further, that the advice of the attorney was not taken or given concerning the question of the policy to be pursued by the plaintiffs with regard to the execution or nonexecution of the deed. The fact that the relation of attorney and client did not exist at the moment of the execution of the deed, or for a considerable time prior thereto, would not render the communications admissible, if such relations existed at the time they were made. The statutory provision above quoted is intended for the protection of the client, and to encourage him to give to the attorney whom he consults the fullest information concerning the facts upon which he asks the attorney's advice or action; and if the relation existed at the time the communications are given, the subsequent cessation of that relation does not make the communication admissible. Nor do the circumstances that after having made the communications with the view of procuring the advice or assistance of the attorney, the client concluded to act upon his own motion, and did so act without receiving any advice from the attorney, make such communication admissible, and particularly where, as in this case, the attorney merely stated to the plaintiffs that if they were disposed to make the conveyance to their uncle out of their personal regard for him, that was a matter upon which he would not presume to advise them. They still had the right to freely inform the attorney of all the facts affecting their case, with a view to having his direction concerning the law, and to have the protection of the statute to prevent disclosure of the communications made to him. The case of Estate of Wax, 106 Cal. 347, 348, 39 Pac. 624, is cited, wherein the court says that when a testator requests his attorneys to sign his will as attesting witnesses, "he in effect consented that whenever the will should be offered for probate, they might be called on as witnesses and testify to any facts, within their knowledge, necessary to the establishment of its validity." We do not think this decision has any bearing upon the question in this case. The attorney was not a witness to the deed sought to be set aside, but was an attesting witness to a contemporaneous document stating the terms of the agreement in pursuance of which the deed was executed. It does not appear either from the instrument itself, or from any evidence in the case, who requested the attorney to sign his name as a witness. That, however, we deem to be immaterial. The reasons advanced in Estate of Wax, supra, for the admission of the testimony of an attorney concerning the occurrences attending the execution of a will are that it is necessary to allow the testimony of such witnesses in order to enable the beneficiaries under the will to secure its probate. The decision in that case does not go beyond allowing the attesting witnesses to give their testimony concerning the occurrences at the time of the execution of the will. The letters introduced in the case at bar were not communications made at the time of the execution of the deeds or the instrument to which the attorney had subscribed his name as a witness, but were letters long prior thereto, and contained statements of facts bearing upon the matter, which statements must be regarded as confidential; and it cannot be conceived how the request of the plaintiffs, conceding that they did request the attorney to sign as a witness, could be understood by them, or could be considered by the court, as constituting a waiver of their right to object to the introduction in evidence against them of the previous statements made to him as their attorney. We think the admission of the letters was clearly erroneous.

A judgment would not be reversed for the admission of such testimony if it appeared that the evidence could not have affected the case. It does not appear, however, in this case, that the evidence was so immaterial as to have been harmless. There was evidence directly tending to prove that the deceased had made the alleged promises charged without intending to perform them, and that the deed was executed in reliance upon those promises, and because of the undue influence possessed by him over them, arising from the relations of confidence and trust existing between them. There was also evidence tending to show that the property in controversy had been conveyed by the deceased to his wife under a naked trust whereby she was to hold the same for his benefit, that this was understood by all the parties, and that the deed in controversy was made for the purpose of terminating this trust. The conflict between these two theories, and the question which of the two was correct, was the principal question in the case. The statements in the letters introduced in evidence tended to prove the latter, and disprove the former. We think it was material evidence of considerable weight, and that it cannot be said to have been without effect upon the decision. There are other questions in the case which are discussed in the briefs, but as they relate to merely technical matters, and may not arise upon another trial, we do not think it necessary to consider them.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

150 Cal. 398

## JENSON v. WILL & FINCK CO. (S. F. 3,856.)

(Supreme Court of California. Feb. 1, 1907. Rehearing Denied Feb. 28, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.

A boy 12½ years of age, employed as a cash boy in a department store, was ordered to remove goods from a warehouse by loading the same on trucks and using an elevator. The elevator was defective and without sides. The trucks were so constructed as to be liable to shift on the elevator, to the injury of those using them. The boy was inexperienced, and he was set at work without any warning. He was injured by a truck moving while on the elevator. *Held* to justify a finding that the injury sustained was the result of the hazardous employment in which the boy was placed while inexperienced and without warning, authorizing a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 314.]

2. SAME—KNOWLEDGE OF DANGER—EVIDENCE.

In an action to recover for injuries to a boy 12½ years of age, while removing goods from the basement of a warehouse to the street by the use of an elevator, evidence *held* insufficient to show that the boy appreciated the peril in which the shifting of the truck might place him, and as a matter of law he did not assume the risk of injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 601–609, 981–986.]

3. SAME.

Where a minor employé is shown to have known of the special dangers attending the work to which he was assigned, and has sufficient intelligence to appreciate them, his employer is not liable for an injury sustained by him resulting from such dangers; for in such a case he assumed the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 601–609.]

4. SAME—QUESTION FOR JURY.

The law does not exact from a child of tender years the same judgment or the same degree of caution that it does from an adult, and whether a minor employé is shown to have had knowledge and an appreciation of dangers incident to his employment is a question for the jury, except where the evidence unquestionably demonstrates that he did have such knowledge and appreciation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1079–1082.]

5. SAME—VIOLATION OF RULES—EVIDENCE.

An infant employé was injured while removing goods from the basement of a building to the sidewalk by the use of an elevator, and was caught between the elevator and the sidewalk. There were signs on the elevator which read, "No person allowed to ride on the elevator. This means you"—and "Keep off this elevator. Dangerous." It was the custom of employés removing goods to the sidewalk to ride up with them on the elevator. The employé was ordered to use the elevator, and the person who directed him to do the work saw he used it. *Held*, that the warning did not apply to the employé and deprive him of a right of recovery on the theory that he violated the rules of his employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 759–765, 778–788.]

6. SAME—SCOPE OF EMPLOYMENT.

A boy 12½ years of age was employed as a cash boy. An employé in charge of a warehouse was removing goods from the basement to the sidewalk. The secretary of the employer sent over to the store for a boy to work in the warehouse, and the person under whose control the boy was working directed him to go to the warehouse to work there. The boy was instructed by the person in charge as to what he should do, and, while the boy was at work, the president of the corporation saw him there. *Held* to warrant a finding that the boy was regularly employed at the warehouse, rendering the employer liable for an injury negligently inflicted on the boy there.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 153–156.]

7. APPEAL — REVIEW — COMPLAINT — SUFFICIENCY.

One appealing from an order denying a motion for a new trial cannot raise the point that the complaint is defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3478.]

8. TRIAL—INSTRUCTIONS—RESPONSIVENESS TO ISSUES.

An instruction in an action for injuries to a minor employé as to the duty of the employer to provide a reasonably safe place to work, and that his failure to do so is negligence, is not objectionable as not being responsive to the issues, involving the question of assumption of risk arising from the hazards of the work, where it was immediately followed by a number of instructions relative to the duty of an employer where a minor employé is directed to perform work which in its nature is hazardous.

9. SAME — REFUSAL TO GIVE INSTRUCTIONS EMBODIED IN THOSE GIVEN.

It is sufficient for the court to give on its own motion instructions substantially covering those requested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651, 664, 668.]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Harold Jenson, by Oscar Jenson, his guardian ad litem, against the Will & Finck Company. From an order denying a motion for a new trial, defendant appeals. Affirmed.

Jesse W. Lilienthal and Lloyd & Wood, for appellant. Sullivan & Sullivan, for respondent.

LORIGAN, J. Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained while in the employment of defendant. The cause was tried before a jury, who returned a verdict in favor of plaintiff for $7,500, upon which judgment was entered. A motion by defendant for a new trial was denied, and this appeal is from such order alone. There is no appeal from the judgment.

The complaint alleged that on February 9, 1901, defendant was carrying on business in the city of San Francisco and maintaining in the basement of premises No. 100 O'Farrell street a warehouse, where it kept a stock of merchandise, and operated in said premises an elevator for the purpose of transporting goods from said basement to the sidewalk in front of said premises; that for the purpose of transporting said goods therefrom it was necessary to place the goods in a wheeled truck, which was placed upon the elevator and hoisted thereon to said sidewalk; that prior to the 9th day of February, 1901, plaintiff had been employed as a cash boy in defendant's store, No. 818–820 Market street, and prior to said date had never had any experience whatever in the work of transporting goods in trucks from the basement of said premises, No. 100 O'Farrell street, to said sidewalk, or any experience whatever in handling or transporting goods in elevators; that on said day defendant, well knowing the inexperience of plaintiff in the work of so transporting goods, and well knowing the inexperience of plaintiff in handling and transporting goods upon the said elevator, or any elevator, put plaintiff to work in said basement, and directed him to attend to the transportation and transfer by means of said wheeled trucks of the goods of said defendant from the said basement; that, in order to transport said goods as aforesaid, it was necessary for plaintiff, in the performance of such duties, to go on said elevator with the truck load of goods; that the work of transporting such goods in a truck on said elevator was a hazardous undertaking, and the hazard was known to defendant and unknown to plaintiff; that plaintiff was unfamiliar with the dangers attending said work which he was ordered to do on said day, and was unfamiliar with the dangers of transporting said goods; that before ordering plaintiff to do the work of transporting goods in said trucks from said basement to the sidewalk defendant did not give plaintiff any instructions or directions whatever as to the manner in which he should perform his work or transport said goods from said basement; that, while plaintiff on said day was in the act of transporting from said basement to the sidewalk on the elevator a large quantity of goods belonging to defendant in one of its wheeled trucks, plaintiff's right leg and foot, without any negligence on his part, were crushed between the platform of the elevator and the sidewalk, and were then and there mangled and bruised; that on account of said injuries it was necessary to amputate plaintiff's leg and foot. The answer of defendant denied the allegations of the complaint, and set up affirmatively, among other separate defenses, that he violated instructions, and that he had knowledge during his employment of all the dangers incident to his work in connection with said trucks and elevator, and assumed the risk.

Upon this appeal it is contended that the evidence was insufficient to justify the verdict; that the court erred in denying defendant's motion for a nonsuit, and erred also in its rulings on the admission of evidence, and in giving and refusing certain instructions.

The evidence on the part of plaintiff showed that in December, 1900, shortly before the holidays, the plaintiff, then about 12½ years of age, and four feet three inches in height, was employed by Mr. Litzius, secretary of the defendant, as cash boy in its toy department, where he was working in that capacity on the morning of February 9, 1901. On this date defendant was in control of premises located in three different places in the city of San Francisco used in connection with its business; these consisting of its store and two warehouses. Its store and salesrooms were at No. 818–820 Market street, in the Phelan building, extended back to O'Farrell street, with an entrance thereto on said street, and included the ground floor and the basement; the toy department, where plaintiff was employed, being conducted in the latter place under the management of C. G. Weir. About a block westerly from the store, and at No. 108 O'Farrell street, in the basement thereof, was an old warehouse of defendant from which, as occasion required, goods were brought to the store on Market street. This warehouse was in charge of Osma Welk. Defendant had established a new warehouse on the opposite side of O'Farrell street from its store entrance on that street, and on the day of plaintiff's injury was engaged in removing its goods from the old warehouse to this new one; the employés in the former, with additional employés assigned to the task, doing the work. It was while assisting in this work that the plaintiff was injured, and how he came to leave the toy department and be engaged in the warehouse, and the circumstances surrounding his injury, are best disclosed by the evidence of the plaintiff himself. He testified: That on the morning of February 9, 1901, while engaged in the discharge of his ordinary duties as cash boy in the toy department, Osma Welk, who was in charge of the old warehouse, came over to the toy department, and stated that Mr. Litzius wanted another boy over at the old warehouse to move goods, and that his superior, Mr. Weir, directed him to go over to the basement to work, and he did so. When he reached there, Mr. Welk said to him: "Take those trucks over. This is your work. Take those trucks over to the other warehouse." This was all he said to him; all the direction that was given him as to the task he should perform, or the manner in which he should perform it. There were others engaged in similar work to which he was assigned, and he immediately commenced to do as directed. This work consisted of placing loaded trucks upon a freight elevator, accompanying them on their way in the elevator to the sidewalk above, and then pushing the trucks down O'Farrell street to the new warehouse. The distance from the floor of the warehouse basement to the sidewalk was from nine to ten feet. The trucks used were wooden ones, about four feet wide by four feet high, with wheels upon them; those in the center at the sides being larger than those at either end. No direction was given to him by any one as to the operation of the elevator machinery. It was operated by pulling a chain, which he, observing others do, did likewise. The trucks could not be taken to the sidewalk unless by this elevator. He did not load the trucks himself. They were loaded by others in the warehouse. He simply pushed them to the elevator, took them up on it, wheeled them to the warehouse, and returned with the empty trucks, doing this all the time unassisted, until the last trip made by him, during which his injury was sustained. The persons besides himself engaged in handling these trucks consisted of an able-bodied man and two boys; each one attending to a truck. Some of the loads on these trucks were quite heavy. The elevator was an open one, without siding on any portion of the platform, and the floor of the elevator platform, which was about four feet square, was made of wood, was rickety, and had patches on it and a piece of iron. On account of the construction of the trucks, with higher wheels midway on the sides than on the ends, they tilted to one end when at rest. That for this reason it was necessary that some one should accompany the trucks to the sidewalk in order to prevent their rolling off the elevator. Plaintiff worked from a little after 8 in the morning till noon, and thereafter until the time of the injury, about 4 o'clock in the afternoon, during which period he handled about 50 trucks upon the elevator; no accident happening to his knowledge during that time.

As to the immediate circumstances attending the injury, plaintiff testified: That he started to take a loaded truck up the elevator accompanied by another boy a little older than himself, named Clark. When a truck was a large one, one boy pushed and the other pulled it upon the elevator. On this occasion Clark pushed and plaintiff pulled the truck, which was a large and rickety one, on the elevator. One of them stood on either side of the truck after it was placed on the elevator; there being between the side of the truck where plaintiff was and the edge of the elevator just space enough for him to stand in, and the height of the truck was such that he could just see above the top of it. After placing the truck upon the elevator, each held one end of it, and Clark started the elevator on its ascent. At this point, to quote his testimony, he said: "I was holding on to the truck when I was injured. It was a tilted truck that moved up and down. The side wheels were higher than the end wheels. The side of the truck struck my leg, and that is all I knew after that. Jerry Clark stood at one end of the truck and I stood at the other. I held on to the bottom of the truck, facing the sidewalk—the side—the bottom of the truck. It was necessary to hold on to it because it would bounce and roll off. Movable wheels that would move and revolve like the wheels of a piece of furniture. They would roll all over. For the purpose of maintaining the truck upon the elevator, it was necessary to hold on to the truck." Proceeding, he further testified that, when the elevator was ascending, the truck did not stay straight all the time, and when they had gotten about three-fourths of the way up the truck moved sideways; the lower part striking against his right foot, pushing it in between the elevator and the sidewalk, where the foot and leg were so badly crushed as to necessitate immediate amputation a few inches below the knee.

It further appeared from plaintiff's evidence that he had never been engaged before in taking loaded trucks up this elevator; that his doing so on the day he was engaged was the first time that he had ever done it; that no one gave him any warning, direction, or instruction as to any danger existing incident to, or to be apprehended in, doing this unaccustomed work; that, aside from the order given him by Welk when he reached the warehouse with reference to the work he was required to do, nothing further was said to him by anybody; that Mr. Finck, who it is claimed by defendant had charge of the basement when plaintiff went to work, saw him engaged in taking the trucks to the sidewalk by way of the elevator, but said nothing to him.

This constitutes the evidence on the part of plaintiff, and constitutes practically the entire evidence on his part, and which it is insisted was insufficient to support the verdict.

The general rule of law applicable in cases of the character made by plaintiff is set forth in Ingerman v. Moore, 90 Cal. 410–421, 27 Pac. 306, 25 Am. St. Rep. 138. There this court said: "The principles of law governing this class of actions are clearly defined. It is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment; and if he is an adult, and engages to do a particular work, the employer has a right to presume, unless otherwise informed, that the employé is competent to perform it, and understands and appreciates such risks. But, on the other hand, when one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate unless with care, and by one familiar with its structure, the employer is bound to give him such instructions as will cause him to fully understand and appreciate the danger attending the employment and the necessity for care. This rule is thus stated by the Supreme Court of Wisconsin: 'We think that it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous, and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely with proper care on his part.'" This rule has been frequently approved in subsequent cases. Among others, Mullin v. California Horseshoe Co., 105 Cal. 77, 38 Pac. 535; Foley v. California Horseshoe Co., 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87; Verdelli v. Gray's Harbor, etc., Co., 115 Cal. 517, 47 Pac. 364; O'Connor v. Golden Gate Woolen Mfg. Co., 135 Cal. 543, 67 Pac. 966, 87 Am. St. Rep. 127; Mansfield v. Eagle Box Company, 136 Cal. 624, 69 Pac. 425. These were all actions brought by minors to recover damages for the alleged negligence of their employers, and the doctrine as to liability in such cases was there fully and elaborately discussed, but for the purposes of this case the general rule as above quoted and approved need for the present only be considered.

Now, examining the evidence presented by the plaintiff and applying this rule of law to it, succinctly stated, this evidence shows that the plaintiff, a boy of immature years and diminutive size, was taken from his usual occupation as cash boy in one department of defendant's business and ordered to enter upon work in another department to which he was entirely unaccustomed and concerning the proper discharge of which he knew nothing; that this work consisted of taking large loaded trucks which occupied almost the entire floor space of an elevator from the basement to the sidewalk; that the elevator itself which was used for that purpose was rickety, and its surface uneven; that the trucks were so constructed as to be liable to shift in transit from their position upon the elevator to the injury of those attending their transportation to the sidewalk; that the elevator was without sides which might protect the operator from having his limbs thrust between the elevator and the sidewalk by the sudden movement of the trucks; that the work to which he was assigned, involving the use by him of the trucks and elevator, was attendant with hazard and dangers of which the defendant was advised; that the plaintiff was entirely inexperienced in the discharge of this character of work; that he was set to the task of doing it in the presence of the dangers which surrounded it, and of which he was unadvised, without any warning or direction whatever as to the risks of injury to which he was subjecting himself. As the evidence on the part of plaintiff sustained these facts, it must be assumed in support of the verdict that the jury so found; that they found that the injury sustained by plaintiff was the result of the hazardous employment in which he was placed by his employer, while inexperienced and without any warning of such danger and without fault on his part. So finding, under the rule of law we have referred to, the employer was liable in damages for the injury sustained.

It is, however, insisted by defendant that it was incumbent upon the plaintiff, claiming his injury to have resulted from being put to a hazardous employment, to show that he was ignorant of the dangers, and it is insisted that the evidence of plaintiff himself proves that he was not. This latter contention is based on the testimony of plaintiff. On his cross-examination he testified as follows: "On the day of the accident I knew that there was small room between the sidewalk and the elevator. There was half an inch between the elevator when it got up in place and the frame that surrounded it and the street. I knew that on the day of the accident, before the accident occurred. The form of the truck and the relative size of the wheels and the relative length and width of the truck I knew on the morning of that day and before I went on the elevator the last time. I did not know that they had those trucks before that day. I knew then, when I went up the elevator the last time, that, if I had my foot and my heel projecting beyond the end of the elevator floor, then, when the elevator went up, my foot was likely to get hurt. I had experience and intelligence enough to understand that." This evidence, however, only proves that he knew if he projected his foot beyond the elevator he would get injured. It was not evidence that he knew and appreciated the fact that the truck he was taking up in the elevator might by reason of its size and construction or its position on the elevator list to the side and push his foot beyond the elevator floor. He might have had knowledge that the truck might move, but it does not necessarily follow that he appreciated the dangers which might result therefrom. Plaintiff might have had knowledge of the liability of the truck to move and strike him without, on account of his inexperience and youth, having sufficient judgment to appreciate the dangers arising from it. It was one thing for him to have known that the truck would shift, but another thing to have sufficient judgment to apprehend any dangers from it. If from youth or inexperience, or both combined, he did not appreciate the peril in which such shifting might place him, he is not deemed in law to have assumed the risk of injury so as to relieve the defendant from any liability in placing him there without warning. And, in order that he might not only know, but appreciate, these dangers, he was entitled to be particularly cautioned and instructed by the defendant concerning them. The rule is that "the master must warn such young servants against the dangers to which their employment exposes them, and he must put this warning in such plain language as to be sure that they understand it and appreciate the danger." 1 Shearman & Redfield on Negligence (4th Ed.) § 219. The duty of the defendant when it placed plaintiff to work was to have given particular instructions to him as to the peculiar dangers which might be anticipated, so that, having them in mind and appreciating them, he might perform his work in safety. If particular danger was to be apprehended from there being but very little space for plaintiff's occupancy on the elevator with the truck on it, and the absence of side guards, or special danger of the moving of the trucks on account of the rickety condition of the elevator or uneven condition of its floor, or that the trucks, on account of the manner of their construction, were liable to shift from their position while being raised to the sidewalk and strike him, it was the duty of the defendant to have given the plaintiff warning that such particular dangers were to be looked out for. The warnings or instructions must be commensurate with the dangers. If special dangers are incident to the employment, particular instructions pointing out those dangers must be given, so that they may be known and appreciated by a minor employé. The very fact that no warning is given to a child or inexperienced person would naturally lead them to infer, or at least to proceed to carry out the orders of their employer on the assumption, that no danger was to be apprehended.

It is true that where a minor is shown to have known of the special dangers attending work to which he has been assigned, and has sufficient intelligence and judgment to appreciate them, the employer will not be held liable for any injury sustained by him during such work resulting from dangers which he knew and appreciated. Under such circumstances, as in the case of an adult, he will be held to have assumed the risk of injury. The law, however, does not expect or exact from a child of tender years the same maturity of judgment or the same degree of care, caution, or circumspection that it does from an adult, and whether in a given case a minor employé is shown to have had knowledge and an appreciation of the dangers incident to his employment is (except in cases where the evidence unquestionably demonstrates that he did) a question of fact to be determined by the jury. The rule upon this entire subject is declared in Foley v. California Horseshoe Company, 115 Cal. 184, 190 et seq., 47 Pac. 42, 56 Am. St. Rep. 87, where the court was considering the conduct of a boy nearly two years older than this plaintiff, who had been called to perform a service outside of the line of his office or employment and was injured.

The court said: "Where the ordinary and usual occupation of a minor is the running or management of a machine, or is some employment in and about it, and the minor is shown to have knowledge of the working of the machine, its dangers or its defects, and where it further appears that the minor is not of such tender years as to be unable to appreciate the nature of the dangers or defects, it is beyond question the rule, sanctioned by a long line of authority, that he takes upon himself, as will an adult under the same circumstances, the perils and risks of his employment; and that, if injured in the course thereof, he may not look to his employer for compensation. But there is a distinction which, as a matter of humanity as well as law, should be drawn between such cases and those where the minor is put to a task which, while within the range of his employment, is to him in his inexperience and youth unusual and strange; and it is a case of the latter kind which we are here called upon to consider. Had the accident to the boy occurred while he was engaged in the ordinary operation of his machine, it could be said without hesitation that, knowing the peculiar danger to which he might be exposed by its sudden starting, and knowing, as he did, that it was liable thus suddenly to start, he continued in his employment, taking upon himself the responsibility for any accident which might result therefrom. But the accident did not occur while he was engaged in his ordinary occupation at the machine. It occurred while he was engaged in the unusual task set him, that of screwing on a fallen bolt. It is true that, while engaged in this task, he had still the knowledge that the machine was liable to start, but does this fact establish that for which appellant contends, viz., that he had assumed that particular risk while screwing on the nut, as he had assumed it generally in operating the machine? We think that as a proposition of law this cannot be said. Were the employé in this case an adult, the rule might well be different; but the very reason why an adult under these circumstances would be held to have taken the risk while screwing on the nut serves to show the injustice and hardship which would result if it were sought to be applied to a minor. The question of the taking of a risk, the question of the assumption of responsibility of a given act, is determined as much upon the matter of judgment as upon the matter of knowledge. An adult employé, when the facts are known to him, is presumed in law to exercise the same judgment upon those facts as would the employer. * * * The conduct of the child, however, is and should be viewed and measured by a different rule. Children are taught obedience. They are taught not to oppose their will and their judgment to those in authority over them; but in addition to this, and more important than all, the judgment of the child is the last faculty developed. Knowledge he may have; facts he may acquire; but the ability to apply his knowledge or to reason upon his facts comes to him later in life. * * * The very accidents of childhood come from thoughtlessness and carelessness, which are but other words for absence of judgment. When sent out to labor, they are told by their parents or guardians to obey. In the factory or shop unquestioning obedience is expected and exacted. They must go where they are sent. They must do as they are told. It would be barbarous to hold them to the same accountability as is held the adult employé who is an independent free agent. Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act. And it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability. This must necessarily give rise to a different rule from that so well established, which measures the conduct of the adult by that which might be expected of the ordinarily prudent person placed in the same position. So here the child might well be expected to comprehend the likelihood of accident, and to know how to provide against it, when engaged in his usual employment in front of the machine. But when he is sent to the rear of it, and in among the wheels and mechanism to perform a novel duty, we cannot say as matter of law that he entered upon its performance with a full appreciation of the increased dangers and risks, and with sufficient judgment to know how to avoid them. These matters, and the further question whether the minor duly exercised such judgment as he possessed, must, therefore, as a rule, be left as considerations of fact for the jury's determination; and it would be an exceptional case which would present them as unmixed questions of law for the determination of the court. * * * The ordinary care which a child of limited judgment and experience is called upon to exercise in a given act is not the same quantum of care which the adult would be called upon to use under the same circumstances. Each is required to use ordinary care, but the amount of care which the person of perfected intelligence and judgment must employ is very different from the amount which the law in its humanity exacts of a minor."

We make these extended quotations from the authority in support of the rule that, in order to relieve the defendant here from liability, it must not only appear that the plaintiff had knowledge that the trucks he was engaged in transporting from the basement to the sidewalk were liable to shift or move, but also that he had sufficient judgment to appreciate the dangers of such movements; and that, whether he did or not, was a question of fact for the jury. In the case at bar the question whether the plaintiff had knowledge and appreciation of the dangers were matters to be determined by the jury from all the facts in the case, taking into consideration the youth of plaintiff, his inexperience, and the work to which he was assigned, the particular character of the dangers attending it, and the failure of defendant to give him any warnings or instructions concerning them. If, therefore, it be conceded that plaintiff had knowledge of the dangers, as appellant claims he had, it cannot be said that under the evidence the jury were not warranted in finding, as they must nécessarily have found under the instructions of the court, that plaintiff, by reason of his tender years and inexperience and unadvised of the dangers, was not possessed of sufficient judgment to appreciate them.

Passing now to the next point. It is contended that the plaintiff used the elevator contrary to plain precautionary signs upon it warning him to keep off. These signs, it is claimed, read "No person allowed to ride on this elevator. This means you"—and "Keep off this elevator. Dangerous." Plaintiff claims that he could not read these signs because they were indistinct, but whether he could have read them, or whether he did read them, is, in our judgment, of no consequence. Counsel presses this point under a claim that it was the duty of the employé to put the truck on the elevator, start it up, and then walk up the stairway to the sidewalk. The jury gave no credit to this contention, and the weight of the evidence was against it. These signs undoubtedly were intended to keep persons from using the elevator for their personal convenience and when no freight was being taken up upon it. The evidence shows that it was the custom of employés removing freight to the sidewalk to ride up with it on the elevator. Aside from this, however, the warning could not apply to plaintiff because his direction to take the loaded truck to the new warehouse involved the use of this elevator as the only means of getting it to the sidewalk. All the men employed there were doing so. Mr. Welk, who directed him to take the trucks over, saw him using it, as did Mr. Finck, the president. Under these circumstances, to whomsoever the warning might otherwise apply, it was not intended to apply to plaintiff while engaged in transporting the trucks to the sidewalk by means of it.

It is further insisted that there was no proof that any one in authority gave plaintiff directions to carry goods by the elevator. It is certain from the evidence, however, that the plaintiff left his place of employment in the store as cash boy to work in the old warehouse of the defendant in transporting the trucks to the new warehouse, and that he spent nearly all day in doing so, having during that period moved some 50 truck loads. It is extremely improbable that plaintiff should be thus found working in a department of the general business of defendant different and removed from the one in which he was employed, and at an obviously harder task than his usual employment entailed, without having been so directed by some one in authority. He claims he was directly instructed to go to work by Mr. Welk. It is claimed, however, that Mr. Welk had no authority to employ him. The evidence shows that Mr. Welk was in charge of the old warehouse on the day plaintiff reported there, that the business being done there was the transportation of the stock on trucks to the new warehouse, and that Mr. Welk was actually engaged in attending to and superintending its removal. From these facts the jury would be warranted in finding that at least on that occasion and for the purpose in which it was engaged he represented the defendant. But, assuming he did not, still the evidence shows that Mr. Litzius, the secretary of defendant, sent over to the store for another boy to work in the old warehouse; that in response to this request Mr. Weir, who was in charge of the toy department and under whose control plaintiff was, directed him to go to the old warehouse to work there; that, when he got there, he was immediately instructed by Mr. Welk, who was then actually in charge, what to do, and proceeded to do it; that, while at work handling trucks by way of the elevator, he was seen doing this work by Mr. Finck, president of the corporation, who testified that on that day he had charge of the old warehouse. Proof of these facts was sufficient to warrant the jury in finding that plaintiff was properly and regularly employed there on the day in question.

This disposes of all of the points made by appellant as to the insufficiency of the evidence to justify the verdict. We have not discussed the merits of the motion for a new trial, as the points which were made thereon, in as far as they are pertinent, have been considered under the specifications of insufficiency of the evidence. In discussing in his brief the ruling of the trial court upon his motion for a nonsuit, counsel for appellant attacks the sufficiency of the complaint. He insists that in as far as it attempts to state a cause of action for injury sustained by plaintiff growing out of being placed in a hazardous employment without warning or instructions it is fatally defective. Appellant is, however, not entitled to raise that point on this appeal. He could only do so on an appeal from the judgment, and the appeal in this case is only from the order denying the motion for a new trial. Martin v. Matfield, 49 Cal. 45; Moore v. Douglas. 132 Cal. 400, 64 Pac. 705; Swift v. Occidental, etc., 141 Cal. 161, 74 Pac. 700; Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62.

The court opened its instructions to the jury with one relating to the legal duty of the employer to provide for his employés a reasonably safe place, and that his failure to do so constituted negligence. It is claimed that this was error because the instruction was not responsive to any issue. We do not think that this point has any force. The instruction was given as defining the general duty of an employer to his employé, and was immediately followed by a number of instructions relative to the duty of the employer where a minor is directed to perform work which in its nature is hazardous.

Exceptions are taken to other instructions given by the court, and to the refusal of the court to give some instructions tendered by appellant. We have examined the instructions given under appellant's claim of error, but perceive no valid objection to them. Those tendered by appellant which were not given were in the main covered by the instructions given by the court on its own motion, and this was sufficient. It also appears from the record that many of the instructions tendered by appellant and which he claims were not given by the court, were, as a matter of fact, given by it almost verbatim. The instructions tendered by it which were refused were properly so.

We have disposed of all the points presented which, in our judgment, require discussion.

We find no ground upon which the order appealed from should be disturbed, and it is therefore affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

150 Cal. 466

## GROCERS' FRUIT GROWING UNION v. KERN COUNTY LAND CO. (S. F. 3,573.)

(Supreme Court of California. Feb. 7, 1907.)

1. VENUE—SUBJECT OF ACTION—SPECIFIC PERFORMANCE OF CONTRACT.

An action praying for a specific performance of a contract for the sale of land, for an accounting as to whether the purchase price had been paid, and demanding judgment for the payment in excess of the consideration called for in the contract is triable in the county in which the land is located, within Code Civ. Proc. § 392, subd. 1, providing that actions for the recovery of an interest in real estate must be tried in the county in which the property is situate; the demand for an accounting and for a judgment for payment in excess of the price being incidental to the general relief sought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 4; vol. 44, Specific Performance, § 324.]

2. SAME—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under Const. art. 12, § 16, providing that a corporation may be sued in the county where the particular place of business thereof is situated "subject to the power of the court to change the place of trial as in other cases," Code Civ. Proc. § 392, providing that an action for the recovery of real property must be tried in the county in which the property is situated, is applicable to a corporation, and, on being sued for specific performance of a contract for the sale of land, it may demand that the case be tried in the county where the property is situated; the phrase quoted in the Constitution giving the court permission to change the place of trial in accordance with the statute.

3. SAME.

An action for the specific performance of a contract for the sale of real estate is not an action either for recovery of possession or for quieting title to real estate within Const. art. 6, § 5, providing that actions for the recovery of the possession of or quieting the title to real estate shall be commenced in the county in which the same is situated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 4; vol. 44, Specific Performance, § 324.]

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Grocers' Fruit Growing Union against the Kern County Land Company. From an order denying a motion for a change of venue, defendant appeals. Reversed.

Page, McCutchen, Harding & Knight and W. S. Barnett, for appellant. Edwin L. Forster, Robert R. Moody, and F. T. Poore, for respondent.

HENSHAW, J. This action was commenced in the city and county of San Francisco. Defendant appeared, and, upon filing its demurrer, made demand and moved the court that the place of trial of the action be changed from the city and county of San Francisco to the county of Kern. The motion for a change of venue was denied, and defendant takes this appeal, contending, first, that the action is one for the specific performance of a contract to convey lands, which lands are admittedly situated in the county of Kern, and that under article 6, § 5, of the Constitution of this state the superior court of San Francisco had no jurisdiction over the action, for that it should have been commenced in the county of Kern; second, that the action is strictly one within the letter and the spirit of section 392, subd. 1, of the Code of Civil Procedure, and should, therefore, have been transferred to the county of Kern for trial. In this connection it is urged and argued that, if the proposition be advanced that article 12, § 16, of the Constitution warrants the commencement of the action in the city and county of San Francisco and forbids to defendant its right to change the place of trial, then this clause of our state Constitution is violative of the fourteenth amendment to the Constitution of the United States in denying to corporations the right to have an action affecting an interest in real estate tried in the county where the land is situated, while this right is accorded to natural persons.

The respondent insists that the action is brought under section 395 of the Code of Civil Procedure; that it is of the class where real and personal actions are joined in the same complaint, and upon the authority of Smith v. Smith, 83 Cal. 572, 26 Pac. 356, and other cases of similar import must be tried in the county of defendant's residence; that as the city and county of San Francisco is the principal place of business of the corporation defendant it is its residence within the purview of this section; and that the action was therefore commenced and should be tried before the superior court of that county. Resting its case upon this proposition, respondent has declined to discuss the constitutional questions advanced by appellant.

It thus becomes necessary to determine the true character of this action as disclosed by the complaint. Plaintiff charges that defendant was the owner of certain lands in the county of Kern, and that plaintiff and defendant entered into written contracts for the purchase and sale of these lands; the purchase price being $35,000, to be paid in installments at specified periods of time. Plaintiff under the terms of these agreements entered into possession of the lands and cultivated them, planting large quantities of fruit trees, erecting substantial improvements, and thereby greatly increasing the value of the property. These contracts, it is averred, were entered into in writing "between the 3d day of June, 1893, and the 1st day of January, 1897." It is then averred that on the 6th day of March, 1899, the plaintiff and defendant entered into an agreement in writing, which is set forth in full in the complaint. That agreement recited that the parties had theretofore entered into contracts in writing for the purchase and sale of the lands in controversy, the taking possession of the lands by plaintiff herein, the planting of fruit trees with the object of selling the improved lands "in small tracts." The agreement further declared that the Grocers' Fruit Growing Union is in default in a large amount, and that the sum of $39,448.75 will be due on November 1, 1899, from the Grocers' Fruit Growing Union of the Kern County Land Company, and that the Grocers' Fruit Growing Union is unable to pay this money. Moreover, that it is without financial ability to carry on the business or to cultivate the orchard, to prune the trees, gather and handle the crop, and that it is desirous of obtaining financial assistance from the defendant to enable it to do these things. It was therefore agreed that the defendant would advance to plaintiff moneys sufficient to enable it to carry on its undertaking, and plaintiff agreed upon its part to cultivate, take care of, and handle the fruit crop and the lands, and sell and market the same through the defendant, that it would sell the orchard lands if opportunity presented, the sales always to be subject to the approval of the defendant, and the proceeds of the fruit crop and of the sale of lands should be applied, first, to the repayment of moneys advanced by defendant; and, second, towards the extinguishment of the indebtedness due on account of the original contracts for the purchase and sale of the lands, together with interest. Plaintiff further agreed that on or before the first day of November, 1899, it would pay the sum of $30,000, in addition to the repayment of the advances which might be made by defendant, as full payment of the purchase price of the lands, and agreed that if it was unable to pay or failed to pay by that date all sums of money that should have been advanced to it, together with the sum of $30,000 in satisfaction of the indebtedness due from it, it would on the 1st day of November, 1899, execute and deliver to defendant a good and suficient deed of conveyance of all the lands and peaceably quit and surrender possession thereof and surrender and cancel the contracts for the purchase of the lands, and deliver to the defendant all the personal property of every nature and kind on the said lands, and execute a bill of sale for the personal property, that it would also assign all contracts that it might then have with any person for the sale of any of the lands, or otherwise, and all obligations that it might then have or hold from any person or persons for the payment of any sum of money on account of the sale of the lands. Time was declared to be of the essence of the contract.

As to the transactions following this agreement, it is alleged that before the 1st day of November, 1899, the president of defendant corporation urged the plaintiff corporation to make the deed and bill of sale referred to in the agreement, "saying and representing that the plaintiff had not performed and could not perform its said agreement, and that this would avoid litigation, and that the plaintiff corporation could afterwards have all the time it wanted to make the thing right, and that the defendant corporation would help it." It is next averred that "thereafter and in the month of November, 1899, the plaintiff corporation, acting upon and pursuant to all of the aforesaid statements and representations, and believing them to be true and made in good faith, executed to defendant corporation its deed to said lands and its bill of sale of all of its personal property in the manner specified in said agreement of March 6, 1899, and that, had it not been for said statements and representations, said plaintiff corporation would not have executed said deed or bill of sale, or either of them; that in truth by reason of the failure and neglect of the defendant corporation to account to the plaintiff corporation for moneys received by it from sales of crops and lands and moneys advanced by it, as hereinafter alleged, plaintiff was in ignorance of its financial standing and ability to perform its said agreement; and that by reason of its being so kept in ignorance was induced to rely and act upon said statements and representations." It is then alleged that the original agreements of sale were never rescinded, extinguished, or canceled, but have remained and still remain in full force and effect; that the agreement of March 6, 1899, "was executed solely for the purpose of fixing the amount of the indebtedness then due and as a further security therefor, and of arranging means of settlement and enforcement in the event that said indebtedness should not eventually be paid." It is further alleged that the deed and bill of sale executed by plaintiff to defendant in November, 1899, were understood and intended to operate by way of mortgage and further security. Next, it is averred that demand had been made upon the defendant before as well as after the execution by plaintiff of its deed and bill of sale in November, 1899, for an accounting of the proceeds of the sales of the fruit crop, of the advances by defendant to plaintiff, and of the sales of the lands, but that defendant has neglected and refused to make such accounting. Upon information and belief the plaintiff then alleges the fact to be that by the receipts of the proceeds of the sale of fruits and lands the advances of the defendant and the indebtedness on account of the purchase of the lands has been fully paid, and that there is an excess or surplus of moneys over and above such indebtedness due from the defendant to plaintiff, by reason of which "plaintiff is entitled to an accounting by the defendant, and thereupon to a judgment against the defendant for the transfer and reconveyance of said real and personal property, and to a judgment for the surplus or excess of said proceeds from said sales above the amount necessary to discharge said indebtedness and advances, and for interest on such surplus or excess," and the prayer of the complaint is for an accounting, that upon the accounting it be adjudged that the indebtedness and advances have been fully paid and discharged, and that plaintiff have judgment against defendant for any surplus or excess, that the court adjudge that the agreements of sale have never been rescinded, executed, or canceled and are in full force and effect, and that defendant be ordered and directed to execute and deliver to plaintiff due and legal conveyances of the real property in fee simple absolute, and due and legal transfers of all personal property.

Stripped to its essentials this is simply an action for the specific performance of a contract for the sale of land under an allegation that the purchase price has been paid. If it be conceded that the right to an accounting is sufficiently pleaded, that accounting is but an incident in the transaction. It goes merely to the establishment of the proposition as to whether or not the consideration has been paid. That the alleged collections made by defendant exceed the amount due from plaintiff does not in any sense change the character of the action, even though, upon proof being made, plaintiff would be entitled to a personal judgment for the excess. In any action for specific performance when the matter in dispute is the payment or nonpayment of the purchase price an accounting may be necessary, and, if necessary, will be ordered; such being clearly within the power of a court under our system where equitable and legal functions are exercised by the one tribunal. But such an accounting in no way changes the cause of action. This case is in all essentials like that of Bush v. Treadwell (N.Y.) 11 Abb. Prac. (N. S.) 27. That was an action brought in Monroe county to have the title to certain real estate in the city of New York declared to be in plaintiff, on the ground that the deed conveying the title to defendant was a mortgage, for a conveyance of the property to plaintiff and for an accounting by defendant of the rents, issues, and profits. Defendant made a motion for change of the place of trial from Monroe county to the county of New York under section 123 of the Code from which our section 392 Code of Civil Procedure is taken. It was there urged in resisting the motion that the cause of action was transitory, and not local; that section 123 of the New York Code related to actions of legal cognizance only, and that the present action was in equity; that the relief sought was an accounting by the defendant; that the accounting might show advances beyond the value of the trust estate, in which case no land would be transferred or conveyed; that land was not the primary object of the action; and that the fact that land might be affected by the determination was not sufficient to entitle the defendant to a change of the place of trial. The Court of Appeals declared that the action was for the recovery of an interest in real property, and for the determination of such an interest, "and the statute declared in plain language that where such an action is brought it is local, and that this shall be so without regard to the form in which the determination is sought." So here, while the proceeding may necessitate an accounting, the relief sought is a conveyance of the land. And, if it should be determined that a payment in excess of the consideration had been actually made, the personal judgment which would follow for plaintiff would, as in Bush v. Treadwell, be but incidental to the real cause of action and relief sought. Smith v. Smith, 88 Cal. 572, 26 Pac. 356, upon which respondent most strongly relies, was vitally different in character. In that case personal property consisting of 26,000 sheep, together with horses, wagons, harness, and camp equipage, together with real estate in Tuolumne and Merced counties, was by conveyance absolutely transferred to the defendant. Plaintiff sought in this action to have the transfer declared to be a mortgage, and alleged that the property so mortgaged had earned and paid funds more than enough to extinguish the mortgage indebtedness, and thus sought an accounting, a personal judgment for the excess, and a reconveyance of the property transferred. Here the cause of action was plainly twofold, and twofold owing to the very nature of the original transaction. It was transitory and personal as to the accounting for the vast amount of personal property which had been conveyed. It was local as affecting the title to the land. That action was commenced in the county of Tuolumne against the defendant, who was a resident of the county of Merced, and who, because of the nature of the action, was insisting upon his right to have the place of trial changed to the county of his residence, in which contention this court held that he was right because of the clear joinder of an action local with one which was transitory; the venue for the trial of such an action being the county of the defendant's residence. But here we have an action strictly local in character, clearly affecting the title to land, the gist of the action being specific performance of a contract for the conveyance of land, the principal relief which is sought being a conveyance of the land, and the defendant is asking that the place of trial be changed to the county where the land is situated.

It having been determined that in its character this action is local, it will not be questioned but that in this regard it is one of those actions provided for by section 392, subd. 1, of the Code of Civil Procedure. It is an action for the determination of a right or interest in real property. Such an action, as the above cited section of the Code declares, must be tried in the county where the land is situated. Since the Legislature has decreed that all such actions must be tried in the county in which the land is situated the test then becomes the subject-matter of the action. Where the subject-matter of the action, to wit, land, is made the test for fixing the place of trial of the action, no reason or distinction appears, or can be made to appear, why the right should be given to a natural person to have such an action tried in the county where the land is situated, and the same right should be denied to an artificial person, a corporation. In State v. Hayes, 81 Mo. 574, it is held that the provisions in regard to the venue of an action involve rights in respect to which the fourteenth amendment of the Constitution of the United States forbids arbitrary discrimination. That the discrimination is arbitrary and rests upon no logical or rational distinction seems too plain to permit of debate, or to call for elaborate consideration. No conceivable ground can be suggested why a natural person should have the right of trial of an action involving an interest in land in the county where the land is situated, and the same right should be denied to a corporation. If the situation were reversed, the absurdity would be patent. A law which granted to a corporation the right and denied it to a natural person would be held arbitrarily discriminative without a moment's hesitation. Yet it must be recognized that a refusal to change the place of trial in such a case as this has been sanctioned in Miller v. Kern County Land Company, 134 Cal. 586, 66 Pac. 856, and Miller, etc., v. Kern Land Co., 140 Cal. 132, 73 Pac. 836. The jutification was based upon the language of article 12, § 16, of our Constitution. That section provides, "that a corporation * * * may be sued in the county * * * where the principal place of business of such corporation is situated subject to the power of the court to change the place of trial as in other cases." In those cases it was held that the Constitution had the right to fix the place of trial of actions against corporations; that, having so fixed them in the county of the principal place of business of the corporation, the force of this constitutional provision could not be impaired by any legislative enactment fixing the place of trial as to natural persons in other places, since that would be in effect to allow a legislative enactment to modify and control a constitutional provision. Of the soundness of the determination in this case so far as concerns the points which were presented and determined there can be no question, but the particular proposition here and now advanced, namely, that such a construction of the law works a violation of defendant's right under the fourteenth amendment of the

Constitution of the United States was not presented to this court for consideration. Being now so presented, since the Supreme Court of the United States has repeatedly decided that corporations are within the protection of that amendment, the question must be considered in the light of this claim of right.

It has already been said that no valid reason can or has been shown why a distinction in the place of trial should be made, and the distinction has been supported solely upon the authority of the language of our own state Constitution. Since it is beyond question that the Constitution of this state cannot be made to yield to the force of any legislative enactment, it would follow that, if there were no way of harmonizing the provisions of section 392 of the Code of Civil Procedure and article 12, subd. 16, of our Constitution, the necessary result of a conflict would be that the former would fall. But, upon the other hand, if reasonably possible, an harmonious adjustment of the two provisions will be sought. The language of the Constitution itself presents a ready solution of the difficulty. It declares that corporations may be sued in the county of their principal place of business "subject to the power of the court to change the place of trial as in other cases." As the power of the court to change the place of trial rests entirely upon legislative enactment, it follows that here in the Constitution itself is a distinct permission to the courts to change the place of trial in accordance with legislative enactment. The constitutional provision is therefore as though it had read, "Any and all actions may be commenced against corporations in the county of the principal place of business of the corporation, provided, however, that the courts may change the place of trial of such actions in accordance with the laws governing such places of trial." So construed, all our laws touching change of venue and place of trial become uniform and harmonious. The right still remains to a plaintiff to commence his action in the county of the principal place of business, and the right remains to the corporation to have the place of trial changed under exercise of the court's power in enforcing the legislative enactments in regard thereto.

It follows herefrom that the defendant was entitled to have the place of trial of the action changed to Kern county under the provisions of section 392, subd. 1, of the Code of Civil Procedure. We have not in the foregoing overlooked the language of this court in Lewis v. South Pacific Coast R. R. Co., 66 Cal. 209, 5 Pac. 79, where in a single sentence it is said, referring to the section of the Constitution which has been under consideration, "Nor are we able to see wherein the provision of the state Constitution in question conflicts with the provision of the fourteenth amendment to the Constitution of the United States." But this declaration cannot be considered as authority. It was given in 1884, at a time when this court had held that corporations were not persons within the meaning of the fourteenth amendment to the Constitution of the United States, and were therefore not within the protection of that amendment. C. P. R. R. Co. v. State Board of Equalization, 60 Cal. 35. It was not until 1886 that the Supreme Court of the United States first declared corporations to be entitled to the protection of that amendment. Santa Clara County v. S. P. R. R. Co., 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118; Guthrie, Fourteenth Amendment, p. 53. The language of this court in Lewis v. S. P. Coast R. R. Co., supra, while sustainable in the then condition of the law can, in the light of the subsequent decisions of the Supreme Court of the United States, no longer be supported.

Appellant's reliance upon article 6, § 5, of the Constitution, which provides that "all actions for the recovery of the possession of or quieting the title to real estate shall be commenced in the county in which the real estate * * * is situated," is not well founded. It may not be said that this is an action either for the recovery of possession or for quieting title to real estate.

For the foregoing reason, the order refusing a change of venue of the action is reversed.

We concur: LORIGAN, J.; McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.

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150 Cal. 543

## PEOPLE v. WILLARD. (Cr. 1,350.)

(Supreme Court of California. Feb. 8, 1907. Rehearing Denied March 4, 1907.)

1. CRIMINAL LAW—DEFENSE—INSANITY—EVIDENCE—ADMISSIBILITY.

Where, on a trial for homicide, defended on the ground of insanity, it appeared that accused had been committed to the state hospital for the insane three times prior to the homicide, and the commitments were admitted in evidence, the affidavits, report of examining physicians, their certificates, etc., were inadmissible, they not constituting a judgment roll and not conclusively determining anything, the commission for the examination of alleged insane persons, provided by statute, not being a tribunal in which the status of an alleged insane person is fixed.

2. SAME.

Where on a trial for homicide, defended on the ground of insanity, the order committing accused to an insane hospital the day of the commission of the crime, was admitted in evidence, accused's petition for a writ of habeas corpus signed by himself 13 days thereafter, and averring that he was then sane, and praying for his discharge from the hospital, was admissible to show that the prosecution did not try accused while confined in the hospital under the commitment, though the superintendent of the hospital had testified that accused had been discharged.

3. SAME.

On a trial for homicide, defended on the ground of insanity, the petition of accused for a writ of habeas corpus for his discharge from an insane hospital to which he had been committed on the day of the homicide, is admissible on the question of mental capacity of accused at the time of the homicide, where the petition was signed 13 days after the homicide, and alleged that accused was then sane, and where the evidence showed that he read and understood the petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 760.]

4. SAME.

Where the defense of insanity is interposed to a charge of homicide, the acts and conduct of accused at the time of and within a reasonable time before and after the homicide are admissible on the question of insanity existing at that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 760.]

5. WITNESSES — VOLUNTARY ADMISSIONS OF ACCUSED—ADMISSIBILITY.

On a trial for homicide, defended on the ground of insanity, it appeared that accused was committed to an insane hospital on the day of the homicide, and that 13 days thereafter he filed a petition for a writ of habeas corpus for his discharge, in which he alleged that he was then sane. On the hearing of the writ accused testified in his own behalf though he was informed by the prosecuting attorney that in case of his discharge he would be prosecuted for the homicide. *Held*, that the testimony of accused on the hearing was voluntary and admissible on his subsequent trial for homicide, notwithstanding Const. art. 1, § 13, providing that no person shall be compelled in a criminal case to be a witness against himself.

6. SAME — APPEAL — REVIEW — DISCRETION OF COURT—ORDER OF PROOF.

Under Pen. Code, § 1094, authorizing the court, in the exercise of its sound discretion, to depart from the order of trial prescribed by section 1093, the action of the court in a criminal case in permitting the prosecution to give in rebuttal testimony admissible in chief is not ground for reversal, unless the court abused its discretion, which must affirmatively appear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3063.]

7. SAME—ARGUMENT OF PROSECUTING ATTORNEY—GROUNDS FOR REVERSAL.

On trial for homicide, defended on the ground of insanity, the prosecuting attorney in his closing argument in arguing the existence of malice of accused against decedent stated that according to two commitments of accused to the insane hospital, decedent had placed accused in the hospital. Exception was taken by accused. The court declared that there was no evidence to sustain the statement and instructed the jury to disregard the same. The statement was made in the honest belief that the evidence supported it. *Held*, that a verdict of guilty would not be disturbed on the ground of misconduct of the prosecuting attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1669.]

8. SAME.

The prosecuting attorney, in a criminal case, may present to the jury his view of the deductions drawn from the evidence, and though his reasoning is faulty, and his deductions illogical, no exception lies to his argument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1670, 1671.]

9. SAME—INSANITY—BURDEN OF PROOF.

The burden of proving the defense of insanity in a homicide case is on accused, and, to satisfy the burden, insanity must be established by a preponderance of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 742–744.]

10. SAME—APPEAL—VERDICT—REVIEW.

The Supreme Court cannot disturb a verdict in a criminal case unless there is no evidence to support it, or where the evidence relied on by the prosecution is so improbable as to be incredible, or where it so clearly preponderates against the verdict as to convince the court that it was the result of prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074–3083.]

11. SAME—INSANITY.

Though one may be laboring under partial insanity, yet, if he understands the nature and character of his action and its consequences, if he has knowledge that it is wrong and criminal, and that if he does the act he will do wrong, insanity is not a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 53–61.]

12. SAME.

The jury, in a homicide case, defended on the ground of insanity, are not, in determining the issue of insanity, concluded by the report of medical examiners that accused was insane, or by the opinion of the medical examiners as to the nature of his insanity, or by the judgment which declared him insane, and ordered him committed to the insane hospital, though the order of commitment was made immediately prior to the homicide.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1081.]

13. SAME—EVIDENCE—SUFFICIENCY.

Evidence on a trial for homicide, defended on the ground of insanity, examined, and *held* to support a verdict of guilty based on accused's sanity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1285–1288.]

In Bank. Appeal from Superior Court, Mendocino County; A. G. Burnett, Judge.

Frank Willard was convicted of murder, and he appeals. Affirmed.

T. L. Carothers and Charles M. Mannon, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., Robert Duncan, Dist. Atty., and E. B. Power, Deputy Atty. Gen., for the People.

LORIGAN, J. The appellant was tried in Mendocino county for the alleged murder of J. H. Smith, the sheriff of that county.

The immediate circumstances attending the killing of deceased, although by no means the only evidence in the case, are undisputed. The defendant, a man 42 years of age, was born in Mendocino county, and had lived there practically all his life. He had been twice committed by the judge of the superior court of Mendocino county, after examination as to his sanity held in the city of Ukiah, to the Mendocino State Hospital for Insane, in both instances on account of alcoholism, and after remaining there a short time had recovered and been discharged from the asylum; his second discharge occurring some time in the early part of 1903. On December 20, 1905, two days prior to the homicide, the defendant appeared in the city of Ukiah, and the deceased, as sheriff, having been informed that he was acting in a peculiar manner, brought him about 8:30 a. m. on December 22, 1905, to the sheriff's office. Leaving him there, the deceased at once repaired to the chambers of the judge of the superior court, where he made affidavit that the defendant was insane, and that it was dangerous for him to be at large. The judge doubtless thought the defendant would be brought before him, and fixed 9 o'clock a. m. of that morning as the time for the examination, and the defendant, having been formally arrested by deceased, was immediately brought into the judge's chambers for that purpose. Two physicians were summoned as medical examiners, and after an examination had they reported to the judge of the superior court that the defendant was insane and "homicidal and dangerous." On this report defendant was adjudged insane by the judge of said court, and ordered committed to the Mendocino State Hospital for the Insane for care and treatment. Just as the judge was signing the order of commitment, defendant declared that he was not insane; that he ought not to be sent to the asylum—that it was an outrage. He became angry and started to leave the judge's chambers, whereupon the deceased followed to intercept him. As defendant approached the door, he drew a pistol from his pocket, opened the door, and, as he stepped into the hallway, whirled and fired at deceased, who was some five feet from him inside the judge's chambers, and killed him. Defendant fled, and was pursued and captured where he had taken to the brush on the hillside about a mile and a half from the scene of the tragedy. Upon the trial the jury returned a verdict of murder of the first degree, and the motion for new trial having been denied, judgment of death was pronounced upon the defendant. He appeals from the judgment and from the order denying his motion for a new trial.

No attempt was made on the part of defendant upon the trial to dispute the killing of the deceased under the circumstances detailed; the sole contention on his behalf being that he was irresponsibly insane at the time of the homicide, and the principal—it may be said all—testimony in the case was devoted to that subject. Upon this appeal it is urged by appellant as grounds of reversal that the court erred in rejecting evidence offered by appellant on the question of his insanity, and in admitting evidence offered on the part of the prosecution on the same subject, and erred also in instructing the jury on the degree of proof required by appellant under the law to establish his insanity. It is also claimed that the district attorney was guilty of misconduct precluding the appellant from having a fair trial. Lastly, it is contended that on the question of the insanity of appellant, the evidence was so overwhelmingly in support of it, that the verdict of the jury was contrary to the evidence and necessitates a reversal.

Proceeding now to a disposition of these points as they are presented, and, first, as to the alleged erroneous rejection by the court of testimony offered by appellant in proof of his insanity: It appeared from the evidence, as a fact, that the defendant had been three times committed to the Mendocino State Hospital for insane; the first commitment being on February 2, 1901, the second on May 29, 1902 (these being the times of commitment heretofore referred to), and the third on the morning of the homicide. In connection with the testimony of the medical superintendent of said hospital, who testified to the fact of such commitments, the attorneys for defendant offered in evidence all the proceedings pertaining to each of these three insane examinations of appellant, which consisted of the complaint charging his insanity, the warrant of arrest, report of the medical examiners, their certificate, and the judgments and orders of commitment by the judge of the superior court. To the offer of all the documents pertaining to the examination of December 22, 1905, the people raised no objection and they were admitted. As to the admission of all of the documents pertaining to the two prior examinations, except as to the judgment and order of commitment in each case to which no objection was raised, the court sustained the objection of the district attorney. This ruling is claimed to have been erroneous, but we think it was correct. We do not determine on this appeal whether the judgments and orders of commitment which were admitted in evidence would have been admissible if objection had been interposed against their admission. No objection was made to any of them by the district attorney, and, hence, the question of their admissibility is not involved on this appeal, except in as far as that question is affected by discussing the admissibility of the other documents. As to the other documents which appellant insists should have been admitted —the affidavit, report of examining physicians, their certificate, etc.—the court was clearly right in rejecting them. The certificates were purely hearsay evidence, and were not admissible for any purpose. It is contended by appellant that all these proceedings constituted a judgment roll. There is nothing in this contention. In a proceeding such as is in question here, there is no judgment roll, in the sense that it determines conclusively anything. The statute provides for a commission in each county in the state, consisting of at least two physicians and a judge of the superior court of the county, whose duties in the examination of one alleged to be insane, are limited and confined to the specific purpose, viz., to ascertain whether such alleged insane person is a proper subject to be admitted for care and treatment to the insane asylums of the state. This commission is purely a creature of the statute. It is not intended as, and is not, a tribunal in which the status of the alleged insane person is fixed, but simply a commission which determines whether the mental condition of the person it has examined is such as warrants his detention in the asylum for treatment. From these considerations we are satisfied that the ruling of the court, as far as it went, was correct.

It is further claimed by appellant that the court erred in admitting, over his objection, a petition for a writ of habeas corpus made by him, and likewise his testimony given on the hearing thereof. It appears that defendant was placed in the Mendocino State Hospital under the commitment of December 22, 1905, on that date. Thirteen days thereafter a petition for a writ of habeas corpus was presented to the superior court of Mendocino county, signed by appellant himself. In it he stated that on December 22, 1905, he was committed to the Mendocino State Hospital as an insane person, and that he "is now sane," and prayed for his discharge from said hospital. We think the petition was admissible. As the order of December 22, 1905, committing him to the hospital had been introduced in evidence, it was proper for the people to show by the records of the court that he had been discharged therefrom, in order that the prosecution might not be placed in the attitude of trying the appellant for murder while he was detained by the medical superintendent of the hospital under the commitment as insane. It is true that, previous to the offer, the superintendent of the hospital had testified that appellant had been discharged from the hospital on habeas corpus proceedings, but this was only cumulative evidence, and did not affect the admissibility of the record. Aside from this, however, the making of this petition was the voluntary act of the appellant, and the evidence shows that he read and understood it when it was presented. This being true, and being an act done by him within a short time after the homicide, the fact of its presentation, and the declarations of the defendant made in it, were admissible as bearing on the question of the mental capacity of the appellant at the time the homicide was committed. It is a rule of evidence in this state that where the defense of insanity is interposed against a criminal charge, the acts and conduct of the accused at the time of, and within a reasonable time before and after the alleged criminal act is committed, may be presented to the jury upon the question of insanity existing at the time of its commission. People v. Lee Fook, 85 Cal. 300, 24 Pac. 654; People v. McCarthy, 115 Cal. 260, 46 Pac. 1073; People v. Zeigler, 142 Cal. 338, 75 Pac. 1090. Within the rule of these authorities the claim of appellant that the admission in evidence of his testimony taken on the hearing of said petition was error, must also be disposed of against him. This testimony was admitted solely on the question of the mental condition of the appellant, and within that limitation was properly admitted. With reference to the admission of this evidence, it is insisted that by permitting its introduction, it was in fact compelling the appellant "in a criminal case to be a witness against himself" contrary to the provisions of article 5 of the Constitution, and of article 1, § 13, of the Constitution of this state. There is no merit in this claim. The habeas corpus proceedings were not instituted by any public authority, or by any friend on behalf of appellant, but by appellant himself, and it fairly appears from his own statement, while testifying in the habeas corpus proceeding, that he was informed by the district attorney that were he discharged under it he would still be prosecuted for the killing of deceased. He was not required to take the stand at the hearing on the application for the writ. He was under no compulsion whatever, but, as the record shows, was sworn on his own behalf. Under such circumstances, it cannot be said that the introduction of his testimony given on the habeas corpus proceedings was in effect at all violative of any of his constitutional rights. Not only was the testimony voluntarily given, and the proceeding inaugurated solely by himself, but, when his testimony as there given is examined, there is nothing in it which can be construed as a confession or admission of guilt, and it is established as the rule in this state that the admissions or statements made by the defendant, which do not amount to a confession of guilt, are admissible against him whether they are voluntary or not. People v. Le Roy, 65 Cal. 613, 4 Pac. 649; People v. Knowlton, 122 Cal. 357, 55 Pac. 141; People v. Miller, 122 Cal. 84, 54 Pac. 523.

Complaint is further made as to the admission in rebuttal of certain evidence offered by the prosecution. Most of it, particularly on the question of the insanity of appellant, was properly evidence in rebuttal. As to the rest of it, it is apparent that it would have been admissible if offered in chief. The fact that it was permitted to be given in rebuttal constituted of itself no ground of complaint. A court is warranted in departing from the order of proof prescribed by section 1093 of the Penal Code under proper circumstances. Whether it shall permit such departure is a matter committed to its sound discretion, and its action in that regard is not ground upon which error may be predicated unless the discretion appears to have been grossly abused, and this abuse must affirmatively appear. Pen. Code, § 1094; People v. Gordan, 103 Cal. 568, 37 Pac. 534. There is no appearance of abuse in permitting the departure in the case at bar; hence, the point made is not well taken. We have discussed all the rulings of the court made during the trial relative to the admissibility of evidence of which appellant complains, and which we deem worthy of particular consideration. Some other objections on the same line are urged by appellant, but we do not think them tenable or requiring any special mention.

As to the other points urged. The claim

of prejudicial misconduct on the part of the district attorney is, in our judgment, of no force. In his closing address to the jury the district attorney, in arguing the existence of possible malice of appellant against the deceased, stated that according to the two commitments in evidence the deceased had placed the appellant in the asylum. Exception was taken by appellant to this statement. After some discussion between court and counsel on both sides as to what the evidence was in that respect, the court declared that there was no evidence in the record to sustain the statement and instructed the jury, then and there, to disregard the remarks of the district attorney concerning it. Thereafter no reference to the subject was made by the district attorney. It is apparent from the record that this statement of the district attorney was made in the honest belief that the evidence supported it, and as the court immediately pointed out his error, and instructed the jury to disregard it, we are satisfied that, under those circumstances, the conduct of the district attorney cannot be said to have been so prejudicial to the appellant as to warrant a reversal on that account. Verdicts will not be disturbed merely on account of the inadvertent mistakes of counsel as to matters of evidence in addressing juries. It is only when from the course of conduct of a prosecuting officer, it is apparent that the right of the defendant to a fair trial has been prejudicially invaded, that he can successfully complain of it, and nothing of the kind appears here. People v. Ward, 105 Cal. 340, 38 Pac. 945; People v. Putman, 129 Cal. 262, 61 Pac. 961. As to the other matter concerning which misconduct by the same officer is specified, less need be said. It occurred also in his closing address. In his remarks no statement was made by him of any facts which the evidence did not disclose. The matters complained of were suggestions in his argument of certain inferences and deductions, which the jury should make from particular evidence in the case. The exception was leveled against these deductions and inferences. This was no ground for exception. Counsel have a right to present to the jury their views of the proper deductions or inferences which the facts warrant. There reasoning may be faulty; their deductions from the premises illogical, but this is a matter for the jury ultimately to determine, and not a subject for exception on the part of opposing counsel.

It is next insisted that the court erred in giving an instruction to the jury upon the subject of insanity—that the burden of proof was upon the defendant to establish that defense and that it must be established by a preponderance of evidence. But this has been the established rule in this state practically since its earliest history, repeatedly affirmed by this court, so that it cannot be considered as open to further question. It was first established as the correct rule to be applied in this state in People v. Myers, 20 Cal. 518, and has been adhered to ever since. People v. Travers, 88 Cal. 233, 26 Pac. 88, citing a list of cases sustaining the rule since People v. Myers, supra; People v. Bawden, 90 Cal. 195, 27 Pac. 204; People v. McNulty, 93 Cal. 443, 26 Pac. 597, 29 Pac. 61; People v. Bemmerly, 98 Cal. 299, 33 Pac. 263; People v. Ward, 105 Cal. 342, 38 Pac. 945; People v. Allender, 117 Cal. 81, 48 Pac. 1014.

We approach now the last point made by appellant—that the evidence is insufficient to support the verdict. Counsel for appellant make this contention in their brief, without endeavoring to at all specify in what particulars it is insufficient; they simply state the point. We have, however, considering the gravity of the position of the appellant on this appeal, made a careful examination of the record to find if this claim of appellant finds support from it, and are satisfied that it does not. This court cannot disturb a verdict unless there is no evidence to support it, or where the evidence relied on by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict as to convince this court that its return was the result of passion or prejudice on the part of the jury. In a case presenting any of these features, this court would deal with it as a matter of law. Such a situation, however, can only be presented on appeal in extreme cases, and, notwithstanding the claim of appellant, the record before us does not disclose any such case. It presents the usual and ordinary situation where the evidence was conflicting as to the only real question in the case—the insanity of the appellant—and the jury finding against it, and their finding being supported by material evidence, is conclusive on this court.

The claim of counsel that on the subject of the insanity of appellant the evidence was so overwhelmingly in favor of it, is, as we say, without foundation. This claim seems to be based on the several orders of commitment to the insane asylum. But it did not at all follow because appellant was so committed that the commitment was proof that he was insane to the extent that the law would exempt him from responsibility for his criminal acts. There are many kinds and degrees of insanity, and it is not every kind or degree which will relieve a person from such responsibility, and the degree of mental impairment which would authorize his confinement in an asylum for the insane may be entirely different from the degree of mental derangement which will relieve him from responsibility for his criminal acts. A person may be partially insane, or be insane upon one or several subjects, and for that reason be a proper person for confinement in a state insane asylum to be cared for and treated for his mental disorder, and yet at the same time such person may be perfectly sane upon all other subjects and entirely responsible under the law for a criminal act committed by him. In re Buchanan, 129 Cal. 330, 61 Pac. 1120, 50 L. R. A. 378. That insanity may be available as a defense to a crime charged, it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. If he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal, and will subject him to punishment, he must be held responsible for his conduct. Although he may be laboring under partial insanity, as, for instance, suffering from some insane delusion or hallucination, still if he understands the nature and character of his action and its consequences, if he has knowledge that it is wrong and criminal and that if he does the act he will do wrong, such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from responsibility for his criminal acts. Now, while it is true that the appellant was committed to the insane asylum under two commitments prior to the last one of December 22, 1905, there was no evidence introduced to show that he was irresponsibly insane at those times within the rule as the law prescribes it. In fact, the evidence shows that on both these occasions he was suffering merely from acute alcoholism; that he was to some extent mentally deranged therefrom, but after he had been there from 10 days to a couple of weeks he recovered, and was subsequently discharged from the asylum as cured.

As to the last commitment to the asylum —the one made on the morning of the homicide. The fact that the appellant had been ordered committed to the Mendocino State Hospital for Insane immediately prior to the homicide did not of itself exempt him from responsibility for the killing of deceased. He might have been suffering from partial insanity, such as would justify his detention in the asylum for care and treatment, and still, as we have seen, not be insane to such an extent as to be deemed irresponsible in law for his conduct. The fact that he was committed to the asylum did not conclusively establish the fact that he was insane at all. Notwithstanding the commitment, it was a question for the jury to determine whether he was in fact insane, and to what extent. They were in no wise concluded by the report of the medical examiners that appellant was insane, or by the opinion of the medical examiners as to the nature of his insanity, or by the judgment which declared him insane and ordered him committed to the asylum. The report of the medical examiners, and the judgment and order of commitment being before them, were to be regarded by the jury only as evidence bearing on the question of insanity. These were to be considered by them, but what weight or credibility, if any, they should give them, was entirely a matter for their determination. Now, as to the judgment and commitment of the morning of December 22, 1905. It appears from the testimony of the examining physicians given on the trial, that they believed from the evidence adduced at the medical examination, and so stated in their medical report, that the appellant was the subject of an insane delusion, namely, that he was appointed by President Roosevelt and Gov. Pardee a peace officer to arrest people or evil doers. They testified that during the examination upon all other subjects he talked rationally and appeared to be sane. As to the statement in the report of their examination of appellant that he was "homicidal; dangerous," they testified that this statement was made by them in response to one of the questions contained in a blank form for medical examinations in insanity cases prescribed by the state commission in lunacy. The question prescribed in that form was: "Is alleged insane person noisy, restless, violent, dangerous, destructive, incendiary, excited, or depressed, homicidal or suicidal?" It was in response to this inquiry that the examining physicians answered "homicidal; dangerous." As a witness on the trial, testifying as to the medical examination of appellant, Dr. Bond, a physician, who acted as one of the medical examiners, and who gave the answers to be written down, said that during the examination of appellant, after the latter had stated that he was appointed by President Roosevelt and Gov. Pardee as a peace officer to arrest evil doers, he asked him if he would kill a person in the exercise of his duties as peace officer—whether he would kill a wrongdoer if he had him under arrest—whether he would injure him in any way—to which appellant responded that he would kill him if necessary; that this inquiry and the answer of appellant furnished the basis for stating that he was "homicidal; dangerous." Upon the trial four other witnesses testified to other conversations with the defendant, having for their basis this apparent delusion of being appointed as a peace officer by the President and Governor, and that in these conversations defendant, in their judgment, talked irrationally. This was practically all the evidence offered on the part of the defense to sustain the plea of insanity.

Upon the part of the prosecution a number of persons were called who had known defendant intimately a number of years prior to the homicide, who testified that he was rational during all the time they knew him. A large number of witnesses testified to the conduct of the defendant immediately subsequent to the homicide, and that he was entirely rational. And the assistant medical superintendent in charge of the asylum to which appellant was taken on the day of the homicide under the commitment of that date, who examined, observed and talked with him while he was there, testified that during all of the time he was there he was perfectly rational. Attendants at the asylum, who observed and conversed with him, testified likewise. The physicians who examined him at the hearing on December 22, 1905, testified, as we have already said, that upon every other subject than the delusion referred to he was sane, and the superior judge who presided at that examination testified that except as to that delusion defendant appeared to be entirely rational. There was further evidence in the case that several years before the day of the homicide, appellant had stated that he would kill anybody who would try to put him in the asylum again, and the day before the homicide made the same declaration. This is a general statement of the evidence presented on both sides. We do not deem it necessary to go into detail, and state it only as far as we have, to show that there was no such preponderance of evidence in favor of the insanity of appellant as is claimed by his counsel; but, on the contrary, there was a clear and marked conflict in the evidence on this issue. The trial court fully and fairly instructed the jury on the law of insanity as applied to the evidence in the case, with special instructions for determining the responsibility of one suffering from an insane delusion, if they found it existed. Under the conflicting evidence in the case, and applying the instructions to it, the jury in returning a verdict of guilty determined that the appellant was sane. The evidence on behalf of the prosecution, if believed by the jury, warranted them in doing so, and we cannot disturb their conclusion.

This disposes of all the points made on the appeal, and no reason appearing for the reversal of the judgment, it and the order denying the motion for a new trial are affirmed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; SHAW, J.

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150 Cal. 510

## GOORBERG v. WESTERN ASSUR. CO.
(L. A. 1,501.)

(Supreme Court of California. Feb. 7, 1907.)

1. Insurance — Fire Insurance — Policy — Construction.

A fire policy insured for a specified sum a dwelling, and for a specified sum household goods therein, and stipulated that the "entire policy" should be void if the interest of the insured in the property was not truly stated. The building was located on unsurveyed government land, and the insured made misrepresentations with respect to his title to the realty. *Held*, that the policy was entire, without reference to the fact that the premium was entire, and without reference to the use of the word "entire," for the risk to the contents of the house was affected by the circumstances which affected the risk to the building itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 549, 634.]

2. Same—Waiver—Retention of Premium.

The mere retention by an insurer of the premium for a fire policy after a loss has occurred, and where its liability is denied, is not a waiver of the defense that the policy is void because of misrepresentations as to the insured's title to the realty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1045.]

3. Same—Pleadings.

Where, in an action on a fire policy, the complaint showed that there had been a breach of warranty as to title, and to overcome the same it was averred that the policy was issued after notice of the defect of title, the question whether waiver or estoppel might have been created by other facts was not in issue, for, if an insured relies on waiver or estoppel as to any defense otherwise available to the insurer, the facts constituting the waiver or estoppel must be pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1637.]

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by A. V. D. Goorberg against the Western Assurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Sylvester G. Williams and Edwin A. Meserve, for appellant. George L. Keefer, for respondent.

SLOSS, J. This is an action upon a policy of fire insurance, by which, in consideration of a premium of $21.75, the defendant insured the plaintiff in the sum of $1,700 against loss or damage by fire to five different items of property; a specific amount of insurance being apportioned to each item—that is to say, $550 on a frame dwelling, situate upon certain land described in the policy; $725 on household furniture contained in said dwelling; $150 on a smaller dwelling, situate upon the same land; $75 on household furniture situate in the smaller dwelling; and $200 on tools, farming implements, etc., contained in the building first described. A fire occurred, causing damage to each of the five items. The amount of such damage is not here in dispute. The principal defense, and the only one which need be considered on this appeal, is based upon the following provisions of the policy: "This entire policy shall be void if the insured has concealed, or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." It appears that the buildings were located upon unsurveyed government land, to which plaintiff had no title. He was merely in possession as a "squatter." The plaintiff claimed, and so alleged, that any warranty as to title had been waived by defendant's agents, in that they had caused the policy to be issued after having received from plaintiff full notice of the fact that he was holding as a "squatter" on unsurveyed government land. This alleged notice and waiver were denied by the insurer, which alleged that plaintiff, at the time of applying for the insurance, stated to defendant that he was the owner in fee simple of the land, and on these issues the case went to trial before a jury. The court charged the jury as follows: "I instruct you that, on the evidence before you, without any conflict, the plaintiff is entitled to a verdict for $748.95 for loss on the personal property described in the policy of insurance. As to the loss claimed on the buildings, I instruct you that, if you find that the defendant or its agents did not know, or had not been informed at the time of the issuance of the policy, that the plaintiff did not own the land on which the buildings were located, and did not learn that plaintiff did not own the land until after the commencement of this action, then plaintiff is not entitled to recover anything for the loss of the buildings. But, if defendant or its agents did have knowledge of the plaintiff's title or learned of it before the fire, then there was a waiver of the fact that plaintiff did not own the land, and plaintiff is entitled to recover the loss of said building, viz., $575.30. If you find on this issue in favor of the plaintiff, your verdict will be for the plaintiff for $1,324.25. If you find on this issue in favor of the defendant, then your verdict will be for the plaintiff in the sum of $748.95." The verdict was for $748.95 (the amount of loss claimed on the second, fourth, and fifth items of the policy), and defendant appeals from the resulting judgment and an order denying a new trial.

It is evident that the trial court regarded the conditions and warranties which we have quoted as applying solely to the buildings insured, and not to the contents of those buildings. In other words, the policy was treated as severable into as many contracts as there were items insured. Whether such policies, insuring distinct items for different amounts, in consideration of a gross premium, are to be regarded as entire or severable, is a question that has not heretofore come before this court, although it has been passed on by the courts of many other states. The authorities on the point are so numerous that it would be impracticable to attempt to review, or even to cite, all of them. There is conflict between the adjudications of different courts, and even, in some instances, between those of the same court. In a general way, the effect of the cases may be summarized and illustrated by saying that the courts of a number of states have laid down the rule accepted by the trial court in the case at bar, namely, that, where the property insured consists of different items which are separately valued or insured for separate amounts, the contract is divisible, and a breach of warranty or condition as to one item will not affect the insurance on the remainder of the property, even though the premium be entire. Merrill v. Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184; Schuster v. Dutchess County Mut. Ins. Co., 102 N. Y. 260, 6 N. E. 406; Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Continental Ins. Co. v. Ward, 50 Kan. 346, 31 Pac. 1079; State Ins. Co. v. Schreck, 27 Neb. 527, 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. Rep. 696; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Loehner v. Home Mut. Ins. Co., 17 Mo. 247; Sullivan v. Hartford Fire Ins. Co., 36 S. W. 73, 89 Tex. 665; Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 South. 759; Fireman's Fund Ins. Co. v. Barker, 41 Pac. 513, 6 Colo. App. 535; Clark v. New England Mut. Fire Ins. Co., 6 Cush. (Mass.) 342, 53 Am. Dec. 44; Bullman v. North Brit. & Merc. Ins. Co., 159 Mass. 118, 34 N. E. 169; Wright v. Fire Ins. Co., 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; Coleman v. New Orleans Ins. Co., 49 Ohio St. 310, 31 N. E. 279, 16 L. R. A. 174, 34 Am. St. Rep. 565; Light v. Greenwich Ins. Co., 105 Tenn. 480, 58 S. W. 851; Conn. Fire Ins. Co. v. Tilley, 88 Va. 1024, 14 S. E. 851, 29 Am. St. Rep. 770; Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

On the other hand, there are many cases holding that such contracts are entire, and that a breach of any condition or warranty vitiates the whole insurance; most of these decisions basing their conclusion on the ground that the premium was a single or gross sum. Gottsman v. Pennsylvania Ins. Co., 56 Pa. 210, 94 Am. Dec. 55; Day v. Charter Oak F. & M. Ins. Co., 51 Me. 91; Plath v. Minn. Farmers' Mut. Fire Ins. Ass'n, 23 Minn. 479, 23 Am. Rep. 697; Garver v. Hawkeye Ins. Co., 69 Iowa, 202, 28 N. W. 555; Cuthbertson v. North Car. Home Ins. Co., 96 N. C. 480, 2 S. E. 258; Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457; McGowan v. People's Mut. Fire Ins., 54 Vt. 211, 41 Am. Rep. 843.

There is still another line of cases which take a middle ground between the extreme doctrines above stated, and hold that the question of the severability of the contract in such cases depends upon the nature of the risk, i. e., that, where the property is so situated that the risk on one item cannot be affected without affecting the risk on the other items. the policy must be regarded as entire; but where the property is so situated that the risk on each item is separate and distinct from the risk on the other items, so that what affects the risk on one item does not affect the risk on the others, the policy must be regarded as severable. Havens v. Home Ins. Co., 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689; Phenix Ins. Co. v. Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; Pickel v. Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898; Worachek v. New Denmark Mut. Home Fire Ins. Co., 78 N. W. 411, 102 Wis. 88; Taylor v. Anchor Mut. Fire Ins. Co., 116 Iowa, 625, 88 N. W. 807, 57 L. R. A.

328, 93 Am. St. Rep. 261; Western Assurance Co. v. Stoddard, 88 Ala. 606, 7 South. 379; Republic Co. Mut. Fire Ins. Co. v. Johnson, 76 Pac. 419, 69 Kan. 146, 105 Am. St. Rep. 157; Hartshorne v. Agr'l Ins. Co., 50 N. J. Law, 427, 14 Atl. 615; Brehm Lumber Co. v. Svea Ins. Co., 79 Pac. 34, 36 Wash. 520, 68 L. R. A. 109; Herzog v. Palatine Ins. Co., 79 Pac. 287, 36 Wash. 611; Ætna Ins. Co. v. Resh, 44 Mich. 55, 6 N. W. 114, 38 Am. Rep. 228; Phœnix Ins. Co. v. Public Parks Amusement Co., 37 S. W. 959, 63 Ark. 187; Baldwin v. Hartford Fire Ins. Co., 60 N. H. 422, 49 Am. Rep. 324.

In our opinion, the rule declared in the cases last cited is supported by reason, and tends to produce a just result. Whether a contract is entire or severable is a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time they contracted. Sterling v. Gregory (Cal.) 85 Pac. 305. In these cases the policy, insuring several classes of property, provides that it shall be void in certain events. In view of the settled rule that any uncertainty or ambiguity in a contract of insurance is to be interpreted most strongly against the insurer, it is proper to say that this language should not be given the effect of avoiding the policy as to every item insured in all cases. Where the warranty or condition which is broken does not affect the risk on certain items, the insurance should not be held to be ineffective as to those items. Such construction would subject the insured to a forfeiture for a cause which had no substantial relation to the interest of the insurer. The purpose of the warranties and conditions is to protect the insurer from liability on risks which he would have been unwilling to take for the stipulated premium, or, perhaps, for any premium. And if, as to any item, the breach of condition or warranty does not at all affect the risk, the release of the insurer from liability for that item may fairly be said not to have been within the reason or the condition or warranty, and hence not within the contemplation of the parties. For example, where a single policy insured, in separate amounts, two buildings situated upon farms several miles apart, the breach of a warranty of title as to one would not in the slightest degree increase the risk on the other, and the policy should be held severable. Loomis v. Rockford Ins. Co., 77 Wis. 87, 45 N. W. 813, 8 L. R. A. 834, 20 Am. St. Rep. 96. We do not think the mere fact that the premium is entire should affect this conclusion. On the other hand, where the breach of condition, although in terms affecting only one item, is such as to increase the hazard to which other items are subjected, the avoiding of the policy as to all such items is the very thing which is requisite in order to protect the insurer from having to assume a greater risk than the one he had contracted for. Take the case here presented, of a building and furniture in the same, both covered by the same policy. There is a breach of a warranty or representation relating to the title to the land on which the building was situated. That any misrepresentation as to title is material, and has the effect of avoiding the policy, at least as to the building, is undisputed. And one ground upon which the materiality of statements as to title has been put is that they "might, and probably would, influence the mind of the underwriter in forming or declining the contract. Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk or in estimating the premium." Columbia Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25, 7 L. Ed. 335; Id., 10 Pet. (U. S.) 507, 9 L. Ed. 512. "In other words, it is in their relation to the moral hazard that the materiality of statements as to title or interests rests." 2 Cooley's Briefs on Ins., 1340. The risk is greater, then, where a man insures a house which is on land not belonging to him than it would be if he owned the land. But if the risk on the house is greater by reason of the want of ownership, it is clearly greater as to the contents of the house. It is, of course, possible that a house may burn, and a part or all of its contents be saved, but surely the contents of a house are in great danger of burning if the house takes fire, and any circumstance which increases the risk of fire to the house necessarily increases the risk to the contents. If the insuring company would have been unwilling to insure a house on land not belonging to the insured, because it might be more advantageous to the insured to have the house burn than to have it saved, it can hardly be supposed that it would have consented to take the risk on furniture contained in a house exposed to such hazard. It is, we think, no answer to this position, to say, as was said in Merrill v. Agricultural Ins. Co., supra, a case frequently cited, that insurance companies habitually insure the contents of buildings, without insuring the building or inquiring about its ownership. Such insurance on the contents alone would involve no unusual hazard. It would not tempt the insured to permit his furniture or other movables to burn. But if it be coupled with insurance on a building which he does not own, and by the destruction of which he would profit, both the house and its contents are subjected to a risk which the insurer was not willing to assume, and one against the assumption of which he expressly contracted. In the case at bar, the court directed the jury to find a verdict for the plaintiff for the loss on the contents of the buildings, notwithstanding the defense, and the evidence in support of it, that there had been a misrepresentation, which, as the defendant claimed, had not been waived. Under the views above set forth, this was error. The risk to the contents of the buildings was directly affected by any circumstance which affected the risk to the buildings themselves, and the contract should, so far as concerns the representation as to title, have been treated as entire.

In the foregoing discussion, we have laid no stress on the fact that the language of the policy is that "this entire policy shall be void, if," etc. In most of the cases cited above the word "entire" did not appear in the policy in this connection. It has been held (sometimes even in jurisdictions where separate valuations are ordinarily regarded as rendering the contracts divisible) that the inclusion of this word makes the contract entire and indivisible. Germania Fire Ins. Co. v. Schild, 68 N. E. 706, 69 Ohio St. 136, 100 Am. St. Rep. 663; Germier v. Springfield F. & M. I. Co., 33 South. 361, 109 La. Ann. 341; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457; Martin v. Ins. Co. of N. A., 57 N. J. Law, 623, 31 Atl. 213; McWilliams v. Cascade F. & M. I. Co., 7 Wash. 48, 34 Pac. 140. But there are also cases holding, in effect, that no valid distinction can be drawn between the words "this policy shall be void," and "this entire policy shall be void." Kiernan v. Dutchess County Mut. Ins. Co., 150 N. Y. 190, 44 N. E. 698; F. F. Ins. Co. v. Barker, supra; Kans. Farmers' Fire Ins. Co. v. Saindon, 53 Kan. 623, 36 Pac. 983; Trabue v. Dwelling House Ins. Co., 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523. In view of our conclusion that the policy in question is, for other reasons, an entire contract, it is not necessary in this case to express any opinion as to the effect of the use of the word "entire" in a policy which, in the absence of such word, would be treated as divisible.

The respondent contends that, whatever construction be put upon the policy, the judgment must be affirmed, because there was uncontradicted testimony to the effect that, shortly after the fire, the company ascertained the true state of the title, and for a period of several months thereafter, and up to the time of trial, made no offer to return the premium. During all this time, however, it denied liability. It may be conceded that, if by reason of a breach of warranty as to title, no risk ever attached, the insured was entitled to a return of his premium. Civ. Code, § 2617. But the insurer's delay in offering to repay it (assuming the delay to have been unreasonable) did not forfeit the right to defend for such breach. The cases cited to the proposition that a party cannot rescind a contract without restoring what he has received under it are not in point. The defendant is not in this action seeking to rescind the contract sued upon. It is standing upon the contract, and insisting that under its terms there is no liability. Nor can the mere retention of the premium, after the loss has occurred, and where the liability is steadfastly denied, constitute either a waiver of the defense or an estoppel. To constitute such waiver or estoppel by the action or nonaction of the insurer after the loss, it is essential "that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action." McCormick v. Orient Ins. Co., 86 Cal. 260, 24 Pac. 1003; McCormick v. Springfield F. & M. I. Co., 66 Cal. 361, 5 Pac. 617. Here nothing was done which could have led the insured to believe that the defendant would not take advantage of the breach of warranty. On the contrary, it persistently asserted its reliance upon such breach. If the case of Fishbeck v. Insurance Co., 54 Cal. 422, is in conflict with these views, it must be regarded as overruled by the McCormick cases, just cited. See, also, Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358, 37 C. C. A. 96; Austin v. M. R. F. L. Ass'n (C. C.) 132 Fed. 555; Thompson v. Traveler's Ins. Co., 91 N. W. 75, 11 N. D. 274; Blaeser v. Ins. Co., 37 Wis. 39, 19 Am. Rep. 747.

Furthermore, the retention of the premium was not pleaded by the plaintiff. His complaint showed affirmatively that there had been a breach of warranty as to title, and to overcome this he was obliged to allege facts showing a waiver or estoppel. He met this requirement by alleging the issuance of the policy by the defendant after notice of the defect of title, but this did not put in issue any waiver or estoppel that might have been created by other facts. If the plaintiff relies on waiver or estoppel as to any defense which would otherwise be available to the defendant under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance. 19 Cyc. 923; Gillon v. Northern Assur. Co., 127 Cal. 480, 59 Pac. 901; Vernon Ins. & T. Co. v. Maitlen, 158 Ind. 393, 63 N. E. 755; Bruce v. Germ. S. & L. Soc., 24 Or. 486, 34 Pac. 16; McCoy v. Iowa State Ins. Co., 107 Iowa, 80, 77 N. W. 529.

The judgment and order appealed from are reversed.

We concur: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

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4 Cal. App. 698

## PEOPLE v. SCIARONI et al. (Cr. 28.)

(Court of Appeal, Third District, California. Jan. 22, 1907.)

1. Criminal Law—Evidence—Testimony of Accomplice—Corroboration.

Under the express provisions of Pen. Code, § 1111, a conviction cannot be had on the testimony of an accomplice without corroboration, both as to the commission of the offense and as to defendant's connection therewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1124–1126.]

2. SAME—SUFFICIENCY OF CORROBORATION.

While evidence corroborating an accomplice to sustain a conviction need not be strong, it is insufficient if it merely excites suspicion of the defendant's connection with the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1128–1138.]

3. SAME.

In a prosecution for exploding dynamite in a mine with intent to injure the mine and injure and intimidate human beings, evidence that a few days after the offense was supposed to have been committed defendant M. asked witness how the mine was looking, and, about the same time having ceased work at that point, inquired of the railroad ticket agent concerning the fare to Mexico, and that defendant had an opportunity to commit the crime, was insufficient corroboration of the testimony of an alleged accomplice to connect defendant therewith.

Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Fred Sciaroni and another were convicted of maliciously exploding dynamite in a mine with intent to injure the mine and human beings, etc., and they appeal. Reversed.

C. H. Fairall and Will A. Dower, for appellants. U. S. Webb, Atty. Gen., J. P. Snyder, Dist. Atty., and Solinsky & Wehe, for the People.

BURNETT, J. This is an appeal from the judgment and order denying the motion for a new trial.

The defendants were convicted of the crime of exploding dynamite in the Angels quartz mine at Angels Camp, Calaveras county, "with the intent to injure said mine and said structures therein, and to injure, intimidate, and terrify human beings, and by means of which human beings were endangered."

The most serious contention made by defendants is that the evidence is insufficient to justify the verdict of conviction. In this connection it is urged that no corroboration of the testimony of one Charles E. Holmes, an admitted accomplice, can be found in the record. The demand of the law upon the subject is clear and unmistakable. It is set forth in the instructions given by the learned trial judge. These are substantially as follows: "A conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Section 1111, Pen. Code. Furthermore: "Evidence that merely excites suspicion is not sufficient corroboration." People v. Main, 114 Cal. 632, 46 Pac. 612; People v. Hoagland, 138 Cal. 341, 71 Pac. 359. Corroborative evidence need not be strong. People v. McLean, 84 Cal. 480, 24 Pac. 32; People v. Barker, 114 Cal. 619, 46 Pac. 601. There is sufficient evidence shown by the transcript to support the conclusion that a crime was committed, but it is insufficient to establish the connection of defendants with the commission of said crime. Every circumstance upon which plaintiff relies, exclusive of the testimony of the accomplice, is entirely consistent with the innocence of defendants and compatible with the theory that Holmes alone is guilty, or that he was assisted by parties other than defendants.

As an illustration of the few circumstances which, it is urged, furnish the necessary corroboration, reference may be had to the testimony of one of the witnesses to the effect that a few days after the offense is supposed to have been committed he was asked by Mitchell how the mine was looking. In this interrogation there is no suggestion of guilt. Viewed in the light of the presumption of innocence, it would appear to be the artless expression of natural and guileless curiosity. Again, about the same time, Mitchell inquired of the ticket agent about the fare to Candalaria, Mexico. He had, however, ceased work at Angels Camp, and there is no apparent reason why he should have remained there. The fact is, moreover, that the record fails to show any attempt at flight or concealment, and the circumstance involving the ticket agent is utterly without any inculpatory significance. Again, there is some evidence that the defendants had the opportunity to commit the crime, but under the circumstances disclosed this cannot be accepted as tending to show their guilt. They had a right to be there at the time, as required by their employment, and the suggestion contained in People v. Koening, 99 Cal. 576, 34 Pac. 239, may be invoked. It is there said: "No inference of the guilt of the defendant can be drawn from the fact that he was at the saloon on the evening of the commission of the crime beyond the fact that it gave him an opportunity to advise its commission. His business called him there and his presence was not a suspicious circumstance." The other slight considerations to which attention has been directed by the Attorney General do not arise to the dignity of corroborative evidence. It is true that it is peculiarly within the province of the jury to judge of the credibility of the witnesses and the weight to be given to the evidence; and a verdict should not be set aside for slight or trivial causes, nor for technicalities involving no prejudicial error. But the Legislature, acting within the scope of its authority, has provided that to justify the conviction of a defendant there must be substantial corroboration of the testimony of an accomplice. This rule of evidence is doubtless based upon sound public policy. But, whether so or not, it cannot be ignored without an unwarranted invasion of the constitutional rights of the citizen.

Some criticism is directed against the action of the court in giving and refusing certain instructions. Defendants may be entitled to have the jury instructed as to the presumption of fair character, but the instruction proposed is misleading and was properly refused. In the event of a new trial the instruction upon reasonable doubt had better be modified so as to obviate the objection urged against a portion of it as given.

There is no other error in the record.

The judgment and order denying the motion for a new trial are reversed.

We concur: CHIPMAN, P. J.; HART, J.

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4 Cal. App. 680

## ROSE v. DOE. (Civ. 305.)

(Court of Appeal, First District, California. Jan. 3, 1907.)

1. PLEDGES—SALE—OBJECTIONS—ESTOPPEL.

Plaintiff's assignor pledged certain bonds to secure a debt, and was present, but did not object to a private sale thereof, on April 3, 1899. No objection was subsequently made to such sale until after a subsequent sale of the bonds with other similar bonds in April, 1900, to a purchaser procured by plaintiff's assignor for which he was paid a commission. *Held*, that both plaintiff and his assignor were estopped to object to the validity of the original sale of the pledged bonds.

2. APPEAL — REVIEW — FINDINGS OF FACT — SCOPE OF REVIEW.

The findings of fact which are filed with the clerk constitute the decision of the court on the issues of the case and their correctness is to be measured by the evidence, and not by any statement of opinion, made by the court during the progress of the trial.

3. PLEADING—AMENDMENT—DISCRETION.

Whether a defendant should be allowed to file an amended answer, is largely within the discretion of the court, which should be so exercised as to bring about a judgment on the merits of the controversy between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 601.]

4. TRIAL—RECEPTION OF EVIDENCE—OFFER OF EVIDENCE—SUFFICIENCY.

A mere offer of evidence without having a witness in court, or if he be present, without putting a question to him in such form as to give an opportunity for an objection, may be properly disallowed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 112.]

5. APPEAL — REVIEW — PRESUMPTIONS — SUSTAINING TRIAL COURT—EXCLUSION OF EVIDENCE.

In an action for an accounting of a sale of certain pledged bonds, the court directed that the issue as to the validity of the sale be first tried. After the court had stated that further evidence would be of no assistance on that issue, plaintiff's counsel offered to prove, that plaintiff's assignor did not, and could not know of the things done at the sale until about the time the suit was instituted. The offer was rejected, but the record on appeal did not show the ground of the ruling. *Held*, that the refusal of such offer would be sustained on the ground that the offered evidence was not within the issues then being tried, the presumption on appeal, in the absence of any contrary showing, being that the action of the lower court is correct if it can be sustained on any theory applicable to the facts.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by F. M. Rose against Bartlett Doe. A judgment was rendered in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

W. T. Baggett, for appellant. John Flournoy and Mich. Mullany, for respondent.

HARRISON, P. J. Action for an accounting. The cause was tried by the court, and judgment rendered in favor of the defendant. A motion by the plaintiff for a new trial was denied, and from this order he has appealed.

The facts constituting the controversy between the parties, as disclosed at the trial and shown by the findings of the court, are as follows: The plaintiff's assignor, J. S. Emery, made two promissory notes to the defendant—one bearing date September 15, 1896, for $33,319, and the other bearing date December 16, 1896, for $14,950; each payable six months after its date. As collateral security for the payment of the first note he deposited with the defendant 42 bonds of the Blue Lakes Water Company of $1,000 each, and as collateral security for the payment of the other note 23 similar bonds of the same corporation. Each of these pledges was accompanied by an instrument in writing, authorizing the defendant, in case the note for which the security was given should not be paid at its maturity, to sell the pledged property at public or private sale, at any place, with or without any previous notice to the pledgor or any notice whatever of said sale. Neither of the notes having been paid at its maturity, the defendant, on March, 20, 1899, gave written notices to Emery that on April 3, 1899, at 11 o'clock a. m. of that date, he would sell the property so pledged at private sale at his office in San Francisco (designating the street and number thereof). Pursuant to these notices the defendant, on April 3, 1899, sold said bonds to Charles F. Doe for the sum of $52,350. There was then due on the principal of said promissory notes of Emery the sum of $47,350, and the said Charles F. Doe gave to the defendant his check for that amount, and the defendant gave credit therefor to Emery, and at the same time canceled and marked "Paid" the aforesaid notes of Emery. At the time of said sale, and for more than two years prior thereto, Emery was indebted to said Charles F. Doe upon four promissory notes theretofore executed by him to said Doe, and said indebtedness then amounted to $10,180. After giving to the defendant his check for the aforesaid amount of $47,350, Charles F. Doe applied $5,000 of the sum for which he had purchased the bonds as a credit upon the said indebtedness of Emery to himself. Emery, together with his legal counsel, was present at the sale of said bonds, and heard and saw all that took place at the time of said sale, and knew of the application by the defendant and Charles F. Doe of the respective portions of the sum for which the bonds were sold as credits upon his indebtedness to them as aforesaid, but he did not, nor did either of them, either then, or at any time prior to the commencement of this action, make any objection to the manner of making said sale, or to the price at which they were sold, or to the manner in which the price was credited to Emery, or inform or notify the defendant that Emery claimed that the sale was in any respect defective or invalid, or that he elected to treat it as defective or invalid. In addition to the bonds so purchased by him, Charles F. Doe was the owner of 50 other similar bonds of the same corporation, and after said sale and prior to April 25, 1899, he sold to the defendant 65 of said bonds, and on April 25, 1899, the defendant and said Charles F. Doe entered into an agreement with John Flournoy for the sale of the 115 of said bonds held by them, in which it was provided, among other things, that said Flournoy would endeavor to sell said bonds at the highest price obtainable therefor, and should receive from the defendant and Charles F. Doe one-half of whatever sum might be received upon their sale above the sum of $93,800, that being estimated as the approximate cash outlay by them for said bonds. This agreement was prepared and drafted by T. C. Judkins, who was then, and had been for a long time next prior thereto, and was for a long time next subsequent thereto, the attorney and counsel of Emery, representing and acting for him and attending to his legal business, and said Judkins, presented the said instrument to the defendant and to Charles F. Doe, and induced them and each of them to enter into and sign it. Prior to April 25, 1900, Emery was informed by the defendant of the said agreement with Flournoy, and was also informed of its terms and provisions, and after being so informed entered into an agreement with Flournoy, by which they agreed that if the 115 bonds owned by the defendant and Charles F. Doe should be sold to a purchaser procured by Emery, Flournoy would pay and deliver to Emery, and Emery would receive and accept as his commission for procuring said purchaser, whatever surplus above $5,000 should be coming to Flournoy under his aforesaid agreement with the defendant and Charles F. Doe, and that Flournoy should retain such sum of $5,000 as his share of said commissions. On April 25, 1900, the 115 bonds were sold to purchasers procured by Emery and Flournoy for the sum of $109,250, and on April 27th Flournoy received from the defendant and Charles F. Doe the commission to which he became entitled under his aforesaid agreement with them, and paid over and delivered to Emery a portion thereof pursuant to the said agreement between Emery and himself. Upon these facts the court held that the plaintiff was not entitled to any relief. Other matters were embraced in several of the above transactions, between the parties, but as they do not affect the relations between them as shown by the aforesaid statement, a statement of their character is omitted.

The pivotal point of the controversy between the plaintiff and the defendant is the sale of the bonds by the defendant April 3, 1899—the plaintiff contending that, by reason of the mode in which the sale was conducted, it was invalid, and that his ownership of the bonds was not affected thereby, and much of the argument of his counsel is directed to this point. The court has, however, found in favor of the validity of the sale, and we cannot say that the evidence is insufficient to sustain its decision. But, even if its findings on this issue should be disregarded, we are of the opinion that the evidence before the court, and its findings thereon, respecting the conduct of Emery at the time of the sale, his silence and acquiescence therein, his unexplained delay in making any objection thereto, and his conduct thereafter in connection with the bonds, and in reference to their sale in 1900 under the agreement between the defendant and Flournoy, his agreement with Flournoy to accept a compensation for effecting their sale, and his acceptance of such compensation after their sale, and their delivery from the defendant to the purchaser, if not technically a ratification of the sale by the defendant in 1899, operated as an estoppel against Emery, and the plaintiff as his assignee, from disputing its validity, and justified the court in refusing the plaintiff any relief. The evidence in the record is quite voluminous, and, in many material points, is conflicting and quite contradictory. It would serve no useful purpose to recount it at length, but it suffices to say that it justifies all of the findings of the court which are material for sustaining its judgment; and even if it be conceded that some of the other findings are without sufficient evidence to support them, as claimed by the appellant yet, inasmuch as these findings do not countervail the findings which are material to the judgment, and which are fully justified by the evidence, and would not impair the judgment if contrary findings had been made, the want of evidence to support them would not warrant a reversal of the order denying a new trial. At the trial the court directed the parties to first introduce their evidence relative to the sale of the bonds on April 3, 1899, so that the issue upon the validity of that sale might be first determined; and, at the close of the plaintiff's case, the defendant moved for a nonsuit upon the ground that the evidence did not show that the sale was invalid. The court took the matter under advisement, and at a subsequent day denied the motion, filing an opinion in connection therewith, in which it stated that the sale was invalid, and ordered that the cause be set down for a further hearing. Upon the final submission of the cause the court filed its findings of fact, in which it held that the sale was valid, and it is contended by the appellant that the opinion of the court given upon denying the motion for a nonsuit should prevail over its findings of fact. The correctness of the findings of fact is to be determined upon a consideration of the entire evidence in the case, together with such inferences of fact as the trial court might properly draw therefrom, and is not in any way impeached by the fact that at some stage in the course of the trial the court may have given or expressed a contrary opinion. The findings of fact which are filed with the clerk constitute the decision of the court upon the issues in the cause, and their correctness is to be measured by the evidence in the cause, and not by any statement or opinion made during the progress of the trial.

After the motion for a nonsuit had been denied, the court, upon the motion of the defendant, gave him leave to file an amended answer. The plaintiff excepted to this ruling, and now urges that it was error for the court to allow the defendant to amend his answer by setting up special defenses other than those presented in the original answer. The original answer is not contained in the record before us, and we are unable to make any comparison of the defenses therein with those upon which the cause was tried; but even if the fact be as claimed by the appellant, the court did not err in permitting the amendment. Stringer v. Davis, 30 Cal. 321; Guidery v. Green, 95 Cal. 630, 30 Pac. 786; Gould v. Stafford, 101 Cal. 32, 35 Pac. 429; Crosby v. Clark, 132 Cal. 8, 63 Pac. 1022; McDougald v. Hulet, 132 Cal. 154, 4 Pac. 278. In determining whether to allow a defendant to file an amended answer much is left to the discretion of the court, and, as in the case of setting aside a default, this discretion is best exercised when it tends to bring about a judgment upon the merits of the controversy between the parties. It can very rarely happen that the allowance of an amendment, for the purpose of setting up a defense upon the merits that has not been previously pleaded, would be held erroneous. As was said in Stringer v. Davis, supra, where the trial court had denied the defendant leave to amend his answer upon the ground, as alleged by it, that, if allowed, a recovery by the plaintiff might be defeated, "such would seem to be a very good reason why the amendment should be allowed." After the testimony on the part of the plaintiff relating to the validity of the sale of the bonds by the defendant on April 3, 1899, had been presented, the record recites the following proceedings: "Here counsel for the plaintiff offered to prove that Mr. Emery did not know and could not have known of the various details respecting the matters and things done at the sale so far as the giving of the check and its return was concerned until about the time of the institution of the suit. The court sustained the objection thereto, and the plaintiff duly excepted."

The record does not show the nature or grounds of the objection; and as error in the ruling of the court is not to be presumed, for the purpose of sustaining its ruling if any valid objection could have been made to receiving the evidence offered it will be assumed that such objection was made. The objection may have been upon the ground that there was no means at hand of making the proof. A mere "offer" without having the witness in court, or, if he be present, without putting a question to him in such form as to give an opportunity for an objection, would be a sufficient ground for the ruling. In Biddick v. Kobler, 110 Cal. 191, 42 Pac. 578, it is said: "A mere general 'offer' to prove a variety of things without producing the witness or evidence whereby they are to be proved, or segregating the different items, is an improper method of presenting offered evidence, and should not be allowed unless by consent of parties." This offer of proof was made after the court had stated that, for the purpose of deciding that issue, "I do not see how any further evidence could be of any assistance to the court at all. All these other things would come in later." And under this statement of the court a sufficient ground for the objection, and for the ruling of the court would have been that the matters offered were not within the issues which the court had directed to be first tried and which were then before it for trial; or that the testimony offered was not a part of the plaintiff's case, but was in anticipation of what might be shown in defense of the action. In such case the plaintiff would not be precluded from introducing the evidence at a subsequent stage of the trial, but such subsequent offer was not made. Many other rulings of the trial court are assigned as error, the greater part of which are, however, upon matters not essential to the merits of the case, and in none of which a different ruling would have affected the decision, and for this reason need not be further considered in this opinion.

The order denying a new trial is affirmed.

We concur: COOPER, J; HALL, J.

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4 Cal. App. 701

BEAUMONT v. SAMSON et al. (Civ. 320.)

(Court of Appeal, Third District, California. Jan. 22, 1907.)

CERTIORARI—EXISTENCE OF OTHER REMEDY.

The Supreme Court will not entertain a petition for a writ of review to a county board, where the superior court having jurisdiction in the matter, has refused such a writ; the remedy being by appeal from the superior court (Code Civ. Proc. §§ 939, 963, 1064, 1110).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 5.]

Petition by J. B. Beaumont for writ of review to W. H. Samson and others, as board of supervisors of the county of Tehama. Writ denied.

Chas. L. Donohoe and Frank Freeman, for petitioners. McCoy & Gans, for defendants.

CHIPMAN, P. J. The petition sets forth that on September 6, 1906, there was filed in the office of the clerk of defendants a petition asking that defendants give notice of an election to be held for the purpose of determining whether the territory in said petition described, including the town of Corning, shall become incorporated under the act approved March 13, 1883. It is set forth in the petition for the writ that, in certain particulars alleged to be essential to the jurisdiction of the defendants to act in the matter, the petition presented to defendants was fatally defective. It appears that the petition was presented to and heard by defendants, as such board of supervisors; that an election was held pursuant to notice thereof published in the "New Era," a newspaper published in the town of Corning, said county, but as to which it is alleged that no proof of such publication was made to said defendants before making the order declaring the result of said election or before making the order declaring that the territory described therein had become duly incorporated as a municipal corporation of the sixth class. The petition for the writ alleges further: "That heretofore your petitioner presented his petition and application to the Honorable John F. Ellison, judge of the superior court of Tehama county, state of California, praying that a writ of review issue to the board of supervisors of the county of Tehama in the matter hereinbefore set out and alleged in this petition, and on the 11th day of January, 1907, the said judge * * * made and entered an order refusing to issue a writ of review in said matter, and denying the application of your petitioner herein for such writ of review, and dismissing your petitioner's petition in said matter. That the said Hon. John F. Ellison, judge of the superior court of Tehama county as aforesaid, denied the said application of your petitioner upon the sole ground that the subject was not a proper matter for the issuance of the writ." Upon filing the petition, this court issued an order for the defendants to show cause why the writ should not issue, in response to which defendants appeared by demurrer and also by answer, showing the proceedings before the superior court. The demurrer alleged the following grounds: (1) Insufficiency of facts to constitute a proper cause for writ of review; (2) that defendants in respect of the matters set forth in the petition were not exercising judicial functions; (3) that in said matter there is "a plain, speedy and adequate remedy" without resort to writ of review, namely, by quo warranto; (4) that the said board has fully completed its proceedings in the matter, and that no beneficial purpose would be subserved by the writ; (5) that the town of Corning is now, by virtue of the said proceedings, in the full enjoyment of the powers of a municipality, and is acting in fact as such; (6) that the order of the superior court made and entered on the 11th day of January, 1907, is an appealable order and is conclusive except on appeal, and hence no writ should issue.

It appears by plaintiff's petition that the matter as here presented was submitted by petitioner to said superior court, was heard by that court, writ denied, and proceedings dismissed. The view we have taken of the case makes it unnecessary to pass upon the questions presented by defendants at this time, except the last one above enumerated. The superior court had jurisdiction and was empowered to hear and determine the matter. The reason given by the court for, or the ground of, his decision, does not affect the question we are about to consider. He had jurisdiction to act, and he exercised that jurisdiction. This was sufficient for the present purpose. "A judgment in a special proceeding is the final determination of the rights of the parties therein. * * *" Code Civ. Proc. § 1064. The provisions of part 2 of the Code of Civil Procedure, relating to new trials and appeals, apply to the proceedings mentioned in title 1, pt. 3, which relates to writs of review and other writs. Code Civ. Proc. § 1110. "An appeal may be taken to the Supreme Court from the superior court in the following cases: (1) From a final judgment entered in an action or special proceeding commenced in the superior court or brought into a superior court from another court." Code Civ. Proc. §§ 963, 939.

It was held, in Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468, that an appeal lies from the judgment of the superior court denying the writ of mandate (citing cases), and that "this furnishes a plain, speedy and adequate remedy to the petitioner, in the ordinary course of law"—citing Santa Cruz, etc., Co. v. Supervisors, 62 Cal. 40. Many cases might be cited where appeals have been taken from judgments of superior courts upon proceedings for the writ of review. Stumpf v. Board of Supervisors, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350, cited by petitioner, was such a case. See, also, Santa Cruz, etc., Co. v. Supervisors, supra. In the case of Knowles v. Thompson, supra, the petition was filed in the Supreme Court. A demurrer was interposed on the ground, among others, that petitioner had a plain, speedy, and adequate remedy by appeal, as it appeared that the petitioner had applied to the superior court for the writ, and it had been denied. The order of the Supreme Court at the hearing was that "the demurrer to the petition must be sustained, and the writ denied."

So, we think, must be the action of this court upon the present petition.

The writ is denied.

We concur: BURNETT, J.; HART, J.

150 Cal. 477

## BACON v. BACON et al. (S. F. 3,741.)

(Supreme Court of California. Feb. 7, 1907.)

1. Executors — Decree of Distribution — Review in Equity—Mistake—Fraud.

A decree of distribution is not so essentially a part of the probate proceeding in which the will was established that it cannot be reviewed by a suit in equity for fraud or mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1293.]

2. Same—Jurisdiction of Equity—Statutes.

Since the Constitutions of 1849 and 1879 conferred on the superior court such jurisdiction to review judgments and decrees for fraud or mistake as had been formerly possessed by courts of equity, Code Civ. Proc. § 1666, declaring that distribution decrees shall be conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal, and section 473, providing that, on motion in the same cause or proceeding instituted within six months after judgment, a party may be relieved from a judgment taken against him through his mistake, inadvertence, or excusable neglect, afforded merely a cumulative remedy, and did not displace the constitutional power of the superior court to set aside a distribution decree for fraud or mistake, by an original proceeding in equity.

3. Judgment—Mistake—Relief in Equity.

Relief may be given in equity against a decree which was the result of a mistake, unmixed with fraud, and not the result of the negligence of the injured party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 780, 785.]

4. Executors — Decree of Distribution — Setting Aside—Mistake.

Testator declared that, if his estate was worth more than $250,000, the wife of his son and the husbands of his two daughters should receive $10,000. The estate was worth more than the sum specified, and on the reading of the will the word "ten" was by mistake read as "two," for which it might easily be taken. Testator's three children were appointed his personal representatives, and had copies of the will made for each legatee, in which the mistake was continued. The subsequent proceedings in the estate were conducted by the use of the copies, and plaintiff, the wife of the son, was induced by the personal representatives to execute a receipt in full of her legacy on the payment to her of $2,000, and such personal representatives thereafter obtained a decree of distribution, at which plaintiff did not appear and was not represented, which fixed her interest in the estate as $2,000. *Held* that, as there had never been any real contest with reference to the amount of plaintiff's legacy, the mistake was not one of the court by which the decree of distribution was entered, but of the parties interested in the estate, and that it was therefore properly vacated on that ground.

5. Same—Laches.

Nothing having occurred to arouse plaintiff's suspicions as to the truthfulness of the representations of her husband, who was an executor, or to doubt the good faith of the others, until after dissensions arose between herself and husband which ended in a divorce, after which she learned of the mistake and began the action to vacate the decree a short time thereafter, she was not guilty of laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1305.]

6. Limitation of Actions—Accrual—Mistake—Discovery.

Limitations did not begin to run against a suit to set aside a distribution decree for mistake until the mistake was discovered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 337, 476.]

7. Executors—Decree of Distribution—Vacation—Evidence—Will.

A suit to set aside a distribution decree for mistake was a direct attack thereon, in which the probated will was competent evidence to prove the error.

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Mamie C. Bacon against Frank Page Bacon and others. From a judgment in favor of plaintiff, and from an order denying defendants' motion for a new trial, defendant Frank Page Bacon and certain others appeal. Affirmed.

R. Brent Mitchell (John A. Percy, of counsel), for appellants. Bishop & Wheeler and W. W. Deamer, for respondent.

SHAW, J. On January 19, 1893, Henry D. Bacon died, leaving surviving him his widow, Julia A. Bacon, and three children, namely, Frank Page Bacon, Ella Etta Bacon Soule, and Carrie Jennie Bacon. His will was duly admitted to probate on March 13, 1893. By its terms the bulk of the testator's property, after payment of debts, was bequeathed to his three children aforesaid. It contained the following clause, out of which this litigation arises, to wit: "If my said estate is worth as much as two hundred and fifty thousand dollars, at my death after payment of liabilities as aforesaid I desire that my legal representatives shall pay to the wife of my said son Frank the sum of ten thousand dollars and to the husband or husbands of my said daughters Ella Etta and Carrie Jennie each the sum of ten thousand dollars." The plaintiff, at that time, was the wife of said son Frank. The estate was worth much more than $250,000, and she was therefore entitled to the legacy of $10,000. The three children were appointed executor and executrices of the will, and duly qualified and acted as such. Shortly after the testator's death, and before the will was probated, the children and other parties interested, except the plaintiff, met for the purpose of reading the will. In reading it, by mistake the word "ten" was read as "two" where it occurs in the above-quoted clause. This mistake was carried into all the subsequent proceedings, was not perceived by any of the interested parties or any person concerned in the administration, the respective legacies were paid as legacies of $2,000 each, that sum was accepted and receipted for as payment in full by the plaintiff, all parties then believing that the legacies were each for $2,000 only, and a petition for distribution was thereafter filed, notice thereof duly given, and a decree of final distribution of the estate made on December 18, 1896, reciting the said legacy as a legacy for $2,000, declaring its full payment, and distributing the residue to the defendant Bacon Land & Loan Company, a corporation organized to receive and hold the property of the estate, to which said residuary legatees had theretofore conveyed their respective interests in exchange for a proportionate amount of the corporation stock. It is also claimed that this decree was obtained by fraud, as well as by reason of the mistake above mentioned.

This suit was begun on July 31, 1899, against the residuary legatees above named, both in their individual and representative capacities. The widow and the said corporation are also made parties defendant. The object of the action is to obtain a judgment declaring that the legacy bequeathed to plaintiff by the will was $10,000; that of that sum $8,000, with interest, remains unpaid; that the decree of distribution with respect to the recitals that the legacy was $2,000 was satisfied be held void; that the said sum of $8,000 and interest be declared a lien and charge on the property of said estate so distributed to said corporation, or on the stock of said corporation issued to said legatees in exchange for said property in case the property could not be charged; that said property or stock be declared to be held in trust for plaintiff, so far as may be necessary for the payment of the said balance with interest; and that, if not paid, then that said property be sold and payment made out of the proceeds. The court gave judgment substantially as prayed for against the three residuary legatees, declaring said balance and interest a lien and charge on the stock of said corporation belonging to them, and that they held said stock in trust for the plaintiff, so far as should be necessary for the payment of the balance, enjoining any transfer by them and providing for its sale to satisfy said lien. It also gave personal judgment against said legatees in favor of plaintiff for the amount of said balance and interest, and declared her receipt for full payment canceled. The court refused to declare a lien or charge against the property of the estate held by the corporation, and gave judgment in favor of said corporation for its costs. From this judgment, and from an order denying their motion for a new trial, the said Frank Page Bacon, Ella Etta Bacon Soule, and Carrie Jennie Bacon appeal.

There is also an appeal by the same parties as personal representatives of the deceased, Henry D. Bacon; they having never been discharged from that trust. There is no judgment against them in that capacity, except so far as the judgment declaring void the recitals in the decree and canceling the receipts may be so construed. Their interests in that capacity are concerned only so far as that part of the judgment may require further proceedings in the administration of the estate. This appeal has not been argued by either party, and need receive no further consideration here.

The first proposition of the appellants is that the superior court had no jurisdiction of the subject-matter of the action. The complaint states a cause of action of the class formerly cognizable in equity and now within the jurisdiction of the superior courts by virtue of the constitutional grant to those courts of "original jurisdiction in all cases in equity." Article 6, § 5. The appellants claim that decrees of distribution constitute an exception to the general rule, and cannot be reviewed in equity upon the ground of fraud or mistake.

1. The proposition that a decree of distribution is subject to review in equity, upon a showing that it was procured by fraud or mistake, appears to be settled by the decisions of this court in Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232; Sohler v. Sohler, 135 Cal. 323,

67 Pac. 282, 87 Am. St. Rep. 98; Estate of Hudson, 63 Cal. 457; Dean v. Superior Court, 63 Cal. 478; Wingerter v. Wingerter, 71 Cal. 110, 11 Pac. 853; Buckley v. Superior Court, 102 Cal. 10, 36 Pac. 360, 41 Am. St. Rep. 135. In Baker v. O'Riordan, supra, a decree of distribution to the defendant had been obtained by the consent of an attorney, who, fraudulently and without authority, appeared for Baker, who was entitled as husband of the decedent. It was a case of the kind described in U. S. v. Throckmorton, 98 U. S. 65, 25 L. Ed. 93, as a case "where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat," and which is classed therein as among the instances of fraud for which a new suit would be sustained to set aside the judgment so obtained. In regard to the jurisdiction, this court, in Baker v. O'Riordan, said: " 'The equitable jurisdiction to cancel and set aside or to restrain judgments and decrees of any court, obtained by a fraud practiced upon the court and the losing party, is well settled and familiar.' 2 Pomeroy, Eq. Jur. 919. * * * We have no doubt of the right of the plaintiff, under the findings, to have the decree assigning his share of the estate of his wife to the defendant canceled and set aside." In Sohler v. Sohler, supra, the plaintiff sued to set aside a decree of distribution induced by the fraud of the defendants, coupled with the mistake or ignorance of the plaintiff; the ignorance being also the result of the fraud. The court below had sustained a demurrer to the complaint. The Supreme Court reversed the judgment, held that the superior court had jurisdiction of the action and power to review the decree of distribution, and to declare that the defendants held as involuntary trustees of the plaintiff the property improperly vested in them by the decree. This is substantially the same relief as that given in the case at bar. The other cases above cited contain declarations similar in effect to the above quotation from Baker v. O'Riordan, and, although they may be obiter dictum, we think they correctly state a settled rule of equity jurisprudence.

The decisions cited by the appellants are not in conflict with these conclusions. In Langdon v. Blackburn, 109 Cal. 19, 41 Pac. 814, it seems to have been conceded that, while the probate of a will could not be reviewed in equity, a decree of distribution was subject to such attack in a proper case of extraneous or collateral fraud, and it was held that the showing of such fraud in that case was insufficient. William Hill Co. v. Lawler, 116 Cal. 360, 48 Pac. 323; Jewell v. Pierce, 120 Cal. 79, 52 Pac. 132; Cunha v. Hughes, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27; and McKenzie v. Budd, 125 Cal. 600, 58 Pac. 199—were collateral attacks upon decrees of distribution, and they simply announce that the well-known rule protecting judgments against collateral attack, except for want of jurisdiction, is applicable to such decrees. They have no bearing on the question. Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145, and In re Trescony, 119 Cal. 568, 51 Pac. 951, merely decide that the decree of distribution supersedes the will, and that, so long as the decree stands unreversed by any direct attack, the will cannot, in any collateral inquiry, be used to impeach the decree. Toland v. Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100, was an action in the superior court to construe a will and obtain a decree directing the same court as to the manner in which it should distribute the estate then in course of administration in that court. It was held that such a proceeding in equity was no longer necessary, that the same relief could be obtained from the same court in the regular course of the probate proceedings, and that the former jurisdiction of equity was now exercised through the same court by means of the proceeding for distribution, or a proceeding under section 1664, Code Civ. Proc., which were made the exclusive modes of obtaining a judicial construction of a will. Lynch v. Rooney, 112 Cal. 282, 44 Pac. 565, was an attempt to review a decree of distribution and declare an involuntary trust, upon a showing that the decree was procured by false or mistaken testimony. The case is one of the class where the fraud or mistake is intrinsic. In such cases no relief can be given. Pico v. Cohn, 91 Cal. 133, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; U. S. v. Throckmorton, supra. If the latter part of the opinion in this case was intended to declare that such decrees may not be reviewed for extrinsic fraud in procuring them to be made, it must be considered as overruled by the decision in Sohler v. Sohler, supra,. In Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158, the opinion concedes that a distributee may, in a proper case, be held as an involuntary trustee, but decides that the fraud there shown was not extrinsic or collateral.

It is urged, with respect to the jurisdiction, that decrees of distribution, being a part of the same probate proceeding as the decree probating the will, must be governed by the same rule, and that, as in State v. McGlynn, 20 Cal. 231, 262, 81 Am. Dec. 118, and Kieley v. McGlynn (Broderick's Will), 88 U. S. 503, 22 L. Ed. 599, it was decided that decrees probating wills are not subject to review in equity for fraud or mistake, it would follow that a decree of distribution cannot be so reviewed. In view of the decisions we have cited to the contrary, this proposition is clearly untenable. Furthermore, the rule denying such power to review the probate of a will, while it is declared by the above decisions, and perhaps by the greater number of decisions elsewhere, is universally admitted to be an exception to the general rule that all final judgments are subject to such attack. The reasons given in support of the exception are generally declared in the opinions to be unsatisfactory and illogical, and the discussions usually end with the statement that, whether for good reasons or not, the exception is firmly established, and upon that ground must be adhered to. An exception so poorly supported by reason should not be extended to a new class of cases.

2. It is further claimed that such review is prohibited by the provisions of section 1666 of the Code of Civil Procedure, which, on this point, is as follows: "In the order or decree the court must name the persons and proportions or parts to which each shall be entitled. * * * Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal." The proposition proves too much. It necessarily concedes that such jurisdiction is conferred by the Constitution and would remain in the superior court, but for this statute, which is supposed to divest it. The Legislature does not possess power to divest the court of its constitutional jurisdiction. It may change the practice or procedure, the mere method by which the jurisdiction is exercised (Ex parte Harker, 49 Cal. 467), but it cannot take away the jurisdiction entirely, nor substantially impair it. No adequate new procedure has been provided for the exercise of this jurisdiction, and, if it exists at all, it must be exercised by the long-established method of an independent suit. It is true that section 473 of the Code of Civil Procedure provides that, upon motion in the same cause or proceeding, instituted within six months after judgment, a party may be relieved from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. This would undoubtedly also include mistake superinduced by the fraud of the other party, and it does provide a new method whereby some relief can be obtained on motion, similar to that here sought by an independent suit. But this provision has never been considered as an exclusive method for the exercise of the equity jurisdiction, nor as an adequate substitute for the right to proceed by action. It is a cumulative remedy, and does not displace the remedy in equity. Baker v. O'Riordan, supra. We have recently held, not only that it does not displace the equitable remedy, but also that an adverse decision on such a motion does not necessarily bar a subsequent suit to vacate the judgment for the same cause. Estudillo v. Security L. & T. Co. (Cal. Sup.) 87 Pac. 19. Also, Freeman on Judgments, § 511; Simson v. Hart, 14 Johns. 63; Wistar v. McManes, 54 Pa. 318, 93 Am. Dec. 700. It follows that the jurisdiction still remains, notwithstanding the provisions of that section.

It is suggested that, at the time the present Constitution was adopted, section 1666 was in force, and its effect was that courts of equity were thereby deprived of jurisdiction to vacate decrees of this class; that the jurisdiction in equity conferred by the constitutional grant must be understood to include only the jurisdiction as then existing and as limited by that section; and hence that it did not include the power to vacate judgments in cases of this class. To this there is a sufficient answer. The grant of this jurisdiction is not a new provision. It was conferred upon the district courts by the Constitution of 1849, in identical language, and this had been construed to give that court the same jurisdiction as that formerly possessed by the equity courts. Sanford v. Head, 5 Cal. 298; People v. Davidson, 30 Cal. 391; Rosenberg v. Frank, 58 Cal. 400. In Sanford v. Head, supra, it was held that this jurisdiction included power to set aside a judgment for fraud, and in Baker v. O'Riordan, supra, this doctrine was applied to a decree of distribution. Hence this provision of section 1666, if we consider that it was intended to divest a party of this equity jurisdiction, must have been unconstitutional and void in 1866, when it was first enacted. St. 1865–66, p. 767, c. 548. The Constitution of 1879 gave the jurisdiction to the superior court by the use of the same language as that of 1849, and it must be construed to have the same effect. The effect of the words used cannot be changed, and the jurisdiction limited, by reference to a void statutory provision, having only a nominal existence at the time of the adoption of the new Constitution. The grant of jurisdiction in all cases in equity, made in 1879, was of the same effect as the similar grant in 1849, and conferred upon the superior courts the jurisdiction previously vested in the district courts, and therefore it was unaffected by the void statute.

We think, however, that section 1666 was not intended to have the effect claimed. A statute should be so construed as to make it constitutional, if it is reasonably possible. People v. Frisbie, 26 Cal. 139; French v. Teschemaker, 24 Cal. 554. The provision may reasonably be interpreted to mean no more than that the decree of distribution should have the same force and effect as other final judgments; that is to say, that it should not be subject to collateral attack, but only to direct attack on appeal, or as otherwise provided by law. This construction was, in effect, given to it by the decision in De Pedrorena v. Superior Court, 80 Cal. 144, 22 Pac. 71. The rigid construction contended for would as completely cut off the power of the court to vacate such decree upon proceedings by motion, under section 473, Code Civ. Proc., as it would the power of review by a suit in equity. Yet in that case it was held that the court had power to set aside a decree of distribution, on motion, under section 473, begun within six months after its rendition, notwithstanding the provision of section 1666 aforesaid. Thus, in effect, it declared that the latter section does not exclude any form of direct attack. A suit to review a judgment for fraud or mistake is a direct proceeding against such judgment, and not a collateral attack. Bergin v. Haight, 99 Cal. 56, 33 Pac. 760. We conclude that the provisions of section 1666 do not prevent a review of a decree of distribution by a suit in equity, in a proper case.

3. It is urged that the power to review judgments extends only to cases where they have been procured by fraud, and that it does not exist with respect to judgment wrongfully given by reason of mistake either of the court or of the injured party. No such distinction is recognized by the authorities. The text-books all declare that such relief can be given where the former judgment was the result of a mistake, unmixed with fraud, and not the result of the negligence of the injured party. Black on Judgments, § 381; 2 Freeman on Judgments, § 500; 2 Story, Eq. Jur. § 885; 2 Beach on Injunctions, § 701; 2 Pomeroy, Eq. Jur. § 871; 3 Pomeroy, Eq. Jur. §§ 1376, 1377; 16 Am. & Eng. Ency. of Law, p. 383; 1 High on Injunctions, § 209 et seq. Indeed, the cases on the subject of mistake allow relief from a judgment where the subject-matter of the mistake approaches more closely the actual merits of the former inquiry than in cases of fraud. In Quivey v. Baker, 37 Cal. 465, and Busey v. Moraga, 130 Cal. 588, 62 Pac. 1081, a mortgage, by mistake, described a lot not owned by the mortgagor, instead of the one intended. It was foreclosed, and the same mistake was inadvertently carried into the judgment, the sale, and the sheriff's deed. It was held that an action would lie to correct all the mistakes, including the mortgage, the judgment, and the deed. In Gerig v. Loveland, 130 Cal. 512, 62 Pac. 830, one who held two mortgages for the same debt, by mistake foreclosed the first alone, which covered less property than the second, and was insufficient to pay the debt. The court declared that he could maintain an action to cancel the first decree, and to foreclose the second mortgage against a subsequent judgment creditor, thus avoiding the bar of section 726, Code Civ. Proc., allowing but one action on a debt secured by a mortgage. In Merrill v. Bank, 94 Cal. 59, 29 Pac. 242, a judgment by default was rendered against two makers of a note. One of them afterwards discovered that the note had been fully satisfied by the other before the suit was begun. An action by him to set aside the judgment, or to have it declared satisfied as to him, was sustained; it appearing that he was not negligent in failing sooner to discover the defense. Ford v. Ford, 1 Walk. (Miss.) 505, 12 Am. Dec. 587, is substantially to the same effect. In Cohen v. Dubose, 1 Harp. Eq. (S. C.) 102, 14 Am. Dec. 709, there was a trial by jury in an action at law on a note. The note was given in evidence, and the jury returned a verdict for plaintiff for the amount of the principal thereon; the interest being omitted by their mistake. It was held that the plaintiff could maintain a suit in equity to correct the mistake and compel payment of the interest, and that the testimony of the jurors could be introduced in proof of the mistake. Chief Justice Marshall, in Marine I. & S. Co. v. Hodgson, 7 Cranch, 336, 3 L. Ed. 362, states the rule thus: "It may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of equity. On the other hand, it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law."

We are satisfied that the court below had power to entertain the suit and give the relief awarded by the judgment appealed from. It remains for us to consider the case upon its merits.

4. A photographic copy of the will is inserted in the record. Upon a casual reading, a person of ordinary skill in deciphering penmanship might easily mistake the word "ten," in the two places where it appears therein, for the word "two," and believe that the legacies were each for $2,000; but, upon a careful reading, and especially upon a comparison with the formation of the same letters in other parts of the will, and without the aid of a microscope, no person of experience could doubt that the word is "ten," and that the legacies are each for $10,000, and not for $2,000. Without doubt the testator did bequeath to the plaintiff a legacy of $10,000. The original will was filed and probated as it was written by the testator, and, consequently, the estate exceeding $250,000, the probate of the will clearly established that the plaintiff was entitled to a legacy of $10,000.

At the time of the first reading of the will, when the words "ten" were erroneously read by all parties present as "two," the attorney of the executors was present, and was directed by them to have typewritten copies of the will made and sent to the parties interested. This was immediately done; the copyist by mistake writing the amount of the legacy as "two thousand dollars." Thereafter these copies were used in the subsequent proceedings, and the original will was not again carefully read or examined by any person until some three years after the estate was distributed. Thus the mistake was perpetuated and repeated in the final decree. The plaintiff did not expect that any legacy would be left to her, and did not know that anything was given to her by the will, until she was informed by her husband shortly after the first reading thereof. He told her that it gave her a legacy of $2,000. A day or two later she received the copy from the executors, which gave her the same information. She had every reason to believe that the information was correct. It came from those on whom she had a right to rely. We may presume that she had been accustomed to rely on her husband, and had found him trustworthy. She did rely on them, and believed that the legacy was, in fact, $2,000, and during the whole course of the administration she had no occasion for even a suspicion that it was otherwise. Under these circumstances, the court properly found that she cannot be charged with neglect in failing to discover the mistake. Furthermore, the information came from persons occupying fiduciary relations toward her. Her husband first informed her, and she then received the copy from the executors. Afterwards, and before the petition for distribution was filed, upon her request for payment of the supposed balance of her legacy, the individual defendants, in their representative capacity, prepared a receipt in full, in effect stating therein that the balance of the principal of her legacy was but $1,500 ($500 having been previously paid), which they presented to her, and demanded that she should sign upon payment of said balance, which she did, and the supposed balance was then paid by them to her. This was equivalent to a statement by them that her legacy was but $2,000. Executors occupy trust relations toward the legatees, and are bound to the utmost good faith in their transactions with the beneficiary. 1 Story, Eq. Jur. § 218; Robins v. Hope, 57 Cal. 497. They were also residuary legatees, and hence whatever was lacking in full payment to the plaintiff was so much gained to them. They are therefore not in any position to claim that the plaintiff, in relying on their own statements regarding the amount of the legacy, was lacking in diligence.

At the hearing of the petition for distribution the original will, in the handwriting of the testator, was on file, but it was not produced, examined, or read by or to the court. The petition was prepared from one of the typewritten copies of the will. It stated the legacy as for $2,000, and that it had been fully paid. This statement was read or stated to the court by the attorney for the executor and executrices, and he also then stated that it was a correct statement of the contents of the will. The court accepted his statement as true, and gave judgment for distribution accordingly. That all parties concerned, including the court, were acting under the influence of the mistake is unquestionable. It is claimed that it is not extrinsic or collateral to the case that the amount of the legacies and the purport and effect of the will were the precise things which the court was to ascertain and determine by the judgment, and that the mistake in reading the will was a mistake of the court, intrinsic to the action, which cannot be reviewed in any other court. If the plaintiff had been present at the hearing, contending that the will gave her $10,000, had presented the point to the court, and the court had thereupon read the word "ten" as "two," and had made the distribution as it was made by the judgment appealed from, no doubt she would be precluded from any relief by way of equitable review, no matter how plain the mistake of the court would appear. The mistake would then be a mere error in the consideration of the evidence in a case fully presented to the court, an error of the class which human tribunals are subject to in any case, and which cannot be reviewed in equity. There would also be a complete remedy at law. The party injured would have timely notice of the error, and could pursue the usual mode of review by motion for a new trial and appeal.

The general rule as to what constitutes extrinsic fraud or mistake is clearly stated by the United States Supreme Court in U. S. v. Throckmorton, 98 U. S. 65, 25 L. Ed. 93. After stating the general rule that a bill in equity will not lie to set aside a judgment obtained by means of perjured testimony, or forged documents, introduced in evidence in support of a contested issue of fact, that court says: "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to the suit, there was, in fact, *no adversary trial or decision of the issue in the case.* Where the unsuccessful party has been *prevented from exhibiting fully his case* by fraud or deception practiced upon him by his opponent, as by keeping him away from court; a false promise of a compromise; or where the defendant had never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interests to the other side—these, and *similar cases which show that there never has been a real contest at the trial or hearing of the case,* are reasons for which a new suit may be sustained to set aside the former judgment or decree and open the case for a new and fair hearing." (The italics are ours.) This statement was approved by this court in Pico v. Cohn, 91 Cal. 135, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. These cases refer to fraud as the preventing cause of the real contest, adversary trial, or fair submission. The cases related to fraud, and hence the discussion was confined to that subject, but the rule is the same where the preventing cause is mistake, influencing the action, or inaction, of the injured party. Bibend v. Kreutz, 20 Cal. 114; Merrill v. Bank, 94 Cal. 59, 29 Pac. 242; Marine Ins. Co. v. Hodgson, 7 Cranch, 336, 3 L. Ed. 362; Ford v. Ford, 1 Walk. (Miss.) 505, 12 Am. Dec. 587; Wilson v. Boughton, 50 Mo. 17; Drew v. Clarke, Cooke (Tenn.)

373, 5 Am. Dec. 698; Rust v. Ware, 6 Grat. 50, 52 Am. Dec. 100; Currier v. Esty, 110 Mass. 536; Epes v. Williams, 17 S. E. 235, 89 Va. 794; Busey v. Moraga, 130 Cal. 586, 62 Pac. 1081; note to Oliver v. Pray, 19 Am. Dec. 605. See, also, the citations to the text-books under subdivision 3 of this opinion. The gravamen of the rule thus expressed lies in the fact that "the successful party has been prevented from exhibiting fully his case," and, consequently, that there has been "no adversary trial or decision of the issue," no "real contest at the trial," or, as stated in Pico v. Cohn, no "fair submission of the controversy." Where the unsuccessful party has been thus hindered, he is not to be refused relief on the ground that the fact on which his defense or claim in the original action depended, and by which he expects to bring about a different result in the new suit for equitable relief, was technically in issue in the original action or proceeding, or was necessarily decided by the court in that action and concluded by the original judgment beyond reach on collateral inquiry. It is because such judgment does conclude all parties so long as it stands unrevoked and unaffected by any direct attack, not only as to the facts actually in issue, but also as to all facts not in issue, but which might constitute a possible defense, and is therefore injurious, that there is ground for the interposition of equity to give this form of relief. To deny relief where the fact is technically in issue, though, by reason of the mistake or fraud, not controverted or contested at the trial or hearing, would be to destroy the equitable remedy in a large class of cases in which it has been hitherto administered.

The case at bar comes fully within these principles. The plaintiff, by reason of the common mistake, believed that her legacy was only $2,000, instead of $10,000, as it was in fact. She had been fully paid the $2,000, which she believed to be the extent of her demand. Her claim was, as she supposed, satisfied, and she was thereby fully justified in assuming that she had no further concern with the estate and no interest in the distribution. As we have seen, the mistake was not caused by her culpable negligence. In this state of mind she would properly consider that she should not appear in the proceeding in which she had no interest. One who has no defense to an action against him, or no interest in a proceeding in which he is cited, is not negligent, or chargeable with laches, in failing to appear therein, but is thereby doing his legal duty to the court. The plaintiff testified, in substance, that, if she had not been misinformed in regard to the amount of her legacy, she would have made inquiry about it. The court below was justified by the circumstances disclosed by the evidence, as well as by this direct testimony, in finding that, by reason of her mistake as to the contents of the will, the plaintiff was induced to refrain from appearing in the proceeding for distribution and there contesting the statement that her legacy was but $2,000, and claiming the true amount thereof. It is therefore a fact that by reason of this mistake she was prevented from exhibiting fully her case, and that, as the result, there was no adversary trial, no real contest, and no fair submission of the question whether her legacy was $2,000 or $10,000. The obvious result was the decision of the court, based on the uncontested facts set forth in the petition for distribution, that the plaintiff had been paid in full, with the corresponding decree distributing to the residuary legatees $8,000 of the money of the estate, which, of right, belonged to the plaintiff. The mistake of the plaintiff, which led to this injury, was clearly caused by matters extraneous and collateral to the merely formal inquiry made by the court upon the hearing.

The court further found that her failure to appear was induced by both the actual and constructive fraud of the defendants. We do not find it necessary to consider the sufficiency of the evidence to support these respective findings of fraud. There is sufficient proof of mistake, as we have shown, and the judgment is fully sustained by the findings on that subject.

The plaintiff was not guilty of neglect or laches in the delay in beginning the present action. She did not discover the mistake until a short time before the action was begun. We do not find anything in the evidence which would necessarily put her on inquiry as to the amount of the legacy, or cause her to suspect that there had been a mistake concerning it. The dissensions between herself and her husband, and their consequent separation, occurring shortly before the time of the last payment upon the legacy, and the subsequent divorce, had no reference to the legacy, or to the will, and were not of a character to arouse in her a suspicion that her previous information from him concerning it was false, or a doubt of the good faith of the other defendants. She testified that she had no such doubt or suspicion. The delay does not appear to have been in the least injurious or prejudicial to the defendants in respect to their defense in this action, or in any other respect, and therefore one element of laches, as distinguished from the bar of the statute of limitations, is wanting. Cahill v. Superior Court, 145 Cal. 47, 78 Pac. 467; Mayer v. Mayor, 63 N. Y. 455; Lawrence v. American Nat. Bank, 54 N. Y. 432; Nat. Bank of Com. v. Nat. Mechanics' Bank, 55 N. Y. 211, 14 Am. Rep. 232; Snyder v. Ives, 42 Iowa, 157; U. S. Bank v. Georgia, 10 Wheat. 333, 349, 6 L. Ed. 334.

The action was not barred by the statute of limitations. The plaintiff had no actual knowledge of the mistake, prior to the distribution, nor until the accidental discovery, shortly before the action was begun. The statute did not begin to run until that discovery occurred. The causes which produced the cessation of the intimate relations between plaintiff and the defendants did not put plaintiff upon inquiry to the extent necessary to charge her with constructive notice of the mistake, prior to the actual discovery. The differences between them, as we have stated, would not necessarily affect her confidence in the honesty and integrity of the defendants, in respect to the administration of the estate.

There are other particulars wherein it is claimed that the evidence does not sustain the findings, but it is not necessary to discuss them in detail. A careful consideration of the evidence in the record satisfies us that it is sufficient to prove all the facts necessary to support the judgment. The will was competent evidence to prove the mistake, the right of the plaintiff, and the injury to her from the erroneous distribution. Decisions holding that a will is not admissible on collateral inquiry, after probate and distribution, to prove that it was disregarded, or incorrectly construed, by the court in making distribution of the estate, have no application here. This is not a collateral attack on the decree of distribution. It is a direct attack thereon. Bergin v. Haight, 99 Cal. 56, 33 Pac. 760. In such direct proceedings to impeach the decree the will is competent evidence to prove the error and the injury. It is unnecessary to discuss the other errors of law assigned. They are either not well taken, or they do not affect the result.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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150 Cal. 495

## SOULE v. BACON et al. (S. F. 3,744.)

(Supreme Court of California. Feb. 7, 1907.)

JUDGMENT — VACATION — MISTAKE — NEGLIGENCE.

Complainant, a legatee under testator's will to the extent of $10,000, was present when the will was read, at which time a mistake was made in reading his legacy as only $2,000. After the will was read, complainant looked at it, but, not having his spectacles, did not read it. Complainant's wife was one of the executrices, the others being his brother-in-law and sister-in-law, and they promised him a copy of the will, which was delivered a few days thereafter, in which the legacy appeared as $2,000. The mistake continued during the proceedings and into the distribution decree. Shortly after the will was read, a published account thereof stated complainant's legacy at $10,000, and, on his calling his wife's attention thereto, she stated she supposed it was a typographical error, and complainant at no time had any other cause to suspect that the copy of the will was defective. *Held*, that complainant was not chargeable with negligence as a matter of law, precluding his maintenance of a suit to set aside the distribution decree.

In Bank. Appeal from Superior Court, Alameda County; Samuel P. Hall, Judge.

Suit by Frank Soule against Frank Page Bacon and others. From a decree in favor of plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

R. B. Mitchell, for appellants. Bishop & Wheeler and W. W. Deamer, for respondent.

SHAW, J. This was an action by the plaintiff to declare the defendants involuntary trustees of the plaintiff, with respect to the sum of $8,000 belonging to the estate of Henry D. Bacon, deceased, which is claimed by plaintiff as the balance of a legacy given to him by the last will of said deceased, but which, by the decree of final distribution of said estate, was distributed to a corporation organized by the defendants to take and hold the property for their benefit. Judgment was given for plaintiff in the court below. The defendants appealed from the judgment and from an order denying their motion for a new trial.

The case is, in all important particulars, identical with the case of Bacon v. Bacon et al. (decided concurrently with this case) 89 Pac. 317. The parties defendant are the same, and the case depends on the same clause in the will of Henry D. Bacon, and involves the same mistake with respect to the word "ten" in that part of the clause relating to the husband of the defendant, Ella Etta Bacon Soule. The plaintiff was the husband of said defendant, and as such he was given a legacy of $10,000 by the will, but by reason of the mistake he received only $2,000. An estrangement between the husband and wife occurred similar to that in the other case. The questions of law involved, and the facts and evidence also, are, with a few unimportant exceptions, of similar effect to those set forth in the aforesaid case of Bacon v. Bacon, and for the evidence, the facts, and the law of this case we refer to the opinion in that case, where they are elaborately stated and discussed. In this opinion we confine ourselves to a discussion of the exceptions.

Frank Soule, the plaintiff here, was present at the first reading of the will, prior to its probate, and at that time, after it had been read aloud by the attorney for the executor and executrices, he took it in his hands for a moment and looked at it, but, not having on his spectacles at the time, he did not read it, but passed it on to the others. At that time, and while the persons interested were assembled in the presence of the executor and executrices appointed by the will, one of them voluntarily promised, on behalf of all, that they would prepare copies of the will and send one to each person receiving a legacy. A few days afterwards the plaintiff was presented with a copy of the will by his wife, who was an executrix, with the statement that it was the copy promised. Shortly afterwards he read in a newspaper a statement, purporting to give the substance of the will, in which the amount of his legacy was stated as $10,000. There was some conversation at that time between himself, his wife, and her sister, the defendant Carrie Jennie Bacon, in which the plaintiff and his wife both remarked that they supposed the newspaper statement regarding his legacy was a typographical error or an ordinary newspaper exaggeration. He never at any time had further cause to suspect that his copy of the will was not accurate, or that his legacy was larger than $2,000, or that the representatives of the estate were not dealing fairly and honestly with him. In all other respects the present case is not materially different, in respect to the facts, from that of the plaintiff in the case of Bacon v. Bacon, supra. It is apparent in both cases, from the conduct of the parties, that all the interested persons had full confidence in the capacity and integrity of the attorney who read the will aloud at the meeting above mentioned. There never was any statement or intimation to the plaintiff, from any source, that the writing of the words in the will was at all difficult to decipher, or that any person who read it had any hesitation in pronouncing as "two" the word, which in fact was "ten," designating the number of thousands of dollars to be given to the plaintiff, unless it was given by the newspaper article above mentioned.

The facts here recited, when considered in connection with the facts appearing in the case of Bacon v. Bacon, aforesaid, do not require a decision at our hands different from that made in that case. The fact that all parties were mistaken in regard to the amount of the legacy is entirely clear. The only effect of the additional facts recited is to make a somewhat stronger case of negligence on the part of the plaintiff here, in failing to discover the true amount of the legacy until after the decree of distribution. But, with this additional evidence on the subject, the negligence of the plaintiff is not so marked and inexcusable that we can say that the implied finding of the court that the mistake, so far as he was concerned, was not caused by his inexcusable negligence, should be set aside and the case reversed. There are many cases holding that the party may have relief in equity from the consequences of his mistake of fact, although he was somewhat negligent in making the mistake, if his negligence in no way prejudiced the opposing party. Mayer v. Mayor, 63 N. Y. 455; Snyder v. Ives, 42 Iowa, 157; Lewis v. Lewis, 5 Or. 170; Capehart v. Mhoon, 58 N. C. 179; Voorhis v. Murphy, 26 N. J. Eq. 434. Although this rule may not apply with full force to suits in equity to relieve a party from a judgment, nevertheless, the failure of the plaintiff, under the circumstances of the case, to make an earlier discovery of the true amount due him, was not negligence of such a character that it must be declared negligence in law, contrary to the implied finding of the court that it was not negligence. At most, it was a question of fact for the court below to determine whether or not the lack of vigilance on the part of the plaintiff was such as would not have occurred with a man of ordinary care and prudence, under the same circumstances. That court has decided the question in favor of the plaintiff, and we are satisfied with its conclusion.

Some additional errors of law in the admission of evidence are assigned, but we do not think they are of sufficient importance to require discussion. The objections made were either properly overruled, or the evidence elicited was of such slight importance that we cannot believe that the court below could have been influenced thereby in the least in coming to a decision.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

150 Cal. 454

## BROWN v. KLEMMER, County Treasurer.

## DAVIDSON v. SAME. (Sac. 1,310, 935).

(Supreme Court of California. Feb. 7, 1907.)

COUNTIES—FUND—TRANSFER—POWER OF SUPERVISORS.

County Government Act, St. 1897, p. 463, c. 277, § 25, subd. 18, authorizes supervisors to establish such funds as they may deem necessary, and to transfer moneys from one fund to another as the public interest may require, and Pol. Code, § 2712, provides that, when it appears that a road district would be unreasonably burdened by the expense of constructing, maintaining, or repairing a bridge, the supervisors may in their discretion cause a portion of the expense to be paid out of the general road fund of the county, or, by vote of two-thirds of the board of supervisors, may order a portion of the cost of construction and repairs of bridges to be paid out of the county general fund as well as the general road fund. *Held*, that neither of such provisions authorized the board of supervisors to direct a transfer of money from the general fund to a particular road district fund which is expressly limited by law in the amount of its receipts, on the ground that the expense of repairs of certain bridges in such road district, if paid in full out of the funds thereof, would impoverish such district.

In Bank. Appeal from Superior Court, Glenn County; Oval Pirkey, Judge.

Mandamus on petitions of David Brown and C. O. Davidson against L. J. Klemmer. From a judgment in favor of petitioners, defendant appeals. Reversed.

R. L. Clifton, for appellant. Charles L. Donohoe and Frank Freeman, for respondents. Snook & Church, amici curiæ.

ANGELLOTTI, J. By stipulation these two cases are to be heard and determined together. The facts are alike, and the law applying to each case is the same. The action is in mandamus to compel the defendant, as county treasurer of Glenn county, to transfer from the county general fund, in the one case, the sum of $1,512, to the fund of road district No. 2, and, in the other case, the sum of $854 to the fund of road district No. 5. Demurrers were interposed to the petitions and overruled, and defendant having failed to answer, judgment was given in each case that a peremptory writ of mandate issue in accord with the prayer of the petition. Defendant appeals from said judgments. The question before us is as to whether the petitions stated facts sufficient to justify the issuance of the writs.

According to the allegations of the petitions, the material facts were as follows: On February 5, 1904, the board of supervisors of Glenn county, by a two-thirds vote, made an order declaring with respect to each of said road districts that the expense of repairs theretofore made to certain bridges therein, if paid in full out of the funds of said road districts, would not only unreasonably overburden, but would impoverish, said districts, that one-half of such expense, $1,512 in one case and $854 in the other, would be a just and reasonable portion thereof to be paid out of the county general fund, and ordering that, "for the purpose of paying one-half of the cost of repairs," the respective sums aforesaid be transferred from the county general fund to the road district funds, and directing the auditor and treasurer to make the transfers accordingly. There was no order for the payment of any money on account of the repairs; the order being simply one for the transfers. Although there was sufficient money in the county general fund, the treasurer refuses to make the transfers ordered, and it is to compel compliance with said order that these proceedings were instituted.

We are unable to find in the statutes any authorization for the order made by the board of supervisors. No such authority is to be found in subdivision 18 of section 25 of the county government act (St. 1897, p. 463, c. 277), empowering the supervisors to establish such funds "as they may deem necessary and to transfer moneys from one fund to another, as the public interest may require." This is established by the decision in the case of Potter v. Fowzer, 78 Cal. 493, 21 Pac. 118, where a transfer from the county general fund to a road district fund was attempted to be justified under a similar provision of the original county government act. The court there said: "Under this provision the supervisors may establish county funds, and may transfer money from one fund to another, when required by the public interest; but it cannot be construed to authorize the transfer to a fund established by law, and expressly limited in the amount of its receipts." There is no statutory provision which, in terms, empowers the board of supervisors to transfer money to the fund of any road district.

It is sought to justify the order upon the ground that, under the statute by a two-thirds vote of the board of supervisors, the county general fund could be resorted to for the purpose of paying a portion of the cost of these repairs. Ordinarily, the general county fund, collected for general county purposes from all portions of the county, including municipalities, cannot be used for county highway purposes at all. The Legislature has, however, provided that the cost of certain highway work may be wholly or partially paid for from such general fund. Section 2712, Pol. Code, authorizes this to be done in the case of bridge work under certain circumstances, providing that, when it appears that a road district would be unreasonably burdened by the expense of constructing, maintaining, or repairing a bridge, the supervisors "may, in their discretion, cause a portion of the aggregate cost or expense *to be paid out of the general road fund* of the county, or by vote of two-thirds of the board of supervisors, said board *may*, in their discretion, *order* a portion of the cost of construction and repairs of bridges * * * *to be paid out of the county general fund* as well as the general road fund." (The italics are ours.) It will be seen that this section does not purport to authorize any order for the transfer of money *to a road district fund*, but simply authorizes an order for the *payment out of* the general road fund and *out of* the county general funds of amounts that would otherwise be payable only from a road district fund. The section authorizing this exceptional use of the county general fund thus prescribes the method, which is by ordering the payment *directly* from that fund. We are satisfied that the method so prescribed should be held to be exclusive. An examination of the other sections authorizing the use of the county general fund for certain highway purposes discloses the fact that in each case the provision is that the cost apportioned to such fund shall be charged to or paid from the general county fund (Pol. Code, § 2643, subd. 10, and Id., § 2647), and subdivision 8 of section 2643 provides that in auditing claims the board shall "specify the fund or funds, from which the whole or any part of any claim, * * * must be paid." We cannot avoid the conclusion that the Legislature intended that payments for highway purposes authorized to be made from the county general fund should be made directly therefrom, and not accomplished through the circuitous method of a transfer to a road district fund and payment therefrom. Nor should it be held that the distinction here made is one only of form, and not of substance. This very case suggests a reason in support of the method provided. While it is declared in the order of transfer that the transfer is for the purpose of paying a portion of the expense of this bridge work, there is no order for such payment. How can it be known that the money so transferred, instead of being devoted to this purpose, will not ultimately be used, as all real road district money may be used, for some district highway purpose for which the county general fund cannot be resorted to? As is pertinently asked by counsel for defendant: "Must the treasurer keep a fund within a fund, and check up to know whether the supervisors have expended the transferred money for the special purpose?" Were such a method as is here attempted generally followed, it would lead to endless confusion in the accounts of the various road districts, and render it exceedingly difficult to determine exactly for what highway purposes the general county fund was in fact used by the board of supervisors, and whether the same was used for a prohibited purpose or not.

No possible legitimate reason can be suggested for such an order as is here involved. If county general fund money can be used to pay the expenses incurred in these repairs, an order of payment directly from such fund may be made. If there be any reason why they cannot be paid directly from that fund, the same reason is sufficient to forbid their payment in the manner here attempted. If they cannot be directly paid from the general fund, they cannot be indirectly so paid. It is, however, sufficient for all the purposes of this case, that there is no authority in the law for any such order of transfer on the part of the board of supervisors. The Legislature has seen fit to prescribe a different method for the payment of moneys for certain highway purposes from the county general fund. The order therefore was void, and the treasurer, in the discharge of his official duties, properly refused to comply with the same.

The judgment in each case is reversed.

We concur: BEATTY, C. J.; SLOSS, J.; HENSHAW, J.

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(150 Cal. 458)

## LIVERMORE v. RATTI et al. (S. F. 3,548.)

(Supreme Court of California. May 24, 1906. On Rehearing in Bank, Feb. 7, 1907.)

1. Guardian and Ward—Final Accounting—Death of Ward — Legal Representatives.

Code Civ. Proc. § 1754, makes it the duty of a guardian at the expiration of his trust to settle his accounts with the court, or with the ward, if he be of full age, or his legal representatives, and to pay over the moneys and effects in his hands on such settlement to the person lawfully entitled thereto. *Held* that, where the ward died before settlement of the guardian's account, the settlement must be had with the ward's legal representative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 465.]

2. Guardian and Ward—Guardian's Account—Settlement—Appointment of Administrator—Notice.

Code Civ. Proc. § 1754, makes it the duty of a guardian to settle his accounts with the court, the ward, or his legal representatives, and section 1634 provides that, when a final account is to be settled, at least 10 days' notice must be given of the time and place of the hearing by posting. *Held*, that where, on the death of a ward, notices of final hearing of the guardian's account were posted on March 16, 1899, but no legal representative of the ward was appointed until March 20th, and the hearing was had and the account allowed on the 27th, there was no sufficient notice to a person legally representing the ward, and the decree allowing the account was therefore void.

On Rehearing.

3. Same—Notice of Hearing.

Under Code Civ. Proc. § 1789, providing that the proceedings on the settlement of the account of a guardian and the notices required thereof are the same as on the settlement of the accounts of an executor or administrator, section 1634, declaring that, if the account filed by an administrator be for a final settlement, notice of the time and place of the hearing must be posted or published for at least ten days prior to the day fixed for the hearing, is applicable to the settlement of the final account of the guardian of a deceased ward.

4. Same—Jurisdiction.

Where, after the death of a ward, an administrator was appointed for the ward's estate, the court in proceeding to settle the guardian's account could acquire jurisdiction of the administrator only by his appearance at or before the hearing, by the issuance of a citation to him and a personal service thereof, or by posting or publishing the same as required by law for 10 days before the day set for the hearing.

5. Same—Presumption as to Jurisdiction—Collateral Attack.

The record of the settlement of a guardian's account stated that jurisdiction was acquired by the posting of notices, which were shown both by recitals and by proofs on file to have been posted less than 10 days after the appointment of an administrator of the ward's estate. The record also disclosed that there was no continuance, but that the hearing was had and the guardian's report approved on the date specified in the notices. *Held*, that it conclusively appeared that the court had no jurisdiction of the representative of the ward's estate at the time the guardian's account was allowed, and that a finding that notice had been given as required by law and as ordered by the court did not justify a presumption that other proof of jurisdiction not shown by the record had been adduced.

Department No. 1. Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by Charles E. Livermore, as executor of the will of Teresa B. Livermore, deceased, against Giovanni B. Ratti, individually, and as administrator of the estate of Delfina L. Ratti, deceased. From a judgment for plaintiff, defendants appeal. Reversed.

Metcalf & Metcalf and Johnson & Shaw, for appellants. William R. Davis and George W. Langan, for respondent.

SHAW, J. This is an appeal by the defendants from the judgment and from an order denying their motion for a new trial. The complaint sets forth an action to enforce a lien against certain lands formerly belonging to the deceased, Delfina L. Ratti; the said Giovanni being her sole surviving heir at law. Teresa B. Livermore was the mother of the deceased, Delfina L. Ratti. In April, 1888, she was appointed guardian of the person and estate of Delfina, and continued to act in that capacity until the said Delfina arrived at the age of 18 years, which was on the 25th of November, 1892. No account of her trust as guardian was ever filed or presented to the court during the minority of the ward, nor at all until March

15, 1899. On September 29, 1897, the ward Delfina was married to the defendant Giovanni B. Ratti, and on September 19, 1898, she died intestate, leaving surviving her husband and one child, which child has since died, at the age of four months. On March 15, 1899, when the guardian Teresa B. Livermore filed her final account as guardian of her daughter Delfina, there had been no administrator appointed of the estate of her said daughter, although proceedings to that effect were then pending and were set for hearing on March 20, 1899. The hearing of the final account filed on March 15th was set for March 27th, and the usual 10 days' notice of that hearing was given by posting, in the manner required by the statute. On March 20th the defendant Giovanni was appointed administrator of the estate of the ward. The order settling the account recites that proof was made to the satisfaction of the court; that notice of said settlement had been given as required by law and as ordered by the court. The account showed disbursements of $1,508.18 by the guardian in excess of cash receipts, and that the entire estate of the ward consisted of a one-ninth interest in certain real estate. The order settled and allowed this balance, and declared that it should be a charge against the estate of the ward. The purpose of the action is to have this charge declared a lien against the estate and enforced by foreclosure.

The respondent contends that the order settling the final account and declaring the balance a charge upon the estate of the ward is invalid for want of jurisdiction in the court over the legal representative of the ward. By the provisions of section 1754 of the Code of Civil Procedure it is made the duty of the guardian, "at the expiration of his trust, to settle his accounts with the court, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto." The proceedings to settle the account of a guardian instituted after the ward has arrived at full age, or after the ward has deceased, is one in which no persons are directly interested except the guardian, on the one hand, and the ward, or his legal representative, on the other. The proceeding is regulated by the provisions of the act concerning administrators of deceased persons (Code Civ. Proc. § 1789), and under section 1634, Code of Civil Procedure, when a final account is to be settled, notice of at least 10 days must be given of the time and place of the hearing thereof. The effect of the provisions of section 1754, above quoted, in a case where the ward has deceased, is that the proceeding for the settlement of the account must be had with the legal representative. It would seem to be a reasonable conclusion from this provision that such proceeding cannot be instituted nor determined unless there is a legal representative against whom it can be prosecuted, who may appear and resist the claims of the guardian, and who may be bound by the adjudication therein made. His interests are adverse to those of the guardian, and he is a necessary party to the proceeding, although he may be brought in by constructive notice only. It is a proceeding of a special nature in which the only process required by law is the posting of a general notice for 10 days. In all cases where by statute a substituted service of notice is authorized in place of actual service, a strict compliance with the statute is essential to a valid service. 17 Ency. Pl. & Pr. 45; 19 Ency. Pl. & Pr. 625; Forbes v. Hyde, 31 Cal. 342; Ricketson v. Richardson, 26 Cal. 149; People v. Huber, 20 Cal. 81; McMinn v. Whelan, 27 Cal. 300. A publication or posting for less than the required time is ineffectual to give jurisdiction and renders the subsequent proceedings under such notice void. 17 Ency. Pl. & Pr. 94; Foster v. Vehmeyer, 133 Cal. 460, 65 Pac. 974. The theory upon which such constructive service is allowed as a substitute for actual service is that, if such public notice is given for a reasonable time, the parties interested will, during the prescribed period, thereby obtain knowledge of the proceeding, and, where the proper notice is given for the required time, such knowledge is conclusively presumed. The Legislature, within reasonable limits, has power to determine the length of the period over which the publication is to extend. Such determination implies that in the legislative judgment the whole of the period is necessary to create the presumption that the published notice has imparted knowledge to the persons interested. It is always in the power of the guardian to procure the appointment of an administrator with whom he may settle the account, and who will then be in existence to receive such constructive notice. Such legal representative being made by the statute a necessary party to the settlement, and constructive notice being authorized as to him, and the only notice given him, as in the present case, it seems to follow that his existence during the entire period required to make that form of service valid is necessary to raise the statutory presumption that he has obtained from such notice a knowledge of the pendency of the proceeding. In cases under the statute, where the ward dies before the account is filed, the full period of posting must run while the person against whom the notice is directed is in legal existence and capable of receiving such knowledge; otherwise there will not be the full statutory notice to him, and jurisdiction of the proceedings will be lacking. The giving of such notice before the appointment of a legal representative, or in part before and in part after such appointment, will not give the court jurisdiction to make a valid order settling the account. In the present case the notices were posted on

March 16, 1899, the legal representative was not appointed until March 20, 1899, and the hearing of the account and the order settling it was on March 27th. The administrator was not legally in existence in his representative capacity to receive such constructive notice during the period of the notice, except for the last seven days thereof, and consequently he could not in that capacity have received the full statutory constructive notice, upon which alone jurisdiction to make the order was predicated.

It follows, therefore, that the order in question is invalid. The evidence is therefore insufficient to support the finding that the order settling the account was duly given and made, the court erred in admitting the order in evidence over the objection of the defendant, and, as the findings show the dates of the notice and order and of the appointment of the administrator, and the consequent invalidity of the order, they are not sufficient to support the judgment.

In view of the conclusion we have reached upon this point in the case, it is unnecessary to consider the effect of the previous judgment as a former adjudication of the same cause of action, nor the numerous other questions presented.

The judgment and order are reversed.

We concur: ANGELLOTTI, J; SLOSS, J.

### On Rehearing In Bank.

SHAW, J. In the petition for rehearing it was urged that the recital of the order settling the final account of the guardian, that "proof was made to the satisfaction of the court that notice of said settlement had been given as required by law, and as ordered by the court," is, upon this inquiry, which, in effect, is collateral, conclusive evidence that the representative of the deceased ward's estate had, in some manner, received due and legal notice of the time and place of the hearing of the account, that it conclusively established jurisdiction, and that we cannot look into the record to ascertain what notice was in fact given to him, or receive proof of other facts outside the record to show the lack of jurisdiction. The rehearing was granted chiefly for the purpose of re-examining this point. Upon further consideration we are satisfied that the proposition is untenable.

The proper solution of the question depends upon the applicability of section 1634 of the Code of Civil Procedure to the proceedings for the settlement of the final account of a guardian. That it does apply thereto has not been disputed by either party. Section 1789, Code Civ. Proc., provides that the proceedings upon the settlement of the account of a guardian and the notices required thereof are the same as those required upon the settlement of the accounts of an executor or administrator. Section 1634, Code Civ. Proc., provides that, if the account filed by an administrator or executor be for a final settlement of the estate and a petition for final distribution of the estate is filed therewith, notice of the time and place of the hearing thereof must be posted or published for at least 10 days prior to the day fixed for said hearing. No other provision is made specifically relating to a final account. It has been, so far as we are advised, the universal custom throughout the state to treat this provision as applicable to a guardian's final account and to require 10 days' notice thereof. The final account of a guardian is, in many respects, the counterpart of the final account and petition for distribution of an executor or administrator. In the latter the balance due is determined and ordered paid over to the persons found to be the heirs, legatees, or creditors. In the former the balance is ascertained and ordered paid over and delivered to the ward, if living, or to his representative, if he is dead. Code Civ. Proc. § 1754. We think it is reasonable to conclude that the Legislature deemed the two proceedings to be analogous and intended that the same procedure should apply to both, so far as the notice to be given is concerned.

The court could have acquired jurisdiction of the administrator of the ward's estate in but three ways: Firstly, by his appearance at or before the hearing, by which act he would have submitted himself to its jurisdiction; secondly, by the issuance of a citation to him and its personal service on him; thirdly, by the constructive service of notice upon him, by posting or publishing the same as required by law for 10 days before the day set for the hearing. The latter notice is recited in the record, but there is nothing whatever in the record to indicate that any order was made by the court, or that there was any citation issued, or any appearance by or for the administrator. The proofs, which constitute a part of the record, show that the recital regarding the posting of notice was true. With respect to the order of the court, referred to in the recital, the record is silent. The law, however, does not provide for any order of court, except in the contingency that, at the time of the hearing, the court, or a judge thereof, deems the notice given by posting insufficient (Code Civ. Proc. § 1633), in which case a further notice may be ordered. This would necessarily require a continuance of the hearing to another day. The record shows affirmatively that there was no continuance, thus demonstrating that there was no order for any further notice, or that, if there was, no such notice could have been given, which fact would of itself be fatal to the existence of jurisdiction. With regard to the possible fact of an appearance by or for the administrator, it may be that, if the record had been silent concerning any sort of notice, the usual presumptions in favor of the validity of the proceedings of a court of general jurisdiction would prevail and such appearance would, if necessary, be conclusively presumed. But, on that point, the rule laid down in the leading case of Hahn v. Kelly, 34 Cal. 407, that, "when the record states what was done, it will not be presumed that something different was done," applies. The record here states that the jurisdiction was acquired by the posting of notices, which is shown by the recital and by the proofs on file, and it will not be presumed that it was acquired in some other way, as by an appearance. If service of notice in the manner recited was legally possible, it will be presumed that it was made, although the proof on file may be defective. In that event it would be presumed that proof was made by parol, or that the corrected proof had been mislaid. Sacremento Bank v. Montgomery, 146 Cal. 751, 752, 81 Pac. 138. The validity of the order, therefore, depends on the question whether or not, under the circumstances appearing outside the actual record of the proceedings, it was legally possible that the notice could have been given to the legal representative of the ward for 10 days before the hearing.

Upon the death of the ward, the law, as shown in the original opinion, to which we still adhere, requires the settlement to be made with the legal representative, and the constructive notice of 10 days must have been operative upon that representative for the full period of 10 days, and that in his representative capacity, to make it effective at all. For the purpose of showing that jurisdiction could not have been acquired in the manner shown by the record, evidence is admissible to prove any fact, the existence or nonexistence of which is not conclusively established by the record or its recitals. Thus, if a judgment against a corporation recites due service of process upon the corporation, or the appearance for it by some authorized person, it may be set aside upon proof that it had been dissolved and had no legal existence for any purpose at the time the action was begun and until the rendition of the judgment. So, also, if a judgment against a natural person recites due service of process on him, his heirs or legal representatives may show that such service was impossible, and that the judgment was void, by proof that he was dead before the action was begun.

In like manner, the giving of an effective notice in the manner here recited is shown to be impossible and the order is accordingly avoided, by proof of the fact that the legal representative of the ward was not in legal existence to receive it, during a necessary part of the 10 days for which it was running; that is, that he was not appointed until March 20, 1899, which was only seven days prior to the day upon which the order was made. Neither the record nor the recital of the giving of the notice, nor the presumptions in favor of the jurisdiction of the court, are conclusive of the fact of the existence of the administrator, as such, during the whole or any part of the 10 days, any more than they would be conclusive of the existence of the corporation, or of the fact that the defendant was alive, in the instances above referred to. The actual, effective, time of the notice to the administrator was therefore only seven days, whereas the law requires 10 days to constitute legal service. Jurisdiction to hear the settlement of the account was therefore wanting and the order was void.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

I concur in the judgment: BEATTY, C. J.

150 Cal. 592

## WILLIAMS v. LOS ANGELES RY. CO.

(L. A. 1,676.)

(Supreme Court of California. Feb. 27, 1907.)

1. MUNICIPAL CORPORATIONS — STREETS — RIGHTS OF ABUTTING PROPERTY OWNERS—INJURY TO RIGHT TO USE FOR TRAVEL.

An injury to an adjoining property owner's right to travel from place to place on a street in front of his lot or elsewhere being one which he enjoys in common with the public, he is not entitled to maintain an action for damages or for an injunction for an injury to such right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1447, 1448.]

2. SAME—PRIVATE EASEMENTS.

An owner of a lot adjoining a street has certain private easements therein, consisting of the right of ingress and egress, the right to receive light and air from the space occupied by the street, and the right to have the street space kept open, so that signs or goods displayed in or upon the lot may be seen by passers in order that they may be attracted as customers, etc., for injury to which rights the property owner is entitled to sue, regardless of the number of persons who may suffer a similar injury to similar private easements appurtenant to other lots fronting on the street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1447, 1448.]

3. STREET RAILROADS—FRANCHISES—USE OF STREETS—SIGNAL TOWERS.

The granting of a franchise to lay street car tracks in a street, and to run cars thereon by electricity, did not confer the right to erect a signal tower in the street, at least without a showing that it could not be made of practical use if located on private property.

4. EMINENT DOMAIN—USE OF STREETS—CONDEMNATION OF LAND.

Where a street railway company placed a signal tower at the intersection of certain streets, to the injury of the private easements of an adjoining property owner, it was no answer to the railroad company's obligation to condemn private property for the location of such tower that the expense of such proceedings would be great.

5. APPEAL—DISCRETION—TEMPORARY INJUNCTION—DENIAL—REVIEW.

The denial of an application for a temporary injunction pendente lite will not be reversed on appeal, unless there appears to have been an abuse of the trial court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3818.]

6. Injunction — Preliminary Injunction—Remedies—Monetary Damages.

Where the damage or injury threatened is of a character which may be easily remedied if a temporary injunction is refused, or where the damage is chiefly monetary and the defendant is solvent, the injunction pendente lite may be properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305–307.]

7. Same.

Where one or the other of the parties to a suit will suffer by the granting or refusing of an injunction pendente lite, the inconvenience likely to be incurred by each, from the action of the court in granting or refusing the injunction, should be balanced, and the injunction should be granted or withheld accordingly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305–307.]

8. Eminent Domain—Use of Street—Temporary Injunction.

Defendant street railway company erected a signal tower in a street nine feet from the plaintiff's property. The post alone interfered slightly with plaintiff's right of ingress and egress. It did not appear that the defendant was insolvent, and that full damages could not be recovered in the action; the court under the prayer for general relief being authorized in the final judgment to restrain the use of the tower and command its removal, unless the damage was paid or the right to retain the tower was obtained by condemnation proceedings. *Held*, that the refusal of an injunction restraining the use of the tower pendente lite was not an abuse of discretion.

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Suit by Chester Williams against the Los Angeles Railway Company. From an order refusing an application for an injunction pendente lite, plaintiff appeals. Affirmed.

Works, Lee & Works, for appellant. Bicknell, Gibson, Trask, Dunn & Crutcher, for respondent.

SHAW, J. This is an appeal from an order refusing an application for an injunction pending the action.

The plaintiff was the owner of a lot and of the building thereon situated on the corner of Spring and Fourth streets, which is about the business center of the city of Los Angeles. The building was used for a retail curio store, and among its advantages were those arising from its position on the street, consisting of the facilities thereby afforded for the display of signs advertising the business, its accessibility, and the free admission of light and air. The defendant was operating a system of electric street railways passing along both of the streets and turning each corner of the intersection. It had previously kept a man employed to turn the switches and signal the men operating the cars at the proper time to cross the intersection or turn the corner into the other street. For the purpose of facilitating this work, the defendant erected a large iron post or pedestal, twelve inches in diameter and about ten feet high, and placed thereon a switch tower four feet two inches wide and over nine feet high above the top of the post. The post was situated on the sidewalk of Spring street some two or three feet north of the north line of Fourth street and about nine feet from the walls and windows of the plaintiff's building. This tower was to be used as a signal station, and in it was to be stationed a man who, by means of electric wires extending from the tower to the switches, was to turn the switches and by semaphore signals was to direct the running of the cars, as was formerly done by the switchman on the street. At the time the complaint was sworn to the tower had not been placed on the post; but, before the preliminary restraining order was served, it had been so placed, though not entirely completed ready for operation.

Every lot fronting upon a street has, as appurtenances thereto, certain private easements in the street, in front of and adjacent to the lot, which easements are a part of the lot and are private property as fully as the lot itself, though exercised in the street and extending into and over the street. Any obstruction to the use of the street which impairs or destroys these easements is a private injury, special and peculiar to the owner of the lot, and different and distinct from the injury to the general public and from that which such owner suffers as a part of the general public. As one of the public he has the right to travel from place to place on the street, in front of his lot or elsewhere. An injury to this public right gives him no right to maintain an action for damages, or for an injunction. As an abutting owner, he has the right to the private easements in question, and for an injury thereto he may sue for damages, or to enjoin the continuance of the injury, regardless of the fact that the same obstruction also constitutes an injury to his public right of travel, and regardless of the number of persons who may suffer a similar injury to similar private easements appurtenant to other lots fronting on the street. These private easements are: First, the right of ingress and egress to and from the lot over and by means of the adjacent portion of the street (Eachus v. Los Angeles R. Co., 103 Cal. 617, 37 Pac. 750, 42 Am. St. Rep. 149; Bigelow v. Ballerino, 111 Cal. 563, 44 Pac. 307; Geurkink v. Petaluma, 112 Cal. 308, 44 Pac. 570; Symons v. San Francisco, 115 Cal. 557, 42 Pac. 913, 47 Pac. 453; Sievers v. San Francisco, 115 Cal. 653, 47 Pac. 687, 56 Am. St. Rep. 153; Bancroft v. San Diego, 120 Cal. 437, 52 Pac. 712; Eachus v. Los Angeles, 130 Cal. 495, 62 Pac. 829, 80 Am. St. Rep. 147); second, the right to receive light from the space occupied by the street, and to the circulation of air therefrom (Brown v. Board, 124 Cal. 280, 57 Pac. 82; Townsend v. Epstein, 93 Md. 537, 49 Atl. 631, 52 L. R. A.

409, 86 Am. St. Rep. 441; Field v. Barling, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311; Shepard v. Manhattan Ry. Co., 117 N. Y. 442, 23 N. E. 31; Story v. R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Lahr v. Railroad Co., 104 N. Y. 268, 10 N. E. 531; 2 Dill. Mun. Corp. [4th Ed.] § 712); third, the right to have the street space kept open so that signs or goods displayed in and upon the lot may be seen by the passers-by, in order that they may be attracted as customers to patronize the business carried on thereon (First Nat. Bank v. Tyson, 133 Ala. 459, 32 South. 144, 59 L. R. A. 399, 91 Am. St. Rep. 46; Dill v. Board, 20 Atl. 743, 47 N. J. Eq. 421, 10 L. R. A. 276; Hallock v. Scheyer, 33 Hun [N. Y.] 111). The plaintiff, as the owner of the lot abutting on the street, was possessed of these private easements. The structure erected by the defendant was, at the place where it was situated, to some extent an obstruction to the exercise of all of these easements. To the extent of the space occupied, it absolutely excluded all other use, either for passage, light, air, or view. Whether the damage and obstruction thereto was so slight as to come within the de minimis rule, or was sufficient to justify an injunction pendente lite, was a matter for the determination of the court below.

The allegations of the answer do not show that it was necessary to the operation of the street cars that the tower should be placed in the street. They show, only, that it was necessary, if it was to be used at all, that it should be placed "at the intersection." But, for all that appears, it would have served its purpose as well if erected upon private property at the apex of either of the four corner lots at the intersection, and within the property line. The photographs of the place included in the record make it extremely probable that this is the case, if they do not absolutely demonstrate the fact. The granting of the franchise to lay tracks in streets and run cars thereon by electricity did not carry the right to erect such a structure as this tower in the street, at any rate not unless it is shown that it cannot be made of practical use if located on private property. We do not mean to say that, even if that were shown, the right would be included in the franchise. What we decide is that, if it can be placed on either of the four corners, on private property, and not in the space dedicated as a street and sidewalk, and can there be used substantially in the same manner, then the city authorities cannot give the right to put it in the street, to the detriment of the private rights of the plaintiff. The fact that it may cost a large sum to obtain the necessary private property at that point is immaterial. It is not at all clear, from the facts stated in the answer, whether the purport of it is that the use of the tower is essential to any operation of the car line, or only that it is much more convenient, economical, and efficient than the employment of one or more men in the street to perform the work of changing the switches. These are matters for the determination of the trial court upon the final trial, if it has not yet been had. The answer fails to show that its franchise, or permit to erect this tower, authorized it to place it at the point selected, to the injury of the plaintiff, without first making compensation to him for the damage caused thereby, if any.

Nevertheless, upon this appeal, we cannot say that the refusal of a temporary injunction until the trial of the cause was erroneous. The question of granting or refusing an application for a temporary injunction is addressed to the sound discretion of the lower court, and its action will not be reversed upon appeal, unless there appears to be an abuse of the discretion. If the damage or injury threatened is of a character which may be easily remedied if the injunction is refused, as where it is chiefly monetary damage and the defendant is solvent, the court, in its discretion, may refuse to issue an injunction, leaving the question to be decided upon the final hearing. Hicks v. Michael, 15 Cal. 116; Peterson v. Santa Rosa, 119 Cal. 389, 51 Pac. 557; U. S. v. Duluth, 1 Dill. 469, 25 Fed. Cas. 925, Fed. Cas. No. 15,001. Where one or the other of the parties is to suffer by the granting or refusing of an injunction, pending the action, the inconvenience likely to be incurred by each from the action of the court in granting or refusing a temporary injunction should be balanced, and the court should grant or withhold the injunction accordingly. 10 Ency. of Pl. & Pr. 989.

From the facts stated it is probable that the court below believed that the actual damage to the plaintiff's private rights would be small. The tower is at least nine feet distant, and the post alone interferes with the right of ingress and egress, and that but slightly. It may be that the court below considered it doubtful that there would be any appreciable damage, or, at all events, as it is not claimed that the defendant is insolvent, that the full damages could be recovered in an action. Bigelow v. Los Angeles, 85 Cal. 618, 24 Pac. 778; Reardon v. San Francisco, 66 Cal. 506, 6 Pac. 317, 56 Am. Rep. 109; Tyler v. Tehama Co., 109 Cal. 624, 42 Pac. 240. The court could allow it in this action, under the prayer for general relief, and could, in the final judgment, restrain the use of the tower or command its removal, unless the damage was paid within a time fixed. The defendant would have the right to bring a condemnation suit, pay the damages assessed, and thereupon resume the use of the tower. At the time of the service of the restraining order, the tower was in place, and it remained there at the hearing, substantially ready for use. We cannot say that it would have been unreasonable in the court below, in view of these circumstances, to have considered that the rights of the parties could be substantially preserved by reserving the matter of an injunction until the trial, in the meantime suffering the tower to remain, and allowing defendant to operate its cars therewith. The abuse of discretion is not clear.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(150 Cal. 597)

## MARTINOVICH v. MARSICANO.

(L. A. 1,601.)

(Supreme Court of California. Feb. 28, 1907.)

1. WILLS—LIABILITIES OF DEVISEES—REMEDIES OF CREDITORS.

A creditor of a devisee, who attaches real property devised, before the distribution of the estate, is not required to present his claim to the probate court, and is not entitled to participate in the distribution, but the property continues subject to the lien of the attachment.

2. EXECUTION—SALE—TITLE OF PURCHASER.

A sheriff's deed executed in pursuance of an execution sale under a judgment in attachment takes effect from the levy of the attachment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 948.]

3. ATTACHMENT—AFFIDAVIT—ALIAS WRITS.

Code Civ. Proc. §§ 538, 539, require the clerk to issue a writ of attachment on receiving the affidavit and undertaking, and section 540 provides that "several writs may be issued at the same time to sheriffs of different counties." *Held*, that it is not necessary to file additional affidavits and undertakings to secure additional writs not issued at the time the first writ is issued; and if, by reason of a change in conditions between the filing of the affidavit and the issuance of the writ, the writ ought not to issue, the debtor's remedy is by motion to set aside the attachment.

Department 1. Appeal from Superior Court, San Bernardino County; F. F. Oster, Judge.

Action by M. S. Martinovich against P. Marsicano. Judgment for defendant, and plaintiff appeals. Affirmed.

James H. Boyer, for appellant. Naphtaly, Freidenrich & Ackerman and Waters & Wylie, for respondent.

ANGELLOTTI, J. This is an action to quiet title, involving an undivided one-half of the N. E. ¼ of the N. E. ¼ of section 10, Tp. 1 S., R. 7 W., S. B. M., in San Bernardino county. From a judgment therein in favor of defendant, the plaintiff appeals.

Ceverio Martinovich died testate on February 6, 1889, the owner of the property above described. By the terms of his will, the undivided one-half thereof in controversy was devised to his widow, Sophia Martinovich. On December 1, 1897, defendant commenced an action in the superior court of the city and county of San Francisco against said Sophia Martinovich. On December 16, 1897, he filed in said action an affidavit and an undertaking for attachment in regular form, and on that day a writ of attachment was regularly issued from said court, directed to the sheriff of the city and county of San Francisco. On December 18, 1897, without filing any new affidavit or undertaking, he procured to be issued by said clerk another writ of attachment in said action, directed to the sheriff of San Bernardino county. Under this writ, the property involved was attached on December 20, 1897, by the sheriff of San Bernardino county, in the manner provided by law. On February 14, 1898, no motion to dissolve said attachment ever having been made, judgment was given in said action in favor of this defendant and against Sophia Martinovich for $3,083.19, and a transcript of the original docket of this judgment, duly certified, was filed and recorded in the office of the county recorder of San Bernardino county on April 8, 1898. On June 30, 1898, execution was duly issued out of the superior court of the city and county of San Francisco, and levied by the sheriff of San Bernardino county on this property, and he, after due notice, on July 25, 1898, sold the property at public sale to defendant. No redemption having been made, said sheriff, on December 16, 1899, executed a deed for the property to defendant. In the meantime, on March 29, 1898, which was after the attempted levy and the judgment, but prior to the filing of the transcript of the docket in San Bernardino county, Sophia Martinovich executed and delivered a conveyance of the property to plaintiff. This deed was not recorded until February 20, 1903. On March 30, 1898, a decree of final distribution in the matter of the estate of Ceverio Martinovich was made by the superior court of the city and county of San Francisco, and by this the property here involved was distributed to plaintiff, it being recited in the decree that it had been made to appear to the court that said Sophia had transferred the same to plaintiff. This decree was entered in the minutes of the court April 21, 1898, and a certified copy thereof was recorded in the office of the county recorder of San Bernardino county on June 25, 1898, which was before the sheriff's sale.

Upon these facts, judgment was properly given for defendant. Such rights as defendant may have had under the attachment levy were in no way affected by the decree of distribution. He was not required to present his claim in this behalf to the probate court and was not entitled to participate in the distribution of the estate, and the property distributed continued to be subject to the lien of his attachment, if the property had been legally attached, which for the present we assume to have been the case. See Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459.

Concededly, a sheriff's deed executed in pursuance of an execution sale under a judgment rendered in an attachment suit relates back to and takes effect from the levy of the attachment, if the levy was such as to create a lien. Porter v. Pico, 55 Cal. 165, 171; Godfrey v. Monroe, 101 Cal. 224, 35 Pac. 761;

Woodward v. Brown, 119 Cal. 283, 306, 51 Pac. 2, 542, 63 Am. St. Rep. 108. If the attachment was valid, plaintiff, therefore, acquired the property from Sophia Martinovich subject thereto, and subject to the subsequent proceedings to enforce the judgment recovered against her.

Plaintiff claims that there was no valid attachment as to this property, for the single reason that the San Bernardino writ was issued by the clerk without the giving by plaintiff of any additional affidavit or undertaking. Manifestly, it was considered sufficient that an affidavit showing a proper case for an attachment, and an undertaking in due form, had been filed two days before. We have no doubt that such affidavit and undertaking constituted a sufficient legal basis for the writ. It is not claimed that several writs may not be issued upon a single affidavit and undertaking to the sheriffs of different counties. That this may be done is clearly shown by the statute. Code Civ. Proc. §§ 537–540. But it is contended that all writs so issued must be issued at the same time. This contention is based upon the fact that sections 538 and 539, Code Civ. Proc., require the clerk to issue the writ upon receiving the affidavit and undertaking, and that section 540, Code Civ. Proc., after declaring that the writ must be directed to the sheriff of any county in which property of the defendant may be, and in terms requires him to attach and safely keep all property of the defendant within his county not exempt from execution, provides: "Several writs may be issued at the same time to the sheriffs of different counties." This provision of section 540, as we read it, was intended solely in aid of the plaintiff in attachment, and the whole purpose was to authorize such a plaintiff to have at one time two or more writs addressed to sheriffs of different counties, so that property of the defendant in various counties necessary to secure the plaintiff's claim may be levied on under the one proceeding for attachment instituted by him. The plaintiff in attachment is, by virtue of the showing made and security given, entitled to have as many writs issued to different sheriffs as he may see fit to demand. All writs so demanded and issued constitute parts of the one proceeding to have the property of the defendant in the state levied on as security for any judgment that may be obtained, and have for their basis the affidavit and undertaking given to secure the remedy of attachment. If by his first demand he has failed to ask for and secure a writ for a county in which he almost immediately thereafter discovers attachable property necessary to his security, no good reason is apparent why he may not reach such property by procuring what he would have been entitled to as a matter of right in the first instance by including it in his demand to the clerk, thus accomplishing the same result that he would be enabled to obtain as to property subsequently discovered in a county for which a writ had issued, before the return of the attachment, by a simple direction to the sheriff. The mere fact that a writ has been issued as to one county of the state should not deprive the plaintiff of his right to a writ for any other county, and the statute does not, in our opinion, have such effect. Such fact does not detract from the power and duty of the clerk to issue, upon the affidavit and undertaking already filed, writs to other counties as demanded.

It is urged that, if the statute be so construed as to authorize a second writ subsequent to the issuance of the first, conditions may have so changed in the meantime that the affidavit no longer speaks the truth as to the matters essential to the right of attachment. This, however, would be true as to any writ of attachment issued. It has not been attempted to prescribe by our statute the time within which, after the making or filing of the affidavit, a writ may legally issue, nor to limit the force and effect of the affidavit to any specified time after its execution. Some time must, from the nature of things, elapse between the making of the affidavit or its filing, and the issuance of any writ, during which time, however short, a change may occur as to some fact required to be alleged in such affidavit. It is impossible to absolutely prevent this, as successive steps in a proceeding cannot be contemporaneously taken. The mere requirement that all writs issued should be concurrently issued would not absolutely prevent it. It was said in Wheeler v. Farmer, 38 Cal. 203, 215, that an objection that an affidavit for attachment was made before the commencement of the suit was manifestly untenable, and that there was no valid objection to a complete preparation of all the papers requisite to the writ before the complaint was prepared. It has been said elsewhere that, as the ground of attachment must exist at the time the warrant of attachment was issued, an unreasonable time should not be allowed to elapse between the making of the affidavit and the issuance of a writ. By the term "unreasonable time," as herein used, is meant such delay as would, under the circumstances, cast suspicion on the verity of the affidavit, or lead to the supposition that the ground stated for the attachment had ceased to exist. See Kesler v. Lapham, 33 S. E. 289, 46 W. Va. 293, and cases there cited. We think that, as to this particular matter, the true rule, in the absence of statute to the contrary, is as stated in Hadden v. Linville, 38 Atl. 900, 86 Md. 210, where the objection was to the jurisdiction for the reason that the affidavit was made several months before the issuance of the attachment, the appellant insisting that the affidavit must be made either at the time of the institution of the suit, or as shortly before as conveniently might be. The court said: "But while we are of opinion that there may be such delay between the making of the affidavit and the suing out of the writ as may reasonably induce a presumption, when taken in connection with other facts properly proven, that the process of the court is being abused, or that the facts set forth in the affidavit may not be true when the suit is instituted, yet we do not think such divergence of dates is a jurisdictional matter that will enable this court, on appeal, to consider the question in a case like the one at bar, where the point was not raised and considered below on appropriate motion or plea." This is as applicable to a second writ issued to another county after the issuance of the first writ as it is to a case of delay between the making of the affidavit and the procuring of the first writ. The protection afforded by the law to the defendant against an improper attachment is as broad in the one case as in the other. In each, no jurisdictional defect being apparent on the face of the proceeding, his only remedy, under our system, is a motion to set aside the attachment, and on this motion the showing made by the affidavit in support of the judgment can be assailed, and the attachment which has been improperly issued discharged. Code Civ. Proc. §§ 556–558. The reason advanced by plaintiff in support of the construction of section 540, contended for by him, appears to us to be without force.

The San Bernardino writ of attachment must here be held to have been legally issued. Admittedly, the levy thereunder was in full compliance with the statute. The attachment proceedings operated, therefore, to render the subsequent sheriff's deed effectual from the date of the levy, and paramount to plaintiff's deed from Sophia Martinovich, executed subsequent to such levy.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

150 Cal. 575

## CROSSMAN v. VIVIENDA WATER CO.

(L. A. 1,683.)

(Supreme Court of California. Feb. 21, 1907.)

1. CORPORATIONS—VOLUNTARY DISSOLUTION—FALSE STATEMENT IN APPLICATION—EFFECT—COLLATERAL ATTACK.

A decree dissolving a corporation is not assailable collaterally because the corporation falsely stated in its application for dissolution that all claims against it had been discharged; the fraud not affecting the court's jurisdiction to make the decree.

2. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS—DISSOLUTION OF CORPORATION—NOTICE.

The Code provision for the voluntary dissolution of corporations is not unconstitutional as impairing the obligation of contracts, because the only notice of the hearing of the application for dissolution is by publication; the debts of the corporation being not vacated by the dissolution.

3. CORPORATIONS—EFFECT OF DISSOLUTION—ACTIONS.

The effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued. Civ. Code, § 400, providing that unless other persons are appointed, the directors or managers of a corporation at the time of its dissolution are trustees of the creditors and stockholders, and have full power to settle the affairs of the corporation, not having the effect of continuing the corporate existence as cestui que trust, or otherwise, so as to enable it to defend actions in its corporate name, and Code Civ. Proc. § 385, providing that an action does not abate by the death of any disability of a party, if the cause of action survives, if applicable to corporations, not authorizing an action against the corporation itself, and hence a judgment against such corporation is a nullity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2482, 2483.]

4. SAME — JUDGMENT AGAINST DISSOLVED CORPORATION—COLLATERAL IMPEACHMENT—RIGHTS OF STOCKHOLDERS.

Where a dissolved corporation and its stockholders were sued, the stockholders could collaterally impeach a judgment against it, though the suit had been dismissed as to them.

5. ESTOPPEL — EQUITABLE — PERSONS AFFECTED.

Where a dissolved corporation and its stockholders were sued, the stockholders were not estopped to assert the invalidity of a judgment against the corporation, where they filed an answer early in the action, denying the existence of the corporation, and alleging its dissolution, though a demurrer had been filed inadvertently and without authority on its part, and one of the stockholders had accepted service of summons as its president, no estoppel lying against a dissolved corporation.

6. JUDGMENT—SETTING ASIDE VOID JUDGMENT—TIME WITHIN WHICH MOTION MAY BE MADE.

A motion by stockholders of a dissolved corporation to vacate a judgment against it obtained after its dissolution, made within six months of the date of the entry of judgment, was not too late, it being immaterial whether it was then too late to obtain in the action an order setting aside the default.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 735–744.]

In Bank. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by H. M. Crossman against the Vivienda Water Company. Plaintiff appeals from an order setting aside a judgment in his favor. Affirmed.

Ezra Crossman and Works, Lee & Works, for appellant. Flint & Barker and Shirley C. Ward, for respondent.

ANGELLOTTI, J. This action was commenced in the year 1894 against the defendant, alleged to be a corporation, for an accounting and the recovery thereon of some $33,250, and also against certain persons alleged to be stockholders therein, to recover from them their proportionate shares of the amount sought from the corporation. Summons was served on respondent J. F. Holbrook, as president of the corporation, and he acknowledged service as president. What purported to be a demurrer on the part of the corporation and certain other defendants was served and filed on August 27, 1894, by an attorney, assuming to act for such parties. This demurrer was overruled, and on February 1, 1895, an answer was filed by all of said stockholder defendants, in which, besides denying the facts alleged in the complaint as to liability on the part of the alleged corporation, said defendants denied the existence of the corporation since December 27, 1893, alleging that on the last mentioned day, by a proceeding under title 6 of part 3 of the Code of Civil Procedure, §§ 1227–1233, relating to the voluntary dissolution of corporations, said corporation was by the superior court of Los Angeles county duly declared to be dissolved, and had not since existed as a corporation. No answer was made for the corporation. On December 2, 1896, the entry of the default of the corporation was made under direction of plaintiff, and on December 4, 1896, judgment thereon was entered by the clerk against the corporation for the full amount claimed, with interest. A motion to set aside this judgment against the corporation was made by the defendant stockholders on various grounds, and this motion was granted by the superior court on December 11, 1899. An appeal was taken by plaintiff to this court from the order granting such motion, and on June 16, 1902, that order was affirmed. The only ground of the motion considered here was that the clerk had no power to enter the judgment in the absence of an order of the court, and it was held that this claim was well based, the action being primarily for an accounting. Crossman v. Vivienda Water Company, 136 Cal. 571, 69 Pac. 220. On December 23, 1899, plaintiff dismissed the action as to all of the defendants except the alleged corporation. On December 22, 1902, an order was made in the lower court appointing a referee to take an accounting between plaintiff and the corporation, and this referee presented his report to the court, and on November 3, 1903, judgment was given by the court in favor of the plaintiff against such alleged corporation for $28,221.25 and costs. All of these proceedings were had without the participation of any one purporting to represent the corporation, and without any notice to any one. Respondents here, the original stockholder defendants herein, had no knowledge of any of these proceedings until they were served with a supplemental complaint in another action pending against them as stockholders, which complaint alleged the recovery of this judgment against the corporation, and the inability of plaintiff to discover property of the corporation from which the same could be satisfied. Respondents thereupon gave notice of a motion to be made February 8, 1904, to set aside the judgment upon the ground, among others, that the court had no jurisdiction to give the same, for the reason that, prior to the institution of the suit, the corporation had been dissolved and had ceased to exist. They also moved that the default and order appointing a referee be set aside for the same reason. On March 30, 1904, the court made an order setting aside and vacating the judgment upon this ground, and the appeal before us is one taken by plaintiff from this order.

The record shows that the corporation was dissolved and had ceased to exist several months before the commencement of the action. The proceedings for dissolution were in full accord with the provisions of our law relative to voluntary dissolution of corporations. Code Civ. Proc. §§ 1227–1233. It is suggested that the court making the decree of dissolution was without jurisdiction of the proceeding, because of an alleged false statement in the application for dissolution to the effect that all claims and demands against the corporation had been satisfied and discharged. This is not a matter going to the jurisdiction. The question as to the truth of this allegation was, so far as the dissolution proceeding was concerned, one solely for the determination of the court to which the application was made, and that court found that the allegation was true. Id., §§ 1228, 1232. Even if we assume here that the allegation was false in fact, the jurisdiction of the court in the dissolution proceeding would in no degree be affected. In reply to what is said by appellant as to a fraud being committed upon the court in that matter, it is sufficient to say that this is not an action to set aside the decree of dissolution on the ground of fraud, and that such decree is not collaterally assailable upon that ground. The decree of dissolution sufficiently shows legal notice of the hearing of the application to have been given.

There is nothing in the point made to the effect that our Code sections, in the matter of voluntary dissolution of corporations, are unconstitutional, in that the only notice required is by publication, and the opportunity of creditors to recover is thereby restricted and the obligation of contracts is therefore impaired. We see no reason to doubt the legal sufficiency of the provisions as to notice. It is well settled that statutory provisions for the voluntary dissolution of corporations are not violative of the constitutional inhibition against the impairment of the obligation of contracts. The universally accepted modern doctrine is that the debts of a corporation are not vacated by its dissolution. In the absence of statute, equity treats the surviving assets as a trust fund for the creditors and stockholders, and enables the beneficiaries to reach the same by appropriate procedure. In Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 8 L. Ed. 945, it was said by the Supreme Court of the United States: "We are of opinion that the dissolution of the corporation, under the acts of Virginia and Maryland, * * * cannot, in any just sense, be considered, within the clause of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those states, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of bona fide purchasers, but is still held in trust for the company or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws." The matter is now generally covered by statute. Where there is no statute providing for the continuance of the corporation itself for the purpose of settling its affairs, provision is generally made for the doing of this by others. We have such a provision in this state. Section 400, Civ. Code, provides: "Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation." This provision is applicable in all cases of dissolution, whether voluntary or involuntary. Havemeyer v. Superior Court, 84 Cal. 327, 365, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; State I. & I. Co. v. Superior Court, 101 Cal. 135, 148, 35 Pac. 549.

It is settled beyond question that, except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void. As to this, all the text writers agree, and their statement is supported by an overwhelming weight of authority. See 5 Thompson on Corp. §§ 6721, 6722, 6723; Clark & Marshall on Private Corporations, §§ 322, 329; Angell & Ames on Corp. § 195; 2 Morawetz on Corp. § 1031; Vol. 10 Cyc. p. 1316; 7 Am. & Eng. Ency. of Law, p. 854; Pendleton v. Russell, Receiver, etc., 144 U. S. 640, 12 Sup. Ct. 743, 36 L. Ed. 574; First National Bank v. Colby, 21 Wall. (U. S.) 609, 22 L. Ed. 687; Mumma v. Peters, supra; Sturges v. Vanderbilt, 73 N. Y. 384; Rodgers v. Adriatic, etc., Co., 148 N. Y. 38, 42 N. E. 515. There is no statute of this state that authorized the commencement or continuance of this action against the corporation after its legal death. We have no statute similar to that of several states, providing that in the event of the dissolution of a corporation its existence shall be continued either indefinitely or for a specified time for the settlement of its affairs. Statutes similar to our section 400, Civ. Code, above quoted, do not have the effect of continuing the existence of the corporation as cestui que trust, or otherwise, so as to render it capable of defending actions in its corporate name. Thompson on Corp. § 6739; Clark & Marshall on Private Corporations, § 333; Sturges v. Vanderbilt, supra. If section 385, Code Civ. Proc., providing that an action does not abate by the death or any disability of a party, if the cause of action survives, is applicable to the case of a corporation, it does not authorize the continuance of the action against the corporation itself, but allows the action to be continued only against the "representative or successor in interest," brought in on motion. McCulloch v. Norwood, 58 N. Y. 562, 568. See, also, Judson v. Love, 35 Cal. 463. There being no statute which can be held to modify the general rule, it would seem that the judgment in this case was as much of a nullity as if it had been given against a dead natural person, and that plaintiff's remedy, after the dissolution of this corporation was against the directors who continued such at the time of dissolution as trustees, and the stockholders. Sturges v. Vanderbilt, supra.

There can be no serious doubt that such a void judgment can be collaterally impeached and its invalidity shown by any one interested, such as one entitled either as creditor or stockholder to participate in the assets of the corporation, or a stockholder liable for the debts of the corporation. In the absence of circumstances operating as an estoppel upon them to assert such invalidity, they should be allowed to so do for their own protection. In Sturges v. Vanderbilt, supra, a judgment given against a corporation which had been dissolved pending the action, was held void in an action brought to compel stockholders of the company to apply certain moneys received by them from the assets of the company to the payment of such judgment. In McCulloch v. Norwood, supra, the receiver of a defunct corporation was allowed to show such invalidity of the judgment rendered against the corporation after its dissolution, in a proceeding brought to subject assets in his hands to the satisfaction thereof. The same is true of Pendleton v. Russell, 144 U. S. 640, 12 Sup. Ct. 743, 36 L. Ed. 574. Such a judgment, it has been held, will be reversed on a writ of error brought by a member of the corporation whose property has been levied upon under an execution issued to enforce the same. Merrill v. Suffolk Bank, 31 Me. 57, 1 Am. Rep. 649; Thompson on Corp. § 6725. We know of no good reason why such a person may not be permitted to appear in the original action against the corporation, and there assert his claim. As said in Combes v. Keyes, 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369, 46 Am. St. Rep. 839, "from the very nature of things the dissolution or death of a corporation defendant, like the death of a party to a pending action, can only be brought to the attention of the court by some one other than the defunct corporation." In First National Bank v. Colby, supra, it was held that the application of the receiver of such a corporation for a discharge of an attachment issued against the corporation should have been granted although he was not a party to the action. And on the former appeal in this case, it was held in affirming the order made on the motion of the respondents here, vacating the former judgment against the Vivienda Water Company, upon the ground that the same was void for want of power in the clerk to enter it, that the respondents had such interest as entitled them to make the motion. The court said: "These defendants were not only successors in interest of the property involved, but were liable as stockholders for any valid judgment against the corporation. As stockholders they were made parties defendant to recover from them a judgment covering the same liability for which the corporation was sued. If this judgment should stand, we do not see why under some circumstances it might not fix by that much the stockholders' liability, and if this be true they were directly interested in the judgment. But it has been held by this court that one who succeeds to property that is subject to a judgment may appear to have it vacated, though he was not a party to the judgment." We regard this as decisive here. The fact that the action has now been dismissed as to respondents is immaterial. They were not parties to the judgment on the former appeal.

There is nothing in the record which would justify a conclusion that these respondents are estopped from asserting the invalidity of the judgment against the alleged corporation. Their verified answer, filed February 1, 1895, in terms denied the existence of the corporation, and alleged its dissolution, as has already been seen, and there was no subsequent act upon the part of any of them tending to contradict this. This answer filed almost at the very commencement of the action entirely overcame any effect in the direction of an estoppel on respondents, that might have been contended for the prior filing of a demurrer on the part of the corporation by an attorney, and the prior acceptance of service of summons by respondent Holbrook, as president of the corporation. It should be noted in this connection that there was a sufficient showing made on the hearing of the motion, to warrant the conclusion that the attorney filing the demurrer included the corporation as a demurrant inadvertently, and without being authorized to do so. So far as the dead corporation itself is concerned, there could be no admission or estoppel. It could not be served with process, could not appear, could not itself admit anything nor authorize anyone else to do so for it. It was legally dead. The proceedings against it must be held to be an absolute nullity whenever it is made to appear that it had ceased to be prior to the commencement of the action, and those sufficiently interested to be allowed to assail the judgment on this ground cannot, unless estopped by their own acts or omissions, be held bound by any unauthorized appearance or admission attempted to be made on behalf of the dead corporation, or by the entry of the default of such a corporation attempted to be made in such action. The motion to vacate the judgment did not come too late, even if it be assumed that the provisions of section 473, Code Civ. Proc., as to the time within which relief can be granted, are applicable to a case of this character. The application was made within six months of the date of entry of judgment, the time prescribed in that section for the making of application for relief. Whether or not it was then too late to obtain in the action an order setting aside the default is immaterial. It is enough for all the purposes of this appeal, that the judgment was void for the reason that it was given against a corporation that had become legally dead, and that the application for the vacating of this judgment was made within six months of its entry.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

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(150 Cal. 520)

## DUCKWORTH et al. v. WATSONVILLE WATER & LIGHT CO. et al. (S. F. 3,754.)

(Supreme Court of California. Feb. 8, 1907. Rehearing Denied March 9, 1907.)

1. WATERS AND WATER COURSES — RIPARIAN OWNERS—APPROPRIATION—TITLE TO WATER OF LAKE.

The grantee of a riparian owner of land on the outlet of a lake acquired no title to the waters of the lake, since neither a riparian proprietor nor appropriator has title to the water of a stream before it reaches his land or point of diversion respectively.

2. SAME—CESSATION OF FLOW.

The rights of a riparian owner of the waters of a stream forming the outlet of a lake cease for the time being when the stream becomes dry, and do not entitle him to any natural right to the use of water standing in pools or in the lake above his land.

3. SAME—USE OF WATER.

A riparian owner, as such, has no right to sell or convey to another the right to use the water on any land, except that to which the right originally attached as against third persons also entitled to use the water.

4. SAME—DEEDS—EFFECT.

An owner of land abutting on the outlet of a lake at some distance below the lake conveyed to plaintiff "all riparian rights and other water rights and water which he possessed in that outlet as appurtenant or belonging to the grantor's tract of land." *Held*, that such deed gave plaintiff only the right to use the water of the outlet on the grantor's land when any water was flowing in such outlet, and an estoppel against his grantor to prevent complaint by him against any use of such water which plaintiff might make to the injury of the grantor's riparian rights, and did not authorize plaintiff to take water for use on his land as against third persons having rights in the water of the lake.

5. SAME — USE OF WATER — FINDINGS — EVIDENCE.

Where defendant water company from December, 1894, to December, 1902, pumped water from a lake in controversy to an amount sufficient to irrigate the plants of several strawberry growers, so that, if plaintiffs took the 250 inches they demanded, the two diversions would not leave much water in the lake at the end of the dry season, a finding that the water company had never exercised nor used any of the water rights derived by it from certain deeds was erroneous.

6. Same—Extent of Rights—Deeds.

Where defendant acquired the rights of grantees under a deed to water rights in a lake, conveying all the grantor's water and riparian and water rights and privileges of every kind, character, and description which belonged or in any manner pertained to a certain 320 acres of land, reserving the right to water for domestic use and for watering stock thereon, defendants acquired, so far as that land and its owners were concerned, the right to use the whole or any part of the waters of the lake, except such as were necessary for domestic use and for the watering of stock kept on the land.

7. Same—Adverse Use.

The adverse use of the waters of a lake for the watering of stock alone does not confer any right to use the water for the irrigation of land.

8. Same—Evidence.

Where neither plaintiffs nor their predecessors had title to certain land bordering on a lake, and never made use of any water of the lake other than for the watering of stock, nor claimed any right to do so as against defendants until a few months before suit was brought to determine the water rights of the parties, plaintiffs acquired no adverse right to use the water for irrigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 148–150.]

9. Same—Running Streams.

Where a lake, with its tributaries and outlet, during the rainy season constituted a running stream of water, it was properly designated as a "running stream" subject to appropriations for irrigation, though it was not shown that it continued to flow to the sea or to a junction with some other stream.

10. Same—Conveyances—Estoppel.

Where a riparian proprietor conveyed all her water rights in a lake to defendants' grantors, subject to the right to use the water for domestic purposes and the watering of stock, and thereafter conveyed the land to plaintiffs, plaintiffs were estopped to object to the use to which defendants applied the water, so long as there remained enough water for plaintiffs' stock and domestic use.

11. Same.

Plaintiff's privity with a deed, conveying riparian rights in the waters of a lake appurtenant to plaintiff's land, did not estop him from making an appropriation of any water in the lake subject thereto, nor from demanding that the grantee of the riparian rights should not make a greater use of the water than it was authorized to do by the rights which it was shown to have under the deed, if such use interfered with plaintiff's right of appropriation.

12. Same—Actions to Determine Rights—Pleading—Traverse—Admission.

Where a cross-complaint alleged that defendant water company was, and for a long time had been, the owner and entitled to the exclusive use of the waters of a certain lake, a denial that the water company was, or had been, the owner of, and entitled to, the exclusive use of all the waters of the lake, was not a good traverse of the allegation, but was in effect an admission that the water company was entitled to substantially all the water.

13. Same—Streams Subject to Appropriation.

The right to appropriate water, under the provisions of the Civil Code, is not confined to streams running over public lands of the United States, but exists wherever the appropriator can find water of a stream which has not been appropriated, and in which no other person has or claims superior rights and interests.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 145.]

14. Same.

An appropriator's right to the waters of a stream can only be disputed by one who has or claims a superior right or interest, and then only so far as there is a conflict.

15. Same—Appropriation—Rights of Appropriator.

An appropriation of water merely vests in the appropriator such rights as have not previously become vested in private ownership either by some riparian right, or because of prior statutory or common-law appropriation and use, conferring on such appropriator a right superior to that of any subsequent appropriator on the same stream.

16. Same—Riparian Rights—Use and Disuse.

The riparian right to the use of the waters of a stream is neither gained by use nor lost by disuse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 32, 33, 145.]

17. Same—Deeds—Construction.

A deed of a riparian owner, conveying all and singular the water and riparian and water rights and privileges pertaining to certain specified land, did not limit the rights of the grantee to the water then standing in the lake.

18. Same—Estoppel.

Where plaintiffs did not make an adverse claim to the waters of a lake until November, 1902, when defendant water company served on plaintiffs written notice of its claim to the water under a deed emanating from complainants' grantors, such notice was effective to prevent any estoppel from arising in plaintiffs' favor by reason of any subsequent expenditure of money by them in the diversion of water pursuant to their adverse claim.

19. Same—Rights of Appropriator—Disuse—Effect.

The rights to the waters of a lake for irrigation acquired by appropriation depends on use, and ceases with disuse, as provided by Civ. Code, § 1411.

20. Same—Extent of Right.

Where defendant water company was using the water of a lake, not as a riparian proprietor, but as an appropriator for the irrigation of nonriparian land, it was not concerned in the disposition of the surplus waters of the lake not necessary to fulfill its appropriation, but was only entitled to insist that a reasonably ample quantity should remain in the lake to last through the entire season.

21. Same—Notice.

A posted notice of a claim of the waters of a lake for irrigation, stating that the water claimed was to be used on land owned by D., describing it, contained a sufficient statement of the purpose for which the water was claimed and the place of the intended use, though it further stated that the water was also to be used for irrigation by other parties to whom D. might furnish it on other land not described.

22. Same—Extent of Use.

Where a notice of an appropriation of water for irrigation stated that the water was to be conveyed to the place of use by a "six-inch pipe or by a pipe of other dimensions," it was sufficient to authorize a diversion of the quantity that could be carried in a six-inch pipe, not exceeding a maximum of 250 miners' inches claimed by the appropriator.

23. ACKNOWLEDGMENT—DESIGNATION OF OFFICER.

Where an acknowledgment of a deed recited the venue "State of California, Monterey County—ss.," and declared that before the subscriber, a notary public in and for such Monterey county, personally appeared, etc., and after the signature were the words "Notary Public," the acknowledgment sufficiently declared the name of the office of the officer taking the same, as required by Civ. Code, § 1193.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 164-167.]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by S. J. Duckworth and another against the Watsonville Water & Light Company and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

C. A. Shurtliff and H. C. Wyckoff, for appellants. Dickman & Torchiana and W. P. Netherton, for respondents.

SHAW, J. Plaintiffs are the owners of 320 acres of land fronting on Pinto Lake; the plaintiff Flora being the owner of the fee, and the other plaintiff the owner of a leasehold interest. They claim rights in the waters of the lake as riparian proprietors thereon, and the plaintiff S. J. Duckworth also claims a right by appropriation to take therefrom a quantity of water equal to a continuous flow of 250 miners' inches under a four-inch pressure. The lake contains an area of about 70 acres. The defendant Watsonville Water & Light Company owns 65 acres of the bed and surface of the lake and all the land surrounding it, except the land of plaintiffs and two other tracts of small extent, and claims the ownership of, and the right to take and use, all the waters of the lake. The purpose of the action, as stated in the complaint, is to have the plaintiffs' alleged rights determined. The corporation defendant filed a cross-complaint, alleging ownership of all the water of the lake, and asking that its right be also determined. Judgment was given declaring that the plaintiffs have the right to take from the lake and use upon their land as much water as they could beneficially use thereon, not exceeding a continuous flow of 250 miners' inches, and enjoining the defendants from interfering with the plaintiffs' right to such use, and that the defendant corporation take nothing by its cross-complaint. The defendants appealed from the judgment within 60 days after its rendition, and present the evidence in the record by a bill of exceptions.

The plaintiffs derive their title to the land from Carmen Amesti de McKinlay, who, on May 13, 1901, leased the land to S. J. Duckworth, and on August 6, 1901, conveyed it to the plaintiff Flora McKinlay Duckworth, subject to the lease. In 1885, while Carmen Amesti de McKinlay was the owner in fee of the land, she made conveyances to the defendants Smith and Montague, whereby she granted to them "all and singular the water and riparian and water rights and privileges of every kind, character and description which belong, or in any manner pertain to," the 320 acres of land, the same being particularly described therein, reserving, however, the right to water for domestic use and watering stock thereon. On January 21, 1897, Smith and Montague conveyed to the Watsonville Water & Light Company all the waters, right, and privileges conveyed to them by Carmen Amesti de McKinlay as aforesaid. Smith and Montague thereupon, so far as appears, ceased to have any interest in the property in controversy. They joined in the answer and join also in the appeal. There are some indications in the evidence that their holding prior to 1897 was for the benefit of the water company. In any event, as they have no present interest, their position in the case need not be further discussed. It is claimed that the evidence does not sustain the findings. As to several of them, we think this contention is well founded.

1. There was an outlet to Pinto Lake, through which water usually flowed from the lake during the rainy season of each year, but which was dry at all other times. One Grimmer owned a tract of land which abutted upon this outlet at a point some distance below the lake. On March 21, 1903, Grimmer conveyed to S. J. Duckworth "all riparian rights and other water rights and water" which he possessed in this outlet as appurtenant or belonging to this tract of land. This conveyance was made after the beginning of the action, but before the filing of the cross-complaint, and in his answer to the cross-complaint Duckworth averred that by virtue thereof he was a riparian owner to the waters of the lake. The court found, in accordance with this answer, that the plaintiff S. J. Duckworth "is a riparian owner of the waters of said Pinto Lake, its tributaries and outlet," by virtue of this deed. Even if we consider the lake with its tributaries and outlet as forming one continuous stream of water, as the lower court found it to be, this finding is not technically true. Every owner of land upon a stream is, in some respects, interested in the entire stream. He has the right to use the water as it passes his land for domestic purposes thereon, and to take out a reasonable portion thereof for the irrigation of his abutting land, and for the protection of this right, which begins only when the water reaches his land. He has a certain right with regard to all the waters of the stream above his land—the right to insist that it shall not be polluted to his injury nor diminished from use by other riparian owners above, so as to deprive him of his just portion, and, perhaps, as to other than riparian owners, the right to prevent any substantial diminution of the amount of water which would naturally flow to his land. If nothing more than this was meant by the finding in question, we could not say that it was not supported by some evidence, nor that it was not a correct general statement

of the right of Duckworth under the Grimmer deed. But the finding is that Duckworth thereby became a "riparian owner" of the waters of the lake, and it appears that, under it, he claims some right, as against the defendant water company, to take water from the lake for use, not on the Grimmer land, but on the Duckworth land, which abuts on the lake far from the outlet, and that not only during the rainy season, or at such times as there is water flowing to the Grimmer land, but during all seasons, and when the outlet is entirely dry. The court below seems to have intended this finding to declare some such right. This claim is contrary to the doctrine of riparian rights, and to the general principles of law as well. Neither a riparian proprietor nor an appropriator has title or ownership in the water of the stream before it reaches his land, or point of diversion, respectively. This has been expressly decided with respect to appropriators. Parks M. Co. v. Hoyt, 57 Cal. 46; Riverside W. Co. v. Gage, 89 Cal. 418, 26 Pac. 889; McGuire v. Brown, 106 Cal. 670, 39 Pac. 1060, 30 L. R. A. 384. The same rule applies to the riparian owner. As a riparian owner, Grimmer had no title to the water, except as it passed in front of his land and constituted the stream. The right or title to the stream as it passed was a part and parcel of his land, a part of the realty. See cases last cited. Being a part of his realty on his land, it was also part of the realty of other riparian owners at the points where it passed over their lands. Hence the title of each to the water exists only during such passage, and the right of each in the water during its course above consists only of the right to use such means as are necessary to preserve it until it reaches his land. Grimmer had the right to use a reasonable portion of the water running in the outlet by his land for the irrigation of his land riparian thereto, and to take the whole of it, if necessary, for domestic purposes. This right exists because the stream runs by the land, and thus gives the natural advantage resulting from the relative situation. When the stream ceased, and the channel became dry, he, for the time being, ceased to be a riparian owner, so far as a present use of the water was concerned. His land did not, at those times, border upon any stream. It did not then possess any natural right to the use of the water standing in pools or lakes at points above his land. During such dry periods, he could obtain the use of water from such pools or lakes only by convention with the owners of the lands abutting upon them. He would not have it by virtue of any right pertaining to his own land. Furthermore, his riparian right is limited to his riparian land. It gave no right to use any of the water of the stream for any purpose, upon land not riparian, nor upon any riparian land other than his own. No one can sell or convey to another that which he does not himself own. Grimmer could not, by a transfer of his riparian rights, sell to the plaintiff, as against third persons having interests in the water, the right to use the water upon any land, riparian or nonriparian, except his own, to which it originally attached. His deed operated to prevent him from complaining of a diversion, but it did not affect other parties. It does not appear that Grimmer had any water rights, except his right as riparian owner to the use of the water of the outlet. It follows, therefore, that Duckworth did not obtain anything by the Grimmer deed, except the right to use the water of the outlet on the Grimmer land, when any water was flowing therein, and an estoppel against Grimmer to prevent complaint by him against any use of such water which Duckworth might make to the injury of the Grimmer riparian right, as above defined. It did not in any respect add to his rights to take water from the lake for use on the Duckworth land, as against the defendants, or as against any one, except Grimmer and his successors in interest.

2. The findings further state that the water company has never exercised or used any of the water rights derived from the deeds from Carmen Amesti de McKinlay to Smith and Montague. This is true in the literal sense that it has not used any water upon the land to which these rights, prior to those deeds, attached. But it appears from the evidence that the water company was pumping water from the lake during the eight years extending from December, 1894, to December, 1902. The amount is not shown, but it was enough, during part of the time, at least, according to the testimony of William A. White, its superintendent, to furnish water to several strawberry growers for irrigation of their plants, and so much that, if the plaintiffs took the 250 inches they claim, the two diversions would not leave much water in the lake at the end of the dry season. This evidence is not as definite as it should have been; but, there being no evidence to the contrary, it established the fact that the company had taken a substantial quantity of water from the lake during the time specified. Such taking would have been contrary to the riparian rights attached to the Duckworth land, if they had remained unsevered therefrom. By reason of its purchase of these riparian rights, the company possessed the right, so far as that land and its owners were concerned, to use the whole, or any part, of the waters of the lake except such as were necessary for domestic use and for the watering of stock thereon. The pumping of the water was done in the exercise of this right, and it was a right obtained by virtue of the McKinlay deeds. This finding is therefore contrary to the evidence.

3. There is a finding to the effect that, after the execution of the deeds by Carmen Amesti de McKinlay to Smith and Montague, in 1895, she continued in possession of the water and water rights thereby granted to

them, and that she and the plaintiffs, as her successors, did not relinquish possession thereof to the grantees, but have ever since then remained in possession thereof, and that they had been in the open, notorious, hostile, and adverse possession thereof for more than five years immediately before the commencement of this action. This finding has no support in the evidence. They did, indeed, remain in possession of the land, and continued to exercise all ordinary acts of ownership over it, including the use of the water of the lake for the watering of stock. This latter use of the water, however, was reserved in the deed, and hence it was not one of the rights granted. Even if it had been granted, the adverse use for the watering of stock alone could gain a right only to the extent of the use, and it would not confer any right to the additional use of water for the irrigation of land. There is no evidence that Mrs. McKinlay, or either of the plaintiffs, ever made any use of the water other than for the watering of stock, or claimed the right to do so as against the defendants, until November, 1902, a few months before this action was begun. The finding seems to have been based on the fact that the defendants never entered upon the land of the plaintiffs for the purpose of exercising or asserting the right to use the waters of the lake which they obtained under the McKinlay deeds. But it was not requisite to the exercise of the rights granted by the deeds that they should enter upon the land, unless it became necessary to do so in order to get the water from the lake. The deed was evidently procured to protect the grantees from interference in their proposed diversion of water from the lake. They could get the water from any other point on the lake as well as from the limits of the McKinlay land, and it appears that they took it from the lower end of the lake. This was a taking from the McKinlay land, as well as from all the other land on the borders of the lake. The force of gravity would accomplish that. The use which was made of the land by the plaintiffs and McKinlay was not antagonistic to the right which the defendants had to the water under the grant. It is not true, therefore, that the grantor and her predecessors continued or remained in possession of the rights of the grantee, nor that said rights were not relinquished to the grantees, nor that the possession of the plaintiffs and their predecessor extended to the water rights granted, or was hostile and adverse to the grantee, or open and notorious with respect thereto. According to the evidence, their actual use of the water, if any, did not begin under their adverse claim, until the day of the trial in the lower court.

4. There is some evidence that Pinto Lake, with its tributaries and outlet, during the rainy season, constituted a running stream of water. It is clear that during the dry seasons there was no water flowing out of the lake, but there is evidence that during that period there was a slight flow from a tributary into the lake. We cannot agree with the appellant in his contention that the finding that the lake, or its tributaries, constituted a running stream is not sustained by the evidence. We think the better doctrine, in respect to the character of a stream from which the statute provides for appropriations, is that it is not necessary that the stream should continue to flow to the sea, or to a junction with some other stream. It is sufficient if there is a flowing stream; and the fact that it ends either in a swamp, in a sandy wash in which the water disappears, or in a lake in which it is accumulated upon the surface of the ground, will not defeat the right to make the statutory appropriation therefrom, and we can see no reason why the appropriation, in such a case, may not be made from the lake in which the stream terminates, and which therefore constitutes a part of it, as well as from any other part of the water course.

5. The only use which the water company makes of the water is to take it to nonriparian lands to be used thereon for irrigation. Respondents claim that the only right of the water company to the water, shown in the case, consists of the riparian rights pertaining to the narrow strip of land belonging to the water company surrounding the greater part of the lake, and the riparian rights under the McKinlay deeds, and that the use made of it is not in the exercise of either of these rights, but is inconsistent with each of them. In regard to this claim it is to be observed that, so far as the use made of the water by the water company may affect the rights claimed by the Duckworths as riparian owners of the McKinlay land, they have no ground of complaint, being estopped by the McKinlay deeds, and not having regained the rights by adverse possession. The estoppel does not extend to the water necessary for domestic use and for stock, but their right to that extent is not in dispute, nor have they been deprived of it by the water company. But S. J. Duckworth claims a right to a part of the water by appropriation, and with respect to the right thus claimed he has a status which entitles him to challenge the right of the water company. His privity with the McKinlay deed does not estop him from making an appropriation of any water in the lake that may be subject to appropriation, nor from demanding that the water company shall not make a greater use of the water than it is authorized to do by the rights which it is shown to have, if such use interferes with an appropriative right possessed by him. But the claim that the water company has not established any other right is not maintainable. Its cross-complaint alleges that it is, and for a long time has been, "the owner and entitled to the exclusive use of all the waters" of Pinto Lake. The plaintiffs, in their

answer thereto, deny that the water company is, or has been, "the owner and entitled to the exclusive use of all the waters" of the lake. That is not a good traverse of the allegation. It is an admission that the water company is entitled to substantially all of the water. Fitch v. Bunch, 30 Cal. 208; Blood v. Light, 31 Cal. 115; Fish v. Redington, 31 Cal. 185; Reed v. Calderwood, 32 Cal. 109; Doll v. Good, 38 Cal. 287. This allegation of the cross-complaint, therefore, stands as an admitted fact of the case, except so far as it is inconsistent with the affirmative allegations of the answer thereto and of the original complaint. The effect, for the purposes of the trial, was to establish the fact that the water company owns and has the exclusive right to use, for any purpose and at any place, all of the water of the lake, excepting such portion thereof, or right thereto, as is alleged and was proven to belong to the plaintiffs or either of them. Inasmuch as the evidence did not show, and the court did not find, that the alleged claims of plaintiffs included all the waters of the lake, the judgment that the defendants take nothing is contrary to the evidence and to this admission of the pleadings. The existing rights of other riparian owners, not parties to this suit, are not material to this case.

6. The right to appropriate water, under the provisions of the Civil Code, is not confined to streams running over public lands of the United States. It exists wherever the appropriator can find water of a stream which has not been appropriated, and in which no other person has or claims superior rights and interests. And the right cannot be disputed except by one who has or claims a superior right or interest, and by him only so far as there is a conflict. It cannot be vicariously contested by another on behalf of the owner of the better right. The effect of an appropriation under the statute, when completed, is that the appropriator thereby acquires a right superior to that of any subsequent appropriator on the same stream; but he acquires thereby no right whatever as against rights existing in the water at the time his appropriation was begun. An appropriation does not, of itself, deprive any private person of his rights. It merely vests in the appropriator such rights as have not previously become vested in private ownership either by virtue of some riparian right, or because of prior statutory or common-law appropriation and use. It affects and divests the riparian rights otherwise attaching to public lands of the United States, solely because the act of Congress declares that grants of public lands shall be made subject to all water rights that may have previously accrued to any person other than the grantee. An appropriation of water and use thereunder does not become effective to divest private rights in the stream, unless it has been continued adversely thereto for the period of five years, under such circumstances as to gain a title by prescription, and then only to the extent of the use. The amount claimed in the notice is no measure of the right.

It follows that the attempted appropriation by S. J. Duckworth of a part of the water of the lake did not divest or affect the existing rights of the water company either as riparian owners, or by virtue of a prior appropriation or use. And so far as his claim was adverse to, and in conflict with, the prior rights and interests of the water company, it was entitled to a decree quieting its title against him and enjoining him from asserting such adverse title. This applies to the riparian right which attached to its strip of land partially surrounding the lake, as well as to any other prior right which it possessed to the water. The fact that the company had not used the water on this narrow strip did not affect the riparian right. A riparian right is neither gained by use, nor lost by disuse, and, for the protection of these riparian rights, the water company is entitled to a judgment declaring Duckworth's appropriation subject to the riparian rights pertaining to its lands and subject to all other prior rights of the water company, so that the continued use of the water by Duckworth shall not be adverse, and shall not ripen into an easement, which, in effect, would divest the rights of the water company. Moore v. Clear L. W. Co., 68 Cal. 146, 8 Pac. 816; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Heilbron v. Fowler S. C. Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Conkling v. Pacific I. Co., 87 Cal. 296, 25 Pac. 399; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968; Spargur v. Heard, 90 Cal. 221, 27 Pac. 198; Anaheim U. W. Co. v. Fuller (decided 1907) 88 Pac. 978.

7. We have said that, because of the McKinlay deeds, and so far as the claim of plaintiffs as riparian owners is concerned, the water company can use the water for any purpose, at any place, and in any quantity which leaves plaintiffs enough for stock and domestic purposes; but the mere fact that the company is a riparian owner on the lake gives it no right whatever to the water of the lake, except for actual beneficial use upon the land to which the riparian rights attach. The evidence does not show that it is using the water on that land at all. It is carrying the water to other lands and places, for use and sale. The admission of the pleadings, above referred to, relieves it of the necessity of establishing its right to do this, except as it may be affected by evidence in support of the specific rights alleged by the plaintiffs; but the right it actually exercises is not a right derived from the fact of its riparian ownership of the greater part of the lake shore and bed.

8. The claim of the respondents that the grant by Mrs. McKinlay of the rights pertaining to the land described in the deeds extended only to the water then standing in

the lake, and that as soon as that water was exhausted by use, run-off, or evaporation, the rights ceased to exist, is utterly baseless, and needs no discussion, further than to deny it.

9. In its conclusions of law, the court declared that the defendants are estopped from claiming any rights under the McKinlay deeds. We find nothing in the evidence justifying this conclusion. The plaintiffs did not make an adverse claim until November, 1902, and the water company, about the same time, served on them written notice of its claim to the water under the said deed. This may not have been necessary, but it undoubtedly prevented any estoppel from arising in their favor by reason of any subsequent expenditure of money by them in the diversion of water in pursuance of their adverse claim, granting that such expenditure would otherwise have created an estoppel.

10. We have said that the water company is entitled to a judgment protecting its riparian right, although it has not used, and does not immediately propose to use, the water on its riparian land. This rule does not apply to any right which it has acquired by appropriation or use upon other lands, and this appears to be the source of the right which it has been exercising. Such right depends upon use, and ceases with disuse. Civ. Code, § 1411. It extends only to the water actually taken and used. The consequence is that, so far as the protection of this right, and the water necessary to supply this use, are concerned, the water company is not entitled to prevent an appropriation or use by others of the surplus of the waters of the lake, if there is any. So long as there is enough to supply it with the quantity of water which it has been so using, it has, in the protection of this right, no concern with the disposition of the remainder. It has the right, of course, to insist upon a reasonably ample quantity to last through the entire season, until rains renew the supply, and also to enjoin a depletion of the lake which will lower the water surface so as to substantially increase the cost of making the diversion it is entitled to make.

11. It may be that, upon another trial, the sufficiency of the notice of appropriation posted by S. J. Duckworth may not be important; but, as this cannot be decided here, it is necessary to notice the objections urged against it. The notice states that the water claimed therein is to be used for irrigation upon the land owned by Mrs. Duckworth, describing it. This is a sufficient statement of the purpose for which the water was claimed and the place of intended use, and it is not vitiated by the additional statement in the notice that it was also to be used for irrigation by other parties to whom Duckworth might furnish it upon other land, which was not described. It was a good notice for the appropriation of water for use on the place designated, at all events. It states that the water is to be conveyed to the place of use "by a six-inch pipe, or by a pipe of other dimensions." This we consider sufficient to authorize a diversion of the quantity that could be carried in a six-inch pipe, and not exceeding the 250 miners' inches claimed as the maximum. Whether or not it would justify a diversion, within the amount limited, if carried in a pipe more than six inches in diameter, is a question not presented, inasmuch as it does not appear that such pipe was proposed to be used.

12. It is claimed by the respondents that they acquired their title from Mrs. McKinlay to the land in question by purchase for a valuable consideration, and without actual notice of the deeds to Smith and Montague, and that the record of those deeds is ineffectual to constitute constructive notice to them, because the acknowledgment of each deed is defective. The acknowledgments were made before a notary public. The certificates recite his name and official character in the usual form. They are signed by him, with the addition of the words "Notary Public" after his signature. The Code requires that the officer certifying to an acknowledgment must affix thereto his signature, followed by the name of his office. Civ. Code, § 1193. The objection is that the words "notary public" are not a sufficient statement of the name of the office. The certificates in question begin thus: "State of California, Monterey County—ss."—and each recites that "before me, John Ruurds, notary public in and for said Monterey county, personally appeared," etc. In view of this statement, we think the name of the office is sufficiently stated after the signature. There is nothing in Emeric v. Alvarado, 90 Cal. 479, 27 Pac. 356, that is in conflict with this conclusion. In that case the body of the certificate stated that the officer was a notary public of the city and county of San Francisco, while the name of the office after the signature was given as "Notary Public, Contra Costa County." The officer was in fact a notary public of Contra Costa county, and the acknowledgment was taken in that county, though the contrary was stated in the certificate. It was held that the certificate was invalid because it did not, in the body of it, truly recite the "name and quality of the officer" or the venue, as the law required, and that the words, "Notary Public, Contra Costa County," following the signature, were not sufficient to make it good. The two statements were inconsistent, and the certificate afforded no means of ascertaining which was correct. Here there is no inconsistency, and the statement after the signature, construed according to the ordinary usage of the language, and in connection with the recital, means that the person signing was a notary public of Monterey county. This is the proper construction, and therefore it does correctly state the name of the office, as the Code prescribed.

In conclusion, we deem it proper to say that, upon another trial, if the court shall decide that either of the parties possess rights to the water, acquired by appropriation under the statute, or by diversion and use, it will be necessary to ascertain and declare the amount of water covered by the right owned by each respectively. It is not necessary to mention the other points discussed in the briefs.

The judgment is reversed, and a new trial ordered.

We concur: ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

150 Cal. 604

## In re RUSSELL'S ESTATE. (S. F. 4,597.)

(Supreme Court of California. Feb. 28, 1907.)

1. WILLS — CONSTRUCTION — DESCRIPTION OF PROPERTY — RESIDUARY CLAUSE — VOID DEVISE.

Testator bequeathed "the rest, residue and remainder of my estate, whether real or personal, and wheresoever situated," to certain described persons. Civ. Code, § 1332, provided that "a devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will." *Held* that, where a devise of real property was void, it passed under the residuary clause, and not to the heirs, as section 1332 abrogates the rule of the common law giving the residuary legatees only personal property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 965, 967, 1282.]

2. APPEAL—MOTION TO DISMISS.

Where an appeal is determined on the merits as against one claiming to be an adverse party, his motion to dismiss for failure to serve notice will not be considered.

Department 2. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

In the matter of the estate of Robert Russell, deceased. Judgment against the claim of William Russell, and he appeals. Affirmed.

Duncan McPherson, Jr., for appellant. Elliott McAllister, Charles M. Cassin, Cassin & Lucas, and Charles B. Younger, Jr., for respondent.

HENSHAW, J. Appellant instituted proceedings, under section 1664 of the Code of Civil Procedure, to have determined his interest in the estate of Robert Russell, deceased. The admitted facts are that Robert Russell executed his last will and testament on October 20, 1903, and seven days thereafter died. His will was duly admitted to probate. The fifth paragraph of the instrument provided: "Fifthly, I leave my farm, consisting of one hundred and ninety-seven acres within the city limits of Santa Cruz, to the Maria Kip Institute of San Francisco County and City, California, for them to sell or dispose of as seems best to the officers of said institute." The sixth paragraph of his will declared: "Sixthly, I leave the rest, residue and remainder of my estate, whether real or personal, and wheresoever situated, to the other children of said Mary Barrett, widow, to be divided among them, share and share alike, exclusive of said Eugenie C. Barrett, for whom I have hereinbefore provided."

The Maria Kip Institute named in the fifth paragraph is conceded to be the Maria Kip Orphanage, which is a charitable and benevolent institution. Section 1313 of the Civil Code declares: "No estate, whether real or personal, shall be bequeathed or devised to any charitable or benevolent society, or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; * * * and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law." It is not disputed but that the devise to the Maria Kip Orphanage thus made within 30 days of the death of the testator became void. Appellant, as an heir at law of William Russell, deceased, contends that this lapsed and void devise goes to the heirs at law, and not to the residuary legatees, notwithstanding the provisions of section 1332 of the Civil Code, which reads as follows: "A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will." The earlier common law made a distinction between devises of real property and bequests of personal property; the former speaking from the death of the testator, and the latter from the date of the will. According to this distinction it was held that real property did not go to the devisees under a general residuary clause, while personal property did go to the residuary legatees. But it is well settled that section 1332, above quoted, abrogates this rule of the common law. Estate of Upham, 127 Cal. 90, 59 Pac. 315; O'Connor v. Murphy, 147 Cal. 148, 81 Pac. 406. It is thus the accepted rule in this state that, where there is a valid general residuary devise, real property mentioned in a lapsed or void devise goes to the residuary devisee, and not to the heirs, unless a contrary intent is clearly expressed by the terms of the will. No such intent is here shown at all. The devise in this case is general and valid, and bestows upon the residuary devisees the property attempted to be devised to the Maria Kip Orphanage.

A motion to dismiss this appeal has been made by the Maria Kip Orphanage, upon the ground that it was an adverse party and had not been served with notice. This determination of the question upon the merits renders unnecessary any consideration of that motion.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

150 Cal. 584

## GRAGG v. COOPER et al. (L. A. 1,612.)

(Supreme Court of California. Feb. 25, 1907.)

PUBLIC LANDS—LAND ACTUALLY OCCUPIED—HOMESTEAD ENTRY.

Where defendants were in actual possession of public land of the United States inclosed by a substantial fence, and were using it for agricultural purposes, claiming title thereto, it was not subject to homestead entry, and plaintiff acquired no right of possession by filing a homestead declaration with the receiver of the land office, paying the fees, obtaining a certificate therefor, and taking peaceable possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 53.]

Department 1. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by J. Irwin Gragg against J. W. Cooper and others. From a judgment for defendants, plaintiff appeals. Affirmed.

W. S. Day, for appellant. Canfield & Starbuck, for respondents.

SHAW, J. The plaintiff appeals from a judgment in favor of the defendants in an action by plaintiff to recover possession of a tract of land.

The land in question was on and prior to February 24, 1903, a part of the public lands of the United States. At that time, and for a long time prior thereto, the defendants and their predecessor in interest had been in possession of the land, had inclosed it by a substantial fence, and were, and had been, using it for agricultural purposes, claiming title thereto. On that day the plaintiff, who was a person qualified under the laws of the United States to take up public lands as a homestead, made a homestead filing for the land in the United States Land Office, paid the required fees therefor, and obtained the usual receipt or certificate of said entry. Afterwards, on April 6, 1903, he moved on the land with his family and occupied a portion thereof, claiming it all as a homestead. The record does not show that his entry was forcible, or surreptitious, and consequently we must presume that it was open and peaceable. Subsequently the defendants ousted him, and he thereupon began the present action. The defendants have no title to the land, nor any right to the possession thereof, except such as may arise from their prior actual possession and inclosure at the time of the homestead entry of plaintiff.

The question thus presented by the record is whether or not public lands of the United States, which are in the actual occupancy and possession of one who has it inclosed by a substantial fence and is using it for agricultural purposes, but is without other right, can be entered as a homestead by another person by filing his homestead declaration with the receiver of the Land Office, paying the fees, obtaining the proper certificate therefor, and thereafter taking peaceable possession of the land, or some part thereof, in pursuance of his claim. The law seems to be settled that such land, so occupied and possessed by another, is not subject to entry by a qualified claimant under the homestead laws of the United States, and that the process of obtaining from the officers of the United States a certificate of such entry and a receipt for the fees paid, in pursuance of a declaration of intention to settle upon the land as a homestead, filed with them, does not give the homestead claimant the right to go upon the land and oust the prior possessor, either by force of arms, or by process of law in an action for possession. In the leading case of Atherton v. Fowler, 96 U. S. 514, 24 L. Ed. 732, the proposition was laid down that the law of the United States on the subject did not authorize or contemplate an entry on land then in the actual possession of another, and that land so occupied was not subject to entry by another, under the homestead or pre-emption laws, although it would have been, but for the prior possession. In that case there had been no certificate issued, but the entry was made with the intent to purchase it under the pre-emption law. The appellant seeks to distinguish it from the present case on the ground that the certificate was here actually issued, and that its effect was to vest in the plaintiff the equitable title, which should prevail over the defendants who are in possession without title.

The reason of the rule, however, applies in one case as fully as in the other. The foundation of it is that such entries would inevitably lead to strife, violence, and perhaps bloodshed. In this state the rule has been repeatedly applied in cases where there had been the usual filing of the declaratory statement, and issuance of the certificate by the officers of the Land Office to the claimant; the land being at the time in the actual possession of some other person. Goodwin v. McCabe, 75 Cal. 588, 17 Pac. 705; McBrown v. Morris, 59 Cal. 64; Davis v. Scott, 56 Cal. 165. In these cases it is held that such an entry under the homestead or pre-emption laws is invalid, although the entry is open and peaceable, but that it is valid if the prior possession is not actual, but merely constructive. In the present case the court finds that there was an actual prior possession, inclosure, and use.

An exception to the rule is made in some of the cases, but it has no application to the case at bar. It has been held that where the prior occupant has possession of a part only of a governmental subdivision of public land, and the claimant enters upon the unoccupied part, claiming the right to enter the whole of it, and in pursuance of such claim files his declaratory statement and obtains the certificate of entry on the whole tract, he will be allowed to recover the possession of the part occupied by the prior possessor. Whittaker v. Pendola, 78 Cal. 296, 20 Pac. 680; Haven v. Haws, 63 Cal. 514. In the first case, the homestead claimant entered upon three acres of the tract which the other party had not inclosed or occupied. In the second, he claimed a tract containing 160 acres, under an entry upon one-half of it which was unoccupied; the other half being in actual possession of the other party. In the case at bar the plaintiff entered upon the inclosure of the defendants. When the reasons for the doctrine stated in Atherton v. Fowler, supra, are considered, the distinction between these cases and the others clearly appears. Where the applicant can find a part of the land unoccupied, he is at liberty to enter thereon, and can do so without danger of the strife, altercations, violence, or breaches of the peace, such as would be invited by an entry upon the actual possession of another. The reason of the rule does not exist, and the rule ceases. Having the right to take up this part of the land, and having obtained the evidence of title to the whole thereby, his title will prevail over the person in possession who can show no title whatever, but merely possession.

We think the court below correctly held that the plaintiff was not entitled to recover. The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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150 Cal. 587

## TRAVELLI et al. v. BOWMAN. (L. A. 1,653.)

(Supreme Court of California. Feb. 26, 1907.)

1. Reformation of Instruments—Defenses—Persons Entitled to Reformation.

A trust deed is not a mortgage, but conveys the title to the trustee for the purposes of the trust, and the fact that the debt secured has outlawed does not affect the title of the trustee, and will not prevent a court of equity from reforming the deed on the ground that the reformation would be a vain act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 85.]

2. Same—Laches.

Where parties to a trust deed did not discover a mistake in the description, or have knowledge of any facts sufficient to put them upon inquiry as to the mistake until one month prior to the commencement of an action to reform the deed, they were not guilty of laches, so as to estop them from maintaining the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 120.]

3. Same.

The fact that plaintiffs' attorney, who did not know that a certain trust deed was among his papers, did not examine it, is not evidence of any laches that would defeat an action to reform the description in the deed.

Department 2. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Charles I. Travelli and another against M. S. Bowman, administrator. Judgment for plaintiffs, and defendant appeals. Affirmed.

Purrington & Adair, for appellant. Withington & Carter and Collier & Carnahan, for respondents.

McFARLAND, J. This action was brought against M. S. Bowman, administrator of the estate of George R. Senior, deceased, to obtain a judgment reforming the description of land in a certain deed of trust. Judgment went for plaintiffs in accordance with the prayer of the complaint, and from the judgment and from an order denying his motion for a new trial the defendant appeals.

The main features of the case are these: In March, 1896, George R. Senior, since deceased, was and for a long time prior thereto had been indebted to the plaintiff Travelli in a large sum of money, secured by a mortgage on certain real property situated in the county of Riverside. The debt secured by the mortgage was about to be outlawed, when the plaintiff Travelli, who lived in Massachusetts, employed the plaintiff Withington, a lawyer practicing in San Diego, Cal., to look after his claim against Senior and make some disposition of it. Withington went to Riverside and had an interview with Senior, and it was finally agreed that Senior should make a new note to Travelli for $18,000 and give a deed of trust to Withington to secure the payment of the same, and that the mortgage should be discharged. Withington went back to San Diego and had a draft of the note and deed of trust prepared which he gave to one Carter, who was a clerk in his office, to copy. When Carter presented the deed to Withington, the latter discovered that he had described the land as in San Bernardino county when, in fact, it was in Riverside. He told Carter to make the correction and to then send the deed on to Senior to be executed; Withington going away from home for a few days. Carter corrected the deed, but unfortunately made another mistake by describing it as in San Diego county. He sent it on to Senior by whom it was executed and returned to Carter. Carter had been instructed by Withington to send the deed on to Travelli in Massachusetts, but for some reason this was not done, and the deed was left among the papers in Withington's office. There was also another defect in the description. Withington did not see the deed or know of the misdescription until after the death of Senior, which occurred on or about the 10th of July, 1903. Upon the death of Senior, Withington commenced to look for papers connected with the business between Senior and Travelli and found the deed in his office and noticed for the first time the misdescription. This action was commenced within a month after the discovery of the mistaken description. At the time of the commencement of this suit the said note of Senior to Travelli had been outlawed for the period of about a month. Appellant pleaded the several provisions of the Code touching the limitations of actions.

The main contention of appellant for a reversal is that the reformation of a trust deed should not be granted by a court of equity after the note which is secured by the deed has been barred by the statute of limitations. This contention is not maintainable. Appellant has cited some cases to the point that a court of equity will not entertain a suit to reform a deed where it appears that the plaintiff would have no rights under the deed when reformed, and that the reformation would be a mere vain act. The theory of those cases is well illustrated by the case of Thompson v. Phœnix Ins. Co. (C. C.) 25 Fed. 296. The action there was to reform a policy of insurance issued by defendant, and to recover on the reformed policy. It appeared, however, that the contract sued on and set out in the complaint contained a provision that no action could be maintained thereon unless brought within 12 months next after the date of the fire from which loss should accrue, and it appeared that in that case the time had expired, so that, even though the policy should be reformed, the plaintiff would have no legal rights whatever under it as reformed; and the court very properly held that it would not undertake the work of reformation when it was apparent that it would be a vain thing to do it. The court said: "But the court will not reform an instrument merely for the sake of reforming it, but only to enable a party to assert some right thereunder. And, if an action thereon by the assured to recover the amount of loss is already barred by lapse of time, there is no claim that can be asserted under it against the defendant." But no such principle applies in the case at bar. The deed in question in this case is a typical deed of trust to secure a debt well known under the California law; and it has been frequently held here that such a deed is not a mortgage, but conveys the title to the trustee for the purposes of the trust, that the title remains in the trustee unless the debt has been paid or a sale made of the premises under the deed. The fact that the debt secured has become outlawed does not affect the title of the trustee. Grant v. Burr, 54 Cal. 298: Savings & Loan Society v. Burnett, 106 Cal. 528, 39 Pac. 922; Weber v. McCleverty (Cal.) 86 Pac. 706. By the reformation of the deed in question here the plaintiffs are therefore put into the position of holding and asserting title to the land in question until the trustor should have become entitled to a reconveyance by payment of the debt, and to sell the property under the deed. To reform the deed, therefore, is not to do a vain thing, but to perfect a valuable right to property in the respondent.

The other points made by appellant may be condensed into the asserted proposition that plaintiffs have by want of diligence in discovering the mistake been guilty of laches, which estops them from maintaining the action. We do not think that this contention is available. The court found "that plaintiffs, David L. Withington and Charles I. Travelli or either of them, did not discover, nor had they or either of them, any knowledge of said mutual mistakes in the description of said property, as contained in said deed of trust, until on the 14th day of July, 1903, about one month prior to the commencement of this action," and did not "have any knowledge of any fact or facts sufficient to put them, or either of them, upon inquiry as to said mutual mistake until the 14th day of July, 1903, and after the death of said George R. Senior," and "at all times believed and, as reasonably prudent men, had reasonable cause to believe, that the descriptions contained in said deed of trust were correct and in accord with the intentions of the parties to said instrument, viz., Charles I. Travelli, David L. Withington, and George R. Senior." And we think that these findings were amply supported by the evidence. The mere fact that Withington, who did not know that the deed was among his papers, did not examine it is not evidence of any laches that would defeat this action. In Los Angeles & Redondo Railroad Company v. New Liverpool Salt Company (Cal.) 87 Pac. 1029, this court says: "It has been frequently decided that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly"—citing cases. And certainly such rule applies to the grantee in a deed as strongly as to the grantor.

We see nothing more in the other contentions of appellant which requires special notice.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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150 Cal. 535

## JOHNSTON v. SOUTHERN PAC. CO. (S. F. 4,216.)

(Supreme Court of California. Feb. 8, 1907. Rehearing Denied, March 7, 1907.)

1. Appeal—Presumption—Jurisdiction.

An appellate court cannot indulge a presumption in support of the jurisdiction of a court of record to appoint a guardian ad litem for an infant, where the presumption does violence to the facts as presented by the record of such inferior court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3671, 3682–3688.]

2. Same—Record.

The rule that an order of a court of general jurisdiction will be treated as void on appeal only when its invalidity appears on the face of the record does not require that the record shall contain a direct statement that something which must have been done in order to give the court jurisdiction was not done, but only means that want of jurisdiction appears whenever what was actually done was stated and what was done is not sufficient in law to confer jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3682-3688.]

3. INFANTS—GUARDIAN AD LITEM—APPOINTMENT—ERRONEOUS ORDER.

Under Code Civ. Proc. § 373, providing that, when a guardian ad litem is appointed for an infant, it must be on the application of the infant if he be over 14 years of age, an order declaring that it satisfactorily appeared from the petition of M. that he was the stepfather of J., a minor 16 years of age, that the minor was about to commence an action in which it was necessary that a guardian be appointed, and therefore M. was appointed guardian ad litem for the purpose of such action, was erroneous as showing a violation of such section, but was not void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, §§ 215-217.]

4. SAME—RATIFICATION.

Where a guardian ad litem was illegally appointed for an infant 16 years of age on the petition of her stepfather, and on the minor attaining her majority she affirmed the proceedings instituted by her guardian, she thereupon became bound thereby, and the defect was cured.

5. DAMAGES—ASSESSMENT—PHYSICAL EXAMINATION—JURISDICTION.

Plaintiff in a civil action for injuries having called a physician to testify in her behalf concerning the nature of her injuries, the court had power to direct plaintiff to submit to a physical examination by two other reputable physicians on defendant's behalf, to be held at a specified time and place.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 531.]

In Bank. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Gertrude Johnston, by her guardian ad litem, against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

A. A. Moore, for appellant. Clark & Clark (D. M. Delmas, of counsel), for respondent.

HENSHAW, J. This action is to recover damages for personal injuries sustained by plaintiff, who was a passenger upon the cars of the defendant. The negligence charged is that defendant suddenly and violently started a train from which plaintiff was about to alight, whereby she was hurled to the ground, sustaining a fracture of the skull, hemorrhage of the brain, and other injuries. Plaintiff at the time of the commencement of her action was 16 years of age. Section 373 of the Code of Civil Procedure provides that "when a guardian ad litem is appointed by the court he must be appointed * * * when the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years." The record shows that a petition was presented to the court by Charles Manson for the appointment of himself as guardian ad litem of Gertrude Johnston, a minor, that the petitioner is the stepfather of the minor, and that the minor is of the age of 16 years. The order of the court made upon the petition declares, "it satisfactorily appearing to the court from the petition of Charles Manson that he is the stepfather of Gertrude Johnston, a minor, aged 16 years, and that the minor is about to commence an action, etc., * * * and that it is necessary that a guardian be appointed for her for the purpose of maintaining this action: Therefore it is ordered that Charles Manson be, and he is hereby, appointed guardian ad litem for the purpose of this action." The due appointment of the guardian was pleaded in the complaint. An issue was joined upon this allegation by the answer. Upon the trial, by various motions and objections, defendant raised the question of the due appointment of the guardian, and of the right of plaintiff to proceed with her action under the appointment disclosed. These objections were overruled, and here present the first proposition for consideration.

Respondent, in answer to plaintiff's objection, urges that as the proceedings were before a court of record every reasonable presumption will be indulged in to support the order which the court made, and that, in indulging such presumption, it will even be assumed that the minor was present and orally requested the appointment to be made. There is, however, a well-defined limit to an appellate tribunal's power in indulging in such presumptions. It can indulge in no presumption which does violence to the facts as presented by the record of the inferior court, and, while it is true that an order of a court of general jurisdiction will be treated as void only in the event that its invalidity appears upon the face of the record, ever since the case of Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742, the rule in this court has been well settled that this does not mean that the record must contain a direct statement to the effect that something which must have been done in order to give the court jurisdiction was not done, but means that want of jurisdiction appears whenever what was actually done is stated, and this which was done is not sufficient in law to confer jurisdiction. Therefore, whenever the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than is averred. Galpin v. Page, 18 Wall. (U. S.) 350, 21 L. Ed. 959; Smith v. L., A. & P. R. Co., 98 Cal. 210, 33 Pac. 53. It must be conclusively presumed, therefore, in accordance with the express declaration of the trial court in its order, that it appointed a guardian ad litem of a minor 16 years of age upon the application of the guardian alone, and that the minor never exercised, nor was given an opportunity to exercise, her right of nomination. Under these circumstances, is the order valid or erroneous, and, if erroneous, is it error curable, or such as to render the appointment void?

Unquestionably the order appointing the

guardian was erroneous. Not only was it made in violation of the express direction of the statute, but as made it denied to the minor a substantial right of nomination accorded her by law. Indeed, there is very respectable authority for holding that the minor's right of nomination under a statute such as our own must be exercised, or good reason be shown for its nonexercise, else the appointment is void. Such a view of the law makes the nomination a jurisdictional prerequisite. Palmer v. Oakley, 2 Doug. (Mich.) 433, 47 Am. Dec. 41. The decisions of the courts which adopt the view of Palmer v. Oakley are in no sense technical, but rest upon the well-recognized disabilities of infancy and the protection which the law always accords to minors. So fully is an infant under the protection of the law that the courts will not allow his rights to be prejudiced by any act either of his own or of any other person. 10 Ency. of Pl. & Pr. p. 589. Being in their nonage and lacking the power generally to make contracts, infants cannot contract with or be represented by attorneys at law. So that, in general, if an action has been prosecuted on behalf of or against an infant without due observance as to the appearance of the infant either by guardian, prochein ami, curator, or some other legally authorized person, the right of disaffirmance of such a judgment rests with the minor until barred by his laches after attaining his majority. For even laches is not imputable to a minor. Tucker v. McBean, 65 Me. 352; Smith v. Sackett, 10 Ill. 534; Chandler v. McKinney, 6 Mich. 217, 74 Am. Dec. 686. Upon the other hand, since this right of disaffirmance remains with an infant plaintiff or defendant thus irregularly made a party to an action, it is clearly unjust that the adverse party under objection should be compelled to litigate under circumstances where the judgment would be binding against him, and not binding against his adversary. Therefore it is, as it should be, the general rule, even in jurisdictions which do not hold that irregularities in the proceedings touching the appointment of the guardian ad litem render the judgment void, that the error is of such gravity as to necessitate a reversal of the case when such a situation is presented, namely, a situation where the judgment is by law binding upon one litigant and may be disaffirmed because of infancy by the other; for it is of the very essence of a just judgment under our system of jurisprudence that the rights, duties, obligations, and privileges which spring from it should bear with even and exact pressure upon all the parties to it.

Other states, however, have adopted a rule of decision in conflict with that laid down in Palmer v. Oakley, supra, and amongst those states is our own. It has long and consistently been held in this state that a failure to appoint a guardian ad litem, or to sue by one, while irregular is only that, that the defect is not a jurisdictional one, and therefore the judgment is not void. Thus, in Re Cahill, 74 Cal. 52, 15 Pac. 364, a contest of a will was commenced by a minor in propria persona. This court considered the question with some elaboration, and held that the proceedings were not void for want of jurisdiction, and that it was proper after the commencement of the proceeding to appoint a guardian ad litem at the trial. In Childs v. Lanterman, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 121, it was held that a judgment against an infant in an action in which no guardian ad litem had ever been appointed was not void; that the appearance by an attorney, notwithstanding the fact that an infant by reason of infancy could not authorize an appearance by an attorney, would be held "as authorized by him so far as the direction and consent of the infant can give authority." And, as the infant after reaching majority had not disaffirmed the judgment, he had waived his right thereafter to make such objection. In Foley v. California Horseshoe Company, 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87, the complaint averred the appointment of a guardian ad litem, the averment was traversed by the answer, and the court upon trial held the appointment void, and then and there made an order appointing a guardian ad litem. It was held that the action should not abate, and that the appointment of a guardian ad litem after action begun was within the power of the court.

To sum up on this proposition, therefore, were it not for a saving fact hereafter to be considered, it would be held that the appointment of the guardian ad litem in this case was so irregular as to justify a repudiation and disaffirmance by the minor had the judgment been adverse to her. Such a judgment would lack the mutuality of responsibility and obligation which must belong to every valid judgment, and, as the defect was called to the attention of the trial court and no offer there made to cure it, as was done in the Foley Case, a reversal of the judgment would be necessitated. But it was made to appear to this court upon the hearing that the minor had now attained her majority, and made and declared her affirmance of the proceedings which had been taken and her willingness to be bound in all future matters by the proper judgments and orders of the court. Here, then, is the situation which was presented in Childs v. Lanterman, supra. From this point on whatever orders or judgments may be made and given are fully binding upon this plaintiff, who has attained her majority. The defendant, therefore, is protected by such judgments and orders in all of its rights, and the objection based upon irregularity in the appointment of a guardian ad litem, substantial as it was when made, is thus removed. And we hold upon this proposition that, for the reason appearing, namely, the attainment of majority by the minor and her affirmance of the action, no reversal of the judgment is called for.

Plaintiff offered proof, touching the nature of her injuries, that it had been necessary to remove a portion of the skull. Physicians were called on her behalf to testify to this and to other matters of personal injury connected with it. The case presented was that of a plaintiff complaining of and seeking damages for objective, physical injuries. Defendant requested of plaintiff that an opportunity be offered it to have a physical examination of the person of the plaintiff to be conducted by two physicians; plaintiff having permission to have her own physicians present and to select a reasonable place for the examination. This application was first made in the form of a request to plaintiff, and was refused by her attorneys. It was then addressed to the discretion of the court, and an order was asked to that effect. No objection was made that the application was not timely, that the physicians selected were not reputable, or that the circumstances in any way or for any reason were other than modest and proper. Indeed, the court in ruling, as shown by the record, declared that, if the authorities bore out defendant's contention, it would make the order. Its refusal to make the order, therefore, was founded upon the belief that it was powerless so to do. This is the first time this question has come before the court for adjudication, and what is here said must be regarded as applicable strictly to civil actions. It is a principle of criminal law that the defendant may not be compelled to give evidence against himself. In civil actions, where a plaintiff is seeking affirmative relief, the adverse party may compel him to give such evidence, even to becoming a witness. As to the power of a court to order such examination in proper cases, the overwhelming weight of authority is that it exists. The Supreme Court of the United States substantially alone has denied the power in Railroad Company v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734. In Brown v. Railroad Company (N. D.) 95 N. W. 155, the Botsford Case is reviewed. It is said that it is not authority in a state court, and that the reason of the rule as to federal courts comes from the fact that all United States courts other than the Supreme Court must, in the absence of statute, follow the mode of proof as it existed in actions at common law. By the state courts, however, with unusual unanimity, it is held that courts have the power to order such examinations, and should exercise it with a sound discretion. In some states, as New York, the matter is controlled by statute, but where it is not a matter of statute the courts are uniform in declaring the existence of the power. Says the Supreme Court of Minnesota: "To allow the plaintiff in such cases to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses upon the trial, but at the same time to deny the defendant the right in any case to have a physical examination of plaintiff's person and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross in our judgment to be tolerated for one moment." Wanek v. City of Winona, 80 N. W. 851, 78 Minn. 98, 46 L. R. A. 448, 79 Am. St. Rep. 354. Says the Supreme Court of Indiana in City v. Turner, 60 N. E. 275, 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. Rep. 200: "When serious and permanent injuries are claimed by the plaintiff, and he or she has submitted to an examination by a chosen physician or surgeon, who appears as a witness in plaintiff's behalf, and the nature, extent, and effect of the injury are to be deduced from objective conditions, and so fully from no other source, no degree of sentiment will justify the refusal of the motion. When it becomes a question of probable violence to the refined and delicate feelings of the plaintiff, on the one hand, and probable injustice to the defendant on the other, the law will not hesitate; the court in making such orders with respect to time, place, and person, in every case, having such due regard for the feelings of the plaintiff and proprieties of the case as the ends of justice will permit." To the same effect may be cited Shroeder v. Railway Co., 47 Iowa, 375; White v. Railway Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154; Shaw v. Van Renssalaer, 60 How. Pr. (N. Y.) 143; Miami, etc., T. Co. v. Baily, 37 Ohio St. 104; A., T. & S. F. Ry. v. Thul, 29 Kan. 466, 44 Am. Rep. 659; Stuart v. Havens, 17 Neb. 211, 22 N. W. 419; Sibley v. Smith, 46 Ark. 275, 55 Am. Rep. 584; Railway Co. v. Underwood, 64 Tex. 463; Owens v. Kansas City, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; Railroad Co. v. Childress, 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. Rep. 189; Hess v. Lowery, 23 N. E. 156, 122 Ind. 225, 7 L. R. A. 90, 17 Am. St. Rep. 355; Hess v. Railroad Co., 7 Pa. Co. Ct. R. 565; Railroad Co. v. Hill, 90 Ala. 71, 79, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764; Graves v. Battle Creek, 95 Mich. 266, 54 N. W. 757, 19 L. R. A. 641, 35 Am. St. Rep. 561; Demenstein v. Richardson, 2 Pa. Dist. R. 825; Marler v. Springfield, 65 Mo. App. 301; Belt Elec. Line Co. v. Allen, 44 S. W. 89, 102 Ky. 551, 80 Am. St. Rep. 374; Lane v. Spokane R. Co., 57 Pac. 367, 21 Wash. 119, 46 L. R. A. 153, 75 Am. St. Rep. 821; Railway Co. v. Stroth (Ky.) 66 S. W. 177, 57 L. R. A. 875; Thompson on Trials, par. 859; Jones on Evidence, pars. 396-399; Fetter on Carriers of Pass. par. 406, p. 1138; Am. & Eng. Ency. Law, vol. 7, pp. 507, 508, and cases cited; Elliott on Evidence, p. 1237, and late cases cited. In the case at bar, as has been said, the court refused the application for lack of power. We are not left in doubt as to what its action would have been had it believed it possessed the power, for the record discloses that the court believed it to be a proper case. Such an error so clearly affecting the substantial rights of the defendant necessitates a reversal of the action.

We have examined the other propositions presented by appellant, but deem them without substantial merit, but for the foregoing reasons the judgment and order are reversed and the cause reamnded.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.; SLOSS, J.

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150 Cal. 560

## BAIRD v. MONROE et al. (L. A. 1,623.)

(Supreme Court of California. Feb. 16, 1907. Rehearing Denied March 18, 1907.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—ASSESSMENTS—SALE OF PROPERTY—DEED.

Where a street superintendent's deed was made in proceedings for the opening and widening of a street in the city of Los Angeles under and in accordance with the general law (St. 1889, p. 70, c. 76), instead of under the provision of the city charter applicable to such matter, the deed was a nullity.

2. TAXATION—TAX DEEDS—RECITALS.

Pol. Code, § 3785, as amended by St. 1895, p. 328, c. 218, provides that, if property assessed for taxes is not redeemed within the time allowed by law, the tax collector shall make a deed to the state, reciting the date of the sale, the amount for which the land was sold, the time when right of redemption expired, and that no person had redeemed within the time allowed by law, etc., and section 3780 authorizes redemption within five years from the date of sale to the state or at any time prior to the entry or sale of the land by the state. *Held*, that a tax collector's deed reciting the date of sale, but failing to recite in terms the date when the right of redemption expired, was fatally defective when made.

3. SAME—TAX DEEDS—CURATIVE ACT—RETROACTIVE OPERATION.

St. 1903, p. 63, c. 59, declaring that all certificates of tax sales and tax deeds made to the state by a county tax collector, which failed to recite the correct date or any date when the right of redemption would expire or had expired, or which recited an incorrect date when the state would be entitled to a deed, were thereby confirmed and legalized, and should be construed on all occasions as if such matters and things required by law had been recited therein and performed in the first instance, was retroactive in operation, and validated a tax deed to the state previously made which recited no date of the expiration of the right to redeem.

4. STATUTES—LOCAL AND SPECIAL LAWS.

As such act operated on all certificates and deeds having the defects stated, it was not objectionable as a local or special law within Const. art. 4, § 25, subds. 14, 18, prohibiting the Legislature from passing local or special laws giving effect to invalid deeds, wills, or other instruments, or legalizing, except as against the state, the unauthorized or invalid acts of any officer.

5. CONSTITUTIONAL LAW — DEPRIVATION OF PROPERTY—DUE PROCESS OF LAW.

St. 1903, p. 63, c. 59, curing invalid tax deeds from which necessary recitals had been omitted, provided that in all cases five years shall have elapsed between the date of the sale of the property to the state and the date of executing such deed, after which time the property owner had no absolute right to redeem as provided by Pol. Code, § 3780, was not unconstitutional, as depriving the taxpayer of his property without due process of law.

6. TAXATION — TAX DEEDS—RECITALS—CONSIDERATION.

A tax collector being required to sell delinquent lands to the state for the precise amount for which the land was delinquent, a deed reciting that the land was sold to pay taxes of every kind charged against the property, together with penalties, costs, and charges due thereon, to wit, $2.92, was not defective for failure to recite in terms the amount for which the land was sold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1514.]

7. SAME—ASSESSMENTS—USE OF ABBREVIATIONS.

The use of abbreviations in assessments of real property is permissible if thereby the property may be easily known.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 734.]

8. SAME—LISTING PROPERTY.

Pol. Code, § 3650, subd. 2, authorizes an assessment of land by township, range, section, or fractional section, and, where the land is not a congressional division, by metes or bounds, or "other description sufficient to identify it," and declares that any land, wherever situated, may be listed under such provision. Subdivision 3, providing for the listing of city and town lots, authorizes their assessment by naming the city or town and the number of lot and block, according to the system of numbering in such city or town and the improvements thereof. *Held*, that subdivision 3 does not provide an exclusive method for the listing of city and town lots, but that the assessing officer may assess such property under subdivision 2 if he so desires.

9. SAME—DESCRIPTION—REFERENCE TO PLAT—EVIDENCE.

Where an assessment of real property referred to the P. tract in the county of Los Angeles, a recorded map of such tract was admissible to complete the description.

10. SAME—DESCRIPTION—SUFFICIENCY.

A city lot was assessed under description, "In Los Angeles county, in Pellissier Tr.," and in the column headed, "City and Town Lots," under the subdivision "Lots," the figure "5," and, under the subheading "Block," the letter "K." No city or town was mentioned, but it was proved that a map of the Pellissier tract was recorded in 1887 in the recorder's office of Los Angeles county, that it was the only recorded map of such tract, and that it showed lot 5 and block K to be 54 feet front by 121 feet deep. *Held*, that the description in connection with such proof sufficiently identified the property.

11. SAME—NAMING OF CITY OR TOWN.

Where an assessment of a city lot is made by description sufficient to identify it as authorized by Pol. Code, § 3650, subd. 2, and not by the number of the lot and block according to the system of numbering in such city or town, as provided by subdivision 3, the assessment is not defective for failure to name the city or town where the property is situated.

12. SAME — SCHOOL, ROAD, AND REVENUE DISTRICTS.

An assessment of city property contained two columns headed, "School District" and "Road District," and underneath both headings, written across the division line, was the word "Rosedale," underneath which was the description. *Held*, that such assessment substantially indicated that "Rosedale" was the name of both the road and school district in which the property was located, and it was therefore not objectionable, in that it did not show in separate columns the school, road and revenue districts in which the property was situated, as required by Pol. Code, § 3650, subd. 13.

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by W. F. Baird, as administrator of the will annexed of the estate of James G. Wilson, deceased, against J. D. Monroe and others. From a judgment in favor of defendant George Harlan, plaintiff appeals. Affirmed.

O. B. Carter, for appellant. W. W. Allen, Sr. (Lucius M. Fall, of counsel), for respondent. E. R. Fox, as amicus curiæ.

ANGELLOTTI, J. This is an action to quiet title to certain real property, described in the complaint as lot 5 in block K of the Pellissier tract in the city and county of Los Angeles, state of California, as per map recorded in Book 15, p. 70, miscellaneous records of said county. Defendant Harlan had judgment, and plaintiff appeals from such judgment and from an order denying his motion for a new trial.

Plaintiff's testator was the owner of the land involved at the time of his death, January 7, 1899, and his estate is still the owner thereof unless title has been divested by either of two deeds. The first of these is a tax deed from the tax collector of Los Angeles county to the state of California of date July 6, 1900, for state and county taxes for the year 1894, followed by a deed from the tax collector, dated July 20, 1901, purporting to have been made upon the authorization of the State Controller, to one Monroe, whose title is vested in defendant Harlan. The second deed is a deed dated July 24, 1903, from the street superintendent of the city of Los Angeles to defendant Harlan, based on an assessment for the opening and widening of Pico street in said city. It appears that the street superintendent's deed was made in proceedings for the opening and widening of Pico street, under and in accord with the general law of March 6, 1889 (St. 1889, p. 70, c. 76), instead of under and in accord with the provisions of the charter of the city of Los Angeles applicable to such matter. Such proceedings were therefore void (Byrne v. Drain, 127 Cal. 663, 60 Pac. 433), and the street superintendent's deed a nullity. This does not appear to be contested by defendant. The question, then, is as to the validity of the tax deed.

1. The sale to the state was made July 3, 1895, under the provisions of section 3771 of the Political Code, as amended March 28, 1895 (St. 1895, p. 327, c. 218), requiring the sale to the state by the tax collector of all property delinquent for taxes. The deed to the state was made July 6, 1900, under section 3785 of the Political Code, as amended March 28, 1895. St. 1895, p. 328, c. 218. That section provided: "If the property is not redeemed within the time allowed by law for its redemption, the tax collector, or his successor in office, must make the state a deed of the property, reciting in such deed the name of the person assessed (when known), the date of sale, a description of the land sold, the amount for which it was sold, that it was sold for delinquent taxes, giving the assessed value and the year of assessment, the time when the right of redemption had expired, and that no person has redeemed the property in the time allowed by law for its redemption." Section 3780 of the Political Code provided that a redemption might be made "within five years from the date of the sale to the state, or at any time prior to the entry or sale of said land by the state." The tax collector's deed to the state did not recite in terms "the time when the right of redemption had expired," but did recite "the date of sale"; and further: "And whereas no person has redeemed the property aforesaid within the time allowed by law for its redemption * * * and whereas, the time for redeeming said property has expired, and the same has not been redeemed, nor any part thereof." The recital as to what the certificate of sale stated as to when the purchaser would be entitled to a deed we regard as immaterial in this connection. As we have seen, section 3785 of the Political Code requires in the deed not only a recital of "the date of sale," and a recital that "no person has redeemed the property in the time allowed by law," but also a recital of "the time when the right of redemption had expired," and the first two recitals thus required cannot be taken as also answering the requirement as to the additional recital expressly provided for. The statute undoubtedly requires a plain statement in terms as to the time when the right of redemption had expired, and a deed that did not contain it was not in compliance with the statute.

There can be no doubt that it was the well-settled doctrine in this state prior to the amendment of our tax laws providing that all property delinquent for taxes shall be declared sold to the state for the taxes and penalties due, instead of to the best bidder at public auction, that a tax deed not containing any recital required by law was void. See Grimm v. O'Connell, 54 Cal. 522; Hubbell v. Campbell, 56 Cal. 527; Anderson v. Hancock, 64 Cal. 455, 2 Pac. 31; Hughes v. Cannedy, 92 Cal. 382, 28 Pac. 573; Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761. The decisions proceed upon the theory that it is competent for the Legislature to prescribe the form of instrument which as the result of a proceeding in invitum can alone divest the citizen of his title, and that, where the particular form of the tax deed has been prescribed by statute, the form becomes substance and must be strictly pursued, and it is not for the courts to inquire whether the required recitals are of material facts or otherwise. Grimm v. O'Connell, supra; Simmons v. McCarthy, supra. This may appear to be an extremely technical ruling when applied in the case of such a recital as that here involved. We are unable to see how a recital in the deed to the state as to the date when the right of redemption had expired could be of any substantial benefit to the property owner, especially where there is a recital as to the date of sale, which, when considered in connection with the law as to the time after a sale when the state will be entitled to a deed, is sufficient to enable any one to determine exactly when the time had expired. The Legislature has seen fit, however, to require that the time shall be expressly stated in the deed, and that nothing in that regard shall be left to be determined from one's knowledge of the law. If the decisions already cited as to the effect of a failure to include in the tax deed all the recitals required by statute, however immaterial an omitted recital may appear to us, are to be followed, it must be held that the tax deed in question was originally void. By act approved February 28, 1903, taking effect immediately, entitled "An act to confirm, validate and legalize certificates of tax sales and tax deeds executed to the state of California for property sold and deeded thereto for nonpayment of taxes" (St. 1903, p. 63, c. 59), it was provided as follows: "That all certificates of tax sales and tax deeds made to this state by the county tax collector, which certificates and deeds are based upon the sale of property for non-payment of taxes, and which certificates and deeds fail to recite the correct date, or any date, when the right of redemption will expire, or had expired, or which certificates recite an incorrect date when the state would be entitled to a deed, be and they are hereby confirmed, validated and legalized, and the same shall be construed and operate at all times and upon all occasions in law in the same manner as if such matters and things required by law had been recited therein and performed in the first instance; provided, that in all cases five years shall have elapsed between the date of sale of the property to the state for non-payment of taxes and the date of the execution of such deed." It is claimed by defendant that the defect in the deed was cured by this act, and we are of the opinion that it should be so held.

We are fully aware of the rule that a statute should not be construed to operate retroactively, unless the legislative intention that it shall so operate is clearly apparent S. F. Sav. Union v. Reclamation District, 144 Cal. 639, 647, 79 Pac. 374, and cases there cited. See, also, State v. Harman, 50 S. E. 828, 57 W. Va. 447. It is impossible to read carefully the statute in question, however, without coming to the conclusion that it was intended to so operate. It is essentially a curative act, intended to give effect to past acts or transactions which are ineffective because of neglect to comply with some requirement of law. No other object for its enactment can reasonably be suggested. If it had been simply intended to dispense with the necessity in future cases of the requirement that the certificate and deed should correctly recite the date when the right of redemption would expire or had expired, the obvious and simple method would have been to amend in those particulars the statute with reference to certificates and deeds, or to simply provide that the omission to correctly recite such date would not invalidate the certificate or deed. Retaining those provisions in their original form, the Legislature, however, enact this statute, which in every line compels the conclusion that it was the intention to cure, "to confirm, validate and legalize" something already ineffectively done. The words used are capable of no other reasonable construction, however strictly we construe them.

The statute by its terms covers the case before us. At the date of the approval of the act the deed had been executed to the state, and the defect therein was that it failed to recite any date when the right of redemption had expired. The only question remaining in this connection is as to the power of the Legislature to cure such a defect in the manner here attempted. The act of February 28, 1903, is not a "local or special" law within the meaning of those words as used in section 25, art. 4, of our Constitution, and is therefore not within the fourteenth or eighteenth subdivision of that section, whereby the Legislature is prohibited from passing local or special laws giving effect to invalid deeds, wills, or other instruments, or legalizing, except as against the state, the unauthorized or invalid act of any officer. It applies to all certificates and deeds having the defects stated, and the certificates and deeds constituted a class characterized by such qualities as indicated the propriety of such legislation. Deyoe v. Superior Court, 140 Cal. 476, 481, 74 Pac. 28, 98 Am. St. Rep. 73.

The only remaining objection to the act is that it operates to deprive the property owner of his property without due process of law. This objection, we are satisfied, is not well founded. Assuming in the discussion of this question, as we must, that the assessment upon which the deed was founded was valid, and that all the requirements of the law relative to the enforcement of the taxes thereunder up to the time of the execution of the deed had been fully complied with, the omission of the tax collector to insert in the deed the recital in question, though sufficient perhaps, under our decisions, to render the deed ineffectual as it then stood, was really more in the nature of a mere irregularity, not affecting any substantial right of the property owner. Under the law requiring that all property delinquent "shall by operation of law and the declaration of the tax collector be sold to the state" (section 3771, Pol. Code), the property, more than five years before the deed, had been sold to the state for the taxes, penalties, and costs due thereon. At the time of the execution of the deed the five years from the date of sale within which the owner had the absolute right of redemption having expired (section 3780, Pol. Code), the state was entitled to the deed from the tax collector, and it was then the duty of the tax collector to execute such deed in the manner prescribed by law. The state was then equitably the owner of the property. The property owner had, as against the state, forfeited all rights in the property, except the privilege accorded him by the statute of redeeming it at any time before the state actually entered or disposed of it. The deed to the state provided for by the statute, though designated a "deed," is nothing more, in effect, than formal written evidence of the various facts essential to vest the property in the state, and to which the Legislature has seen fit to give a certain effect (Pol. Code, § 3787). It is the evidence, primary in some particulars and conclusive in others, of those facts from which the vesting of the title to the property in the state necessarily follows as a matter of law, and, prima facie, operates as a muniment of title. Pol. Code, §§ 3786, 3787. We cannot see how any right of the property owner is violated by a statute validating such of these instruments as are ineffectual solely because they fail to contain a recital as to the date when the absolute right of redemption had expired and the state had become entitled to a deed. The fact that the five-year period had expired without redemption was the important thing so far as he was concerned, and the curative statute probably could not, and certainly did not, purport to apply to any case where such period had not elapsed between the date of sale and the date of the execution of the deed. It is his failure to redeem within the time specified that deprives him of his property after due process of law, and he has no constitutional right to any particular form of instrument by which his failure to redeem and the consequent final vesting of the property in the state shall be evidenced. The defect attempted to be cured by the act is as to a mere formal matter—one that in no degree affected any of the substantial rights of the taxpayer. It was, therefore, entirely within the power of the state to remedy the defect by curative statute. It appears to be thoroughly well settled that in matters pertaining to the collection of taxes it is within the power of the Legislature to cure, by retroactive statutes, defects which are in their nature irregularities only, which do not extend to matters of jurisdiction, and that such statutes are not within the constitutional inhibition against the taking of property without due process of law. We consider it unnecessary in this connection to do more than refer to the opinion of this court in the recent case of Chase v. Trout, 146 Cal. 350, 80 Pac. 81, where the matter is exhaustively discussed, and many authorities cited. That case, it is true, involved simply a conclusive evidence provision in an act operating prospectively only, but the doctrine therein declared is equally applicable to mere validating acts, and many of the cases cited involved questions as to the validity of such acts. The case of Harper v. Rowe, 53 Cal. 233, relied on by plaintiff, is not in conflict with the views expressed in Chase v. Trout, supra. There the levy of the tax was invalid for want of any law authorizing it to be levied, and the curative act enacted after a purported sale for delinquent taxes thereon attempted to validate the levy and all proceedings had thereon, including the sale for delinquent taxes. This was clearly a matter going to the jurisdiction. Without a valid tax levy there could be no valid proceedings for the enforcement of the tax, and it was very properly held in Harper v. Rowe, supra, that a statute purporting to validate such a levy and the sales already made thereunder operated to deprive property owners of their property without due process of law, and by mere legislative rescript.

2. It is further claimed that the deed was invalid for failure to recite "the amount for which it [the land] was sold" to the state. The objection in this behalf is most technical, and wholly without merit. The recital is "was, by operation of law and the declaration of said tax collector, sold to the state of California, as purchaser, in pursuance of law in such cases made and provided, to pay said taxes of every kind charged against said property, together with the penalties, costs and charges due thereon, to wit, the sum of two and 92–100 dollars." Plaintiff contends that this recital does not show the amount for which the property was sold to the state, but shows only the object of the sale, and the total amount due for taxes, penalties, costs, and charges. As, under the law, there could be a sale to the state only for the precise amount so due, it appears very clear that what the Legislature intended as to this particular recital was simply that there should be a statement as to the exact amount so due to the state at the time of sale. In Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761, relied on by plaintiff, the recitals left it in doubt as to the exact amount paid by a purchaser at a tax sale. There is no such uncertainty in the deed here involved.

3. The assessment is assailed upon several grounds. The assessment was introduced in evidence. The description of property therein was as follows: "In Los Angeles County, in Pellissier Tr.," and in the column headed, "City and Town Lots," under the subheading "Lot," the figure "5," and under the subheading "Block" the letter "K." No city or town was named, and it does not appear whether or not at the time of the assessment the property was included in any city or town. It was stipulated that a map of the Pellissier tract was recorded in the year 1887 in the record-

er's office of Los Angeles county, and that it showed said lot 5 in block K to be 54 feet front by 121 feet deep. The valuation of the property was placed in the column headed, "Value of City and Town Lots." In the assessment the word "Rosedale" was written across the line dividing the column headed, "School District," from the column headed, "Road District," thus:

| School District | Road District |
|---|---|
| Ros | edale |

The principal contention against this assessment is that the description of property is insufficient. It is apparent from the face of the assessment that the property assessed is lot 5 in block K in the Pellissier tract in Los Angeles county. Although we are not prepared to commend the abbreviation of the word "tract" to "Tr.," we think that such abbreviation used in the connection in which it here appears could not be reasonably supposed to indicate, as suggested by plaintiff, either "trustee," "transcript," or "treasurer," or anything else than the word "tract." The use of abbreviations in assessments appears to be permissible, if thereby the property "may easily be known." Rollins v. Woodman, 117 Cal. 516, 519, 49 Pac. 455. Except, therefore, for the reference to the map, we have in the assessment the same description as that contained in plaintiff's complaint.

A substantially similar description, viz., "Lots in Leibrandt Tract, Blk. F, Nos. 13, 14, 15, 16, 17 and 18," was held insufficient in Miller v. Williams, 135 Cal. 183, 67 Pac. 788; but in that case there was no evidence introduced to show that the description in the assessment was sufficient to identify the property. Here we have the stipulation as to the map of the Pellissier tract recorded in the office of the county recorder, showing this lot, which stipulation must be taken as meaning that there was only one such map, and that this map showed but one lot 5 in block K in said tract. It may be conceded that the description was not in compliance with subdivision 3 of section 3650 of the Political Code, providing for the listing of city and town lots as follows: "City and town lots, naming the city or town, and the number of the lot and block, according to the system of numbering in such city or town, and the improvements thereon." Miller v. Williams, supra. But it is not essential that property situated in a city or town, even though it be a city or town lot, should be listed in accordance with this provision. By subdivision 2 of the same section it is provided that land must be listed "by township, range, section, or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it"; and any land, wherever situated, may be listed under this provision. The object of subdivision 3 of section 3650 was to obviate the necessity of describing each lot by metes and bounds or other description sufficient to identify it, and to render an assessment made in accord therewith equivalent to an assessment under subdivision 2, but the assessing officer is still at liberty to assess under subdivision 2, if he so desires. See Davis v. Pacific Imp. Co., 137 Cal. 245, 247, 70 Pac. 15.

The question, then, is as to whether the description here given was "sufficient to identify" the land. It may be assumed that it was of such a nature as to indicate that it could only be exactly located by reference to some map or plat, and that, as it referred to no such map or plat, it did not, prima facie, sufficiently identify the land (Miller v. Williams, supra), as would a description by name, such as "Forks House Ranch," or a description such as "house and lot on the north side of Main street, Michigan Bluffs, occupied by A. Ferguson as a tin shop." See People v. Leet, 23 Cal. 161. In the case just cited it was substantially said that a description of a tract of land by name is prima facie sufficient in an assessment, as it is presumed that the tract and the extent of its boundaries is well known by the name.

It was, however, permissible to show, in aid of this description, that it was, in fact, sufficient to identify the land, and, in this behalf, to show the recorded map of such Pellissier tract designating with certainty the property referred to in the assessment. If by such evidence it was made to appear that there was such a recorded map, and only one such map, or, if more than one, no difference therein so far as the assessed property was concerned, the evidence was sufficient to sustain a conclusion that the assessment sufficiently identified the property. The trial court had the right to assume, in the absence of a showing to the contrary by the person assailing the description, that there was but one Pellissier tract in the county of Los Angeles, and that this tract, and the extent of its boundaries, was well known by that name. People v. Leet, supra. The rules which should be applied in determining the question as to the sufficiency of a description in an assessment are most elaborately and clearly stated in the opinion in Best v. Wohlford, 144 Cal. 733, 78 Pac. 293, the most recent expression of this court upon the subject. It is true that such case involved a question as to the sufficiency of the description of lands outside of a city or town, made under a provision similar to subdivision 2 of section 3650 of the Political Code, but there is no material difference between that case and this, so far as the question under discussion is concerned. The question there was, as here, as to the sufficiency of the assessment description to identify the property. The description there was in an irrigation district assessment, and, so far as material to the question we are discussing, was "Lot four (4) Block one hundred seventy-eight (178) 14.42 acres, Rancho Rincon del Diablo," which rancho was shown to constitute the whole irrigation district. No map of said rancho was referred to in the assessment or collector's deed. The judgment against the claimants under the tax deed was reversed because the trial court had refused to allow proof that there was, at the time of the assessment, but one lot 4 in block 178, in said rancho, and that such fact was then well known; the claimants having sought to introduce in evidence in this behalf the map or plat of said rancho on file in the office of the county recorder. The effect of the opinion in that case is that the real and only essential, so far as the description is concerned, is that it should be sufficient in itself to definitely inform the property owner as to the exact property assessed. This much, of course, has always been considered essential; the owner being entitled to know with certainty what land is charged with the tax. This knowledge being afforded, the whole purpose of the description under the present revenue law, whereby all property delinquent for taxes is declared sold to the state for taxes, penalties, and costs, is subserved. It was expressly recognized in Miller v. Williams, supra, that much of the reasoning in support of the conclusion as to the insufficiency of the description would have no application under the new system. Under this system the possible purchaser who would pay the tax for the smallest portion of the land is eliminated, and the property owner has no longer any ground upon which to urge that his rights may have been injuriously affected by reason of the fact that the description does not, on its face, at once certainly identify the property to all possible purchasers, and, for this reason, does not bring the return at the sale that it otherwise would.

It is said in Best v. Wohlford, supra, that the provision in the law that the description must be "sufficient to identify" the property implies that evidence may be received, not for the purpose of helping out a defective description, or to show the intention with which it was made, or to resolve an ambiguity in its terms, none of which things can be done, but to show the sufficiency of the description and apply the description given to the surface of the earth, and, further, that the question as to whether the description is sufficient to identify the land is a question of fact to be determined from the evidence presented upon that issue. The court further said: "The designation of a tract of land as a portion of a larger tract by number and block, without any reference to a map, may be sufficient to identify it, and, if so, the omission to refer to a map is not fatal to the description. If reference is made to a map, the map thereby becomes a part of the description, and may be read in evidence to identify the land, by showing that it is delineated thereon according to the recital; and, although it is not competent to show that any particular map was intended, if none is referred to, yet if it can be shown that there is only one map of a tract which includes the lot in controversy upon which this lot is delineated or designated, and that that map is well known and generally accepted as authentic, it may be received in evidence as tending to identify the land before the court." While general expressions are to be found in some of the opinions of this court as to what is required to appear on the face of the assessment that tend to support plaintiff's contention, there is no decision in conflict with the views expressed in Best v. Wohlford, supra. In Miller v. Williams, supra, the most favorable case to him, there was no attempt in the trial court to show the sufficiency of the description to identify the property, and the question as to the right to show this in aid of the assessment was not discussed. As to the cases cited in Miller v. Williams in support of the statement that failure to refer to a map of a tract in an assessment has been held fatal, Labs v. Cooper, 107 Cal. 656, 40 Pac. 1042, involved in street assessment simply of "all, lot 6, block D & E—16 and 17," and there was absolutely nothing to indicate of what larger tract or property these lots and block constituted subdivisions. Cadwalder v. Nash, 73 Cal. 43, 14 Pac. 385, was a case of a deed describing land by reference to a map, where there were two maps, and the description given rendered it uncertain as to which map was referred to. Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738, was a case where by reason of failure to state a direction it was impossible to locate the lot; and People v. Mahoney, 55 Cal. 286, was a case where the description was so indefinite upon its face that the taxpayer could not know therefrom the precise property charged against him. None of these cases are applicable here. The description given must always, of course, be sufficient to apprise the owner as to the exact property assessed to him, but when the description is such that, in the light of the knowledge which it must be presumed is possessed by property owners of the community in which the property is situated, it accomplishes this result, it is sufficient for all assessment purposes, although evidence may be necessary to apply the description to the surface of the earth, and evidence is always admissible to show this in support of the description, just as it is admissible to show against a description apparently clear and certain on its face, that, by reason of other circumstances, it is uncertain or doubtful in its application. This is substantially the doctrine of Best v. Wohlford, supra, and it is fully supported by the reasoning of the opinion and by the numerous authorities cited therein. It being made to appear to the satisfaction of the trial court that there was but one map of the Pellissier tract, which map was a public record, and that this map showed but one lot 5, block K, in such tract, there was enough, in the absence of other evidence tending to impeach the effect of this, to justify the conclusion of the trial court that the description in the assessment was sufficient to show with absolute certainty to the owner the exact property assessed to him, and that the same, therefore, complied with the requirements of subdivision 2 of section 3650 of the Political Code.

The other objections to the assessment require very little notice. It is urged that the name of the city or town wherein the property is situated is not stated, as required by subdivision 3, § 3650, Pol. Code, although the lot is assessed and valued under the head of "City or Town Lots." But the naming of the city or town is absolutely essential to the validity of the assessment only when the special mode of assessment prescribed by that subdivision is followed, viz., where only the number of the lot and block, according to the system of numbering in the city or town, is given. While the name of the city or town might advantageously be given in assessments under subdivision 2 of section 3650, it is not essential if the description otherwise sufficiently identifies the property sought to be charged. It is also claimed that the assessment does not show in separate columns "the school, road and other revenue districts in which each piece of property assessed is situated," as required by subdivision 13, § 3650, Pol. Code. We have already stated the facts in this regard, and they, in our judgment, show a substantial compliance with this provision, indicating "Rosedale" as the name of both road and school district. In Knott v. Peden, 84 Cal. 299, 24 Pac. 160, evidence introduced showed the assessed property to be in a certain road district (which is not the case here; there having been no showing in this behalf), and there was no entry at all in the road district column. There is nothing in the record to show that any portion of the tax against this property was for road district purposes. The only recital in the deed to the state in this regard was "for county purposes, the sum of $1.77-100; for state purposes, the sum of $39-100."

It is practically admitted that, if the title of plaintiff's intestate passed to the state by virtue of the tax proceedings, defendant Harlan has regularly succeeded thereto. We are satisfied that such must be held to be the effect of those proceedings, and that the conclusion of the trial court was correct.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

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3 Cal. App. 422

## WOODS v. KELLERMAN. (Civ. 231.)

(Court of Appeal, Second District, California. April 11, 1906. Rehearing Denied by Supreme Court, June 7, 1906.)

1. EXECUTION — SALES — PRIORITY — REDEMPTION—EFFECT.

Where several sales were made by the sheriff in the inverse order of the dates of the liens on which executions were issued, plaintiff becoming the purchaser at all the sales, and having no liens on the property at the time of redemption from the first sale prior to the judgment under which the same took place, the fact that he accepted, through the sheriff, from defendant the amount paid in redemption due on such first sale, gave the judgment debtor no more than the interest which he had at the time of the accrual of the lien under which the land was sold, and the title acquired by him on redemption was subject to the prior liens then existing, and subordinate to the title acquired by plaintiff under the subsequent sales.

2. SAME—SENIOR LIEN—EFFECT OF SALE.

Where there are several executions against the same property in the hands of the sheriff, the senior liens, whether existing by judgment or otherwise, are not impaired by a sale under a junior lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 232, 762, 764.]

3. QUIETING TITLE—CONDITIONS PRECEDENT.

Civ. Code, § 1578, subd. 2, provides that a mistake of law constitutes a mistake within the meaning of the article only when it arises from (1) a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) a misapprehension of the law by one party, of which the others are aware at the time of contracting, or which they do not rectify. Several sales of defendant's property were made at the same time by the sheriff under executions issued on various judgments. Defendant redeemed from a junior lien, paying the amount thereof to the sheriff for plaintiff, who had purchased at all the sales, defendant believing that by the acceptance of such amount plaintiff was estopped to deny that the redemption was complete, and the property thereby freed from all prior liens. Plaintiff, knowing the law and defendant's supposition, accepted the money from the sheriff. After the expiration of the period of redemption plaintiff brought an action against defendant to quiet title to the property. *Held* that, as each party seemed to have aimed to obtain an advantage against the other to which he was not entitled, plaintiff was entitled to the relief prayed only on the condition of repaying to defendant the amount paid by the latter for redemption, with interest from the date of its payment.

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by James H. Woods against J. M. Kellerman. Judgment for plaintiff, and defendant appeals. Judgment modified, and, as modified, affirmed.

Jones & Weller, for appellant. Curtis & Curtis, for respondent.

SMITH, J. This is a suit to quiet title to the real property described in the complaint. The complaint is in the ordinary form. The defendant in his answer deraigns title under an execution sale to plaintiff of date February 3, 1903, in a suit of the Southern California Lumber Company v. Columbia Mining & Milling Company, the then owner of the property, and a subsequent redemption by him of date February 2, 1904, as judgment creditor in a judgment of date January 12, 1904, against the same defendant, which redemption has become final. The amount paid in redemption was $408.13, which sum was received by the plaintiff from the sheriff and is still retained by him. The facts of the case appear from a written stipulation of the parties, from which the court finds, as conclusion of law, in favor of the plaintiff. Judgment was entered accordingly, and the defendant appeals.

From the stipulation it appears that at the time of the execution sale, February 3, 1903, the sheriff had in his hands the following executions against the Columbia Mining & Milling Company, the then owner of the property, showing several judgment liens against the property, with their dates and the parties in whose favor they were, to wit: (1) Judgment of Harper & Reynolds upon attachment levied February 13, 1902, for the sum of $4,038. (2) Judgment of B. H. Dennis on attachment levied February 17, 1902, for the sum of $446.88. (3) Judgment of Gregory Perkins on attachment levied February 17, 1902, for $2,775.35. (4) Judgment of G. S. Welch, docketed April 16, 1902, for the sum of $465.93. (5) Judgment of the Southern California Lumber Company, docketed April 17, 1902, for the sum of $240.16. Several sales of the property were made by the sheriff; the sales being made in the inverse order of the dates of the liens, and in each sale the plaintiff became the purchaser for the several sums mentioned in the stipulation, aggregating $4,398.14. The first sale was made under the execution in favor of the Southern California Lumber Company, which is the sale from which the defendant redeemed. The amount paid in redemption by him was the sum of $408.13, which was received by the plaintiff from the sheriff, as already stated. Subsequently, the time for redemption having expired, deeds of conveyance were made to the plaintiff by the sheriff in pursuance of each of the other sales—all of date March 23, 1904.

The points urged by appellant for reversal are (1) "that by accepting the said payment [i. e., the redemption money], and retaining the money received thereon, the plaintiff is estopped to deny that the redemption was complete and the property thereby freed from all prior liens to defendant's judgment held by plaintiff as purchaser of said property"; (2) that "the first sale passed the title to the property."

With regard to the first point, the position of the defendant seems to be that the plaintiff was entitled, as a condition of the redemption, to receive either the amounts of the several judgments under which he had purchased, or the amounts of the several items of purchase money, or some other sum not specified, in addition to the purchase money, with percentage, etc., of the first sale, and that, having received a lesser amount, he is estopped to deny the validity of the redemption, or its sufficiency to pass a complete title to the property. But we can see no ground for this contention. The plaintiff, at the time of the redemption, had no liens on the property prior to the judgment under which the sale took place, and the liens of the several judgment creditors had been satisfied by the several sales. Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648. There can be no doubt, therefore, of the validity of the defendant's redemption; nor is there any necessity of invoking the doctrine of estoppel to sustain it. But the interest thereby acquired by him was merely the interest of the judgment debtor at the time of the accrual of the lien under which the land was sold. The title acquired therefore was subject to the prior liens then existing and subordinate to the title acquired by the plaintiff under the subsequent sales. Littlefield v. Nichols, 42 Cal. 374; Hibberd v. Smith, 67 Cal. 566, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726; Meherin v. Saunders, 131 Cal. 688, 63 Pac. 1084, 54 L. R. A. 272; Freeman on Judg. § 377.

The second point made by the appellant seems to be based upon the propositions that, where there are several executions against the same property in the hands of the sheriff, any sale made by the sheriff, though under a junior execution, is, in effect, a sale upon all the executions; and that the money is to be credited on the several liens in the order of their priority. This, from the authorities cited, seems to be the law in some states; but, according to the better opinion, "in the majority, the senior liens, whether existing by judgment or otherwise, are not impaired by the sale." And, even in those states where a different rule obtains, it is said: "If it be understood and agreed between the parties in interest and the purchaser that he will take the property subject to prior incumbrances, this agreement will be enforced, the judgment creditor making the sale will be entitled to the proceeds, and the prior lienholders will retain their liens against the property." Freeman on Executions, § 338. The majority rule, we think, obtains in this state; but, if otherwise, the case would clearly come within the exceptions stated; for here the sale seems to have been made by an arrangement to which all the parties to the immediate transaction assented; and we do not doubt as to them the sales were valid as made. The defendant redeemed with full notice of this arrangement, and did not by his redemption acquire any additional rights.

The several sales, it may be inferred from the facts stipulated, were made under some arrangement between the several judgment creditors, the effect of which was to distribute among them the fund to be produced by the sales. They should be viewed, therefore, as one transaction, for otherwise all the first four sales would be subordinate to the last. Hence, independently of this arrangement, the title sold under the junior lien was, in view of the amount of the prior liens, of no value; nor do we suppose the defendant would have redeemed from it, had he not supposed, under the view of the law entertained by him, that he could acquire a title paramount to that of the purchasers at the other sales. In this he is entitled to but little sympathy; but we do not think, under the circumstances of the case, that the plaintiff should have taken advantage of his mistake of the law and taken the money from the sheriff. Civ. Code, § 1578, subd. 2. Each party, indeed, seems to have aimed to obtain an advantage against the other to which he was not entitled; and under these circumstances we are of the opinion that the plaintiff is entitled to the relief granted him by the court only upon the condition of repaying to the defendant the amount paid by the latter for redemption, with interest from the date of its payment (Baird v. Monroe et al.),[1] and that the judgment should be modified accordingly.

It is therefore ordered that the cause be remanded, with directions to the lower court to modify its judgment in accordance with the view above expressed; and that, as thus modified, the judgment shall stand affirmed.

We concur: GRAY, P. J.; ALLEN, J.

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4 Cal. App. 630

## SAN GABRIEL VALLEY BANK v. LAKE VIEW TOWN CO. et al. (Civ. 167.)*

(Court of Appeal, Second District, California. Dec. 27, 1906. Rehearing Denied by Supreme Court Feb. 25, 1907.)

1. MORTGAGES—RIGHT TO FORECLOSE—DEFAULT IN INTEREST.

A mortgage, securing a note due at a specified time, but containing a stipulation that, on default in the payment of interest, the whole sum shall, at the option of the holder of the note, become due and collectible, may be foreclosed for a default in the interest, though the mortgage contains no such stipulation; the note and mortgage being one contract, and the latter being incidental to the former.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1163.]

2. JUDGMENT—CONFORMITY TO PLEADINGS.

In determining whether a complaint contains averments sufficient to support the judgment rendered, every intendment must be indulged in favor of the judgment, and all doubts of construction resolved in support thereof, and, if the complaint can be construed favorably to the upholding of the judgment, such construction must be adopted.

3. MORTGAGES — FORECLOSURE — COMPLAINT —COPY OF MORTGAGE AS PART OF PLEADING.

A copy of a mortgage, attached to and made a part of the complaint in an action to foreclose it, may be examined to ascertain the contract of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1310.]

4. SAME.

The complaint, in an action to foreclose a mortgage to secure a note due at a fixed time, but stipulating that, on default in the payment of interest, the note should at the option of the holder, become due, alleged that no part of the note had been paid, except interest for one year, and asked the court to ascertain the amount due plaintiff according to the terms of the note and mortgage. A copy of the mortgage made a part of the complaint provided that, on a sale under a foreclosure, the proceeds should be applied to the unpaid amount secured by the mortgage, and stipulated that, in the event of a foreclosure sale, the premises should be treated as one parcel and sold as such. *Held*, that a judgment of foreclosure for the payment of the principal of the note and interest was proper as against the objection that it did not appear that the holder had exercised the option to declare the principal due for nonpayment of interest.

5. APPEAL—OBJECTIONS NOT RAISED BELOW—PLEADING—AMBIGUITY.

An ambiguity in a complaint cannot be taken advantage of on appeal from a default judgment rendered thereon, but only by demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3463.]

6. MORTGAGES—PROPERTY CONVEYED.

A mortgage on land and stock of a water company declared to be appurtenant to the land conveys the stock.

7. SAME—FORECLOSURE—VALIDITY OF MORTGAGE—RIGHT TO CONTEST.

The complaint, in an action to foreclose a mortgage on real estate and stock of a water company declared to be appurtenant to the premises, alleged that the interest of a third person in the mortgaged property was subsequent to the mortgage, and the third person was offered an opportunity to set up any claim he had. *Held*, that the third person was estopped from contesting the judgment of foreclosure on the ground that the mortgage of the stock was ineffectual as to him, on the ground that the same was personalty, and that the mortgage was not executed as prescribed by Civ. Code, §§ 2955–2972, relating to chattel mortgages.

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by the San Gabriel Valley Bank against the Lake View Town Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Cyrus F. McNutt and Joseph E. Hannon, for appellants. Wright, Bell & Ward, for respondent.

BORDWELL, Special Judge. Action commenced December 17, 1902, to foreclose mortgage on real estate and certain water rights represented by 1,000 shares of the capital stock of the Lake View Water Company, appurtenant to the land. The note, to secure the payment of which the mortgage was given, bears date April 10, 1901, due in five years. It contains the following provisions: "If default be made in the payment of interest for a period of thirty days, then the whole sum, principal, here promised, shall, at the option of the holder of this note, become immediately due, payable and collectible." The mortgage contains certain incidental covenants with respect to taxes, cultivation, etc., and provides that, if the mortgagor fails to perform them, the mortgagee may do so, and the expenses so incurred by the mortgagee, with interest, "shall be due and payable by the mortgagor to the mortgagee at the next interest due date thereafter, according to said note, and be secured by this mortgage." It is provided by the mortgage that releases of portions of the property may be had upon the making of certain stipulated payments, and there is also contained in the mortgage the following: "In case of default in making payments hereby secured, the mortgagee may cause this mortgage to be foreclosed, and * * * the mortgaged premises, which shall, at that time, be subject to this mortgage, shall be treated as one parcel and not as separate or several parcels, and they shall be entitled to be sold as one parcel. * * * The proceeds of such foreclosure sale shall be applied to the payment of the costs, * * * also to the then unpaid amount secured by this mortgage." The plaintiff alleges, "That no part of the amount promised to be paid by said note has been paid, except that the interest on the principal sum has been paid to the 10th day of April, 1901 [the date of the note]." By the prayer of the complaint the court is asked to "ascertain and by its decree determine the amount due plaintiff according to the terms of said promissory note and mortgage herein described," fix attorney's fee, direct sale of the property, etc. Summons was regularly served on the defendants, who failed to plead, and, after default duly entered, judgment was rendered against them for the amount of said note, both principal and interest to date of judgment, and attorney's fee and costs.

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[1] For decision in Supreme Court, see 89 Pac. 352.

*[Judge Smith was disqualified, and Superior Judge Noyes was designated to sit in his place. After the opinion by Judge Noyes was filed (see 86 Pac. 727), it was discovered that he was disqualified to sit in the case, having decided it below. The case was ordered resubmitted, and Superior Judge Bordwell was named to sit as justice pro tem. in place of Justice Smith.—Ed.]

The defendants have appealed from the judgment and contend: (1) That, because the mortgage contains no stipulation that upon default in payment of interest a foreclosure may be had for the principal amount of the note, no right exists in the plaintiff to prosecute a foreclosure for more than the unpaid interest. The point is not tenable. The note and mortgage constitute one contract. The latter is incidental, and stands as security for the former, and whenever the note, for any reason, becomes due, a right of action of foreclosure is at once available. (2) Appellants further contend that it does not appear that the plaintiff has exercised the option contained in the note to declare the principal thereof due for nonpayment of interest, and therefore the judgment should have directed sale for payment of interest only. This is a more difficult problem.

The sole question is whether the complaint contains averments sufficient to support the judgment. In such cases the rule is invariable that every intendment shall be indulged in favor of the judgment, and that all doubts of construction shall be resolved in support thereof. If the complaint can be construed favorably to the upholding of the judgment, such construction shall be adopted. A copy of the mortgage is attached to and made a part of the complaint, and may be examined to ascertain the contract of the parties. It provides that, upon a sale ordered by foreclosure decree, the proceeds shall be applied, not simply to the payment of the amount due, but also "to the then unpaid amount secured by this mortgage." This provision is not entirely in harmony with the idea conveyed by the note that the principal can become due and payable before the expiration of the five-year term only in case of the exercise of the option. But ambiguity cannot at this stage of the case be considered. It can be taken advantage of only by demurrer. Furthermore, it is stipulated in the mortgage that in the event of a foreclosure sale "the mortgaged premises, which shall, at that time, be subject to this mortgage, shall be treated as one parcel and not as * * * several parcels, and they shall be entitled to be sold as one parcel." If upon any view of the complaint and the contract it can be said that it was the intention of the parties that, in the event of foreclosure, the whole debt then owing should be paid, then the judgment of the trial court was warranted. And, bearing in mind the rule of construction and presumed intendment above referred to, the judgment must be sustained; for the mortgage is subject to the construction that it was intended that in case of foreclosure, because of default in payment of interest, the property should be sold en masse, and the entire debt paid out of the proceeds.

Appellant McNutt makes the point that the mortgage of the water stock is ineffectual as to him, arguing that it is personal property, and not of the list subject to be mortgaged under the statute, and is not mortgaged with the formalities required by sections 2955–2972, Civ. Code; and, though it may be good as between the parties, it is not operative as against him without an averment of notice or knowledge on his part, which is not contained in the complaint. The point appears to us to be without merit for two reasons: (a) The stock is declared by the mortgage to be a water right appurtenant to the land. Anything appurtenant to the land passes with it. (b) The complaint alleges that his interest in the mortgaged property is subsequent to the mortgage. He was offered an opportunity to set up any claim he had. He had his day in court, and upon well-settled principles is now estopped from contesting the validity of the decree. Hutchings v. Ebeler, 46 Cal. 559.

The judgment appealed from is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

4 Cal. App. 711

## SPOTSWOOD v. SPOTSWOOD. (Civ. 237.)

(Court of Appeal, Third District, California. Jan. 30, 1907.)

1. QUIETING TITLE—LEGAL TITLE—EQUITABLE TITLE.

In an action to quiet title, the legal title prevails over the equitable title.

2. APPEAL—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence will not be set aside on the ground of the insufficiency of the evidence to support it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979–3992.]

3. TRIAL—EVIDENCE—FAILURE TO OBJECT TO QUESTIONS—EXCLUSION OF IMPROPER EVIDENCE.

The failure to object to a question asked a witness does not preclude the court from striking out evidence that it deems improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 242.]

4. SAME.

In a suit to quiet title, based on plaintiff's title by prescription, a statement of a witness that he had heard defendant refer to the premises as his father's, which statement was not responsive to the question asked, was properly stricken, not only because it was not responsive, but because of its indefiniteness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 238.]

5. EVIDENCE—DECLARATIONS AGAINST INTEREST.

In a suit to quiet title, based on plaintiff's title by prescription, evidence of his petition and schedules in insolvency and his assessment of his property, all of which omitted the premises in question, was admissible as a declaration against interest, within Code Civ. Proc. § 1870, subd. 2.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1115.]

6. QUIETING TITLE — EVIDENCE OF TITLE — ADMISSIBILITY.

In a suit to quiet title, based on title by prescription, evidence of a sale of the land for taxes to the state was admissible to show that the operation of the statute of limitations was suspended from the time of the sale until the redemption of the land.

7. SAME.

In a suit to quiet title, based on plaintiff's title by prescription, it was proper to show the assessment of the premises, so that the court might determine whether plaintiff had paid the taxes required by statute to obtain title by prescription.

8. APPEAL — HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where, in a suit to quiet title, based on plaintiff's title by prescription, defendant testified to the payment of the taxes thereon, and plaintiff afterwards claimed that he furnished the money therefor, the error if any, in the admission of the tax receipts, was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170.]

9. WITNESSES — IMPEACHMENT — COMPETENCY OF IMPEACHING WITNESS.

Where a witness stated that he knew the reputation of a party for truth and that it was bad, and admitted on cross-examination that he did not know that he had heard anybody say that the party was a man of bad reputation for truth, but that he knew it himself, and that he had heard it discussed, but could not tell by whom or the number, the witness' knowledge on the subject was not too imperfect to preclude the court from considering his testimony.

10. APPEAL—PREJUDICIAL ERROR.

Where, if all the rulings of which complaint is made had been made in favor of the party complaining, a different result would not have been reached, the errors in the rulings will be disregarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4033.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Joseph Spotswood against J. W. Spotswood. From a judgment for defendant, plaintiff appeals. Affirmed.

T. L. Carothers and A. J. Thatcher, for appellant. Weldon & Held, for respondent.

BURNETT, J. This is an action to quiet title. The complaint is in the usual form. The answer denies that plaintiff is the owner or in the possession of any part of the property in controversy, or has been for several years, and alleges that defendant is and has been since 1891 and 1892 the owner and in possession of the whole of said property, and avers that plaintiff claims some interest in the same which is without right, and asks for judgment quieting defendant's title to said property. The findings follow the denials and averments of the answer. The judgment is the appropriate conclusion from the findings, and is in favor of defendant and respondent. From this judgment and from an order denying his motion for a new trial, plaintiff brings this appeal.

The reliance of appellant is exclusively upon a title by prescription. There is no controversy that at the beginning of the action and for a long time prior thereto the record title was and has been in respondent. A portion of the property was deeded to him by appellant on July 16, 1891, another portion by J. A. Cooper, January 7, 1892, and the residue by A. F. Redemeyer, October 18, 1892. Appellant claims that the conveyance to respondent was to protect said appellant from the rapacity of an unjust and importunate creditor; that appellant paid the consideration for the Cooper deed; and that a mortgage executed by respondent was given to secure the amount due Redemeyer for his conveyance, and that appellant has paid the interest on said mortgage.

However, these considerations were not pressed in the court below, nor is it sought here to have a trust declared in favor of appellant. This probably is in contemplation of the fact that such relief is not within the scope of an action to quiet title, and that in this form of procedure the legal must prevail over the equitable title. Castro v. Barry, 79 Cal. 443, 21 Pac. 946; Harrigan v. Mowry, 84 Cal. 456, 22 Pac. 658, 24 Pac. 48; Tuffree

v. Polhemus, 108 Cal. 676, 41 Pac. 806; Chase v. Cameron, 133 Cal. 231, 65 Pac. 460.

1. The contention is made that the evidence is insufficient to support the findings in favor of respondent. The position is untenable. No one can read the transcript without concluding that there is at least a substantial conflict presented by the record. In view of the many decisions of the courts, it would seem to require a good deal of temerity to insist now that in such a contingency the appellate court can consider the question of the sufficiency of the evidence. In justice to counsel for appellant, however, it may be said that little significance seems to be attached to this point. Indeed, keeping in view what constitutes the elements of adverse possession (1 Am. & Eng. Ency. of Law, 789; Unger v. Mooney, 63 Cal. 595, 49 Am. Rep. 100; Nathan v. Dierssen, 146 Cal. 67, 79 Pac. 739), and remembering that such elements must be shown by clear and positive proof (Ward v. Cochran, 150 U. S. 607, 14 Sup. Ct. 230, 37 L. Ed. 1195; Irvine's Heirs v. McRee, 42 Am. Dec. 468, 5 Humph. [Tenn.] 554), it is at least doubtful whether the evidence would support a judgment for appellant. Assuredly, the court was justified in finding for the respondent.

2. John A. Pickle, a witness for the plaintiff, was asked this question: "Did you ever hear the defendant say whether or not he owned the land?" To which he answered, "No, sir. Well, I have heard him refer to it as being his father's." The defendant moved to strike out the answer on the ground "that the plaintiff must prevail on the strength of his own title, and any declaration made by defendant that the property does not belong to him, or that it belongs to somebody else, is not evidence tending to show that plaintiff has title." The court granted the motion to strike out, and plaintiff excepted. Appellant seems confident of his position here. He says: "We submit that the court erred in striking out the answer, and that no citation of authorities is necessary on so elementary a proposition." No objection was made to the question, but that does not preclude the court from striking out evidence that it deems improper. Parker v. Smith, 4 Cal. 105; People v. Wallace, 89 Cal. 165, 26 Pac. 650; Mahan v. Wood, 105 Cal. 14, 38 Pac. 507; Davey v. S. P. Co., 116 Cal. 329, 48 Pac. 117.

The answer was not directly responsive to the question, and the court's action will be determined upon its merits, and not measured by the reason invoked in the motion to strike out. The question called for a categorical answer of yes or no. Counsel for defendant, knowing that if the answer were responsive it could not prejudice their client, might well refrain from objecting to such a preliminary question. Again, the answer was so indefinite as to time that it could neither hurt nor help plaintiff's cause. For aught that appears to the contrary, the remark may have been made while plaintiff was the undisputed owner of the premises. If this be true, assuming that the court's action was erroneous, it was without prejudice. Besides, it may be plausibly argued that the evidence was inadmissible in support of the title by prescription claimed by plaintiff. McGrath v. Wallace, 116 Cal. 548, 48 Pac. 719; Shroder v. Aden G. M. Co., 144 Cal. 630, 78 Pac. 20. If the question had been asked for the purpose of impeaching defendant, the proper foundation having been laid, it would present a different aspect. No error was committed in the ruling.

3. The court admitted in evidence, over the objection and exception of plaintiff, his petition and schedules in insolvency filed in 1897, and also the assessment of his property as given by him to the assessor in the year 1901. These instruments did not contain the land in controversy, and they were clearly admissible as an "act, declaration or omission against interest." Section 1870, subd. 2, Code Civ. Proc.; McCracken v. San Francisco, 16 Cal. 591; Woolridge v. Boardman, 115 Cal. 78, 46 Pac. 868. According to appellant's contention, his occupancy of the land had ripened into a perfect title at the time he filed his petition and schedule in insolvency, and his omission to include therein said property is certainly a significant circumstance and constituted relevant testimony. The same suggestion will apply to the assessment. It was his duty to list all that he claimed to be his property. If he failed to do so, the court had a right to consider that matter, giving it whatever weight to which it seemed entitled.

4. Defendant neglected to pay his poll and hospital taxes for the year 1896, and the land in controversy assessed to him was sold for said tax, costs, etc., to the state, August 1, 1897. The certificate of sale and the deed and certificate of redemption were admitted in evidence over plaintiff's objection and exception. This evidence was not admitted for the purpose of showing what taxes were levied and assessed upon said land which plaintiff was required to pay to perfect his title, but it was received, as evidence that the title had vested in the state of California, in support of defendant's contention that the operation of the statute of limitations was suspended from the time of the sale till the redemption of the land. Plaintiff contented himself with the general objection that the evidence was immaterial, incompetent, and irrelevant, and did not tend to prove any issue in the case, and that the title vested in the state was destroyed by the act of redemption. No attack was directed against the regularity of the proceedings, nor was it questioned that the sale was properly made and invested the state with the title. The evidence was within the issue whether the plaintiff's adverse occupancy, assuming it to exist, had continued for the statutory period. It is in line with the authorities holding that

"forfeiture to the state within the period necessary to give effect to the statute has the effect to break the continuity of adverse possession, and prevented the operation of the statute bar." Armstrong v. Morrill, 14 Wall. (U. S.) 120, 20 L. Ed. 765; Reusens v. Lawson, 21 S. E. 352, 91 Va. 226.

5. The objection to the introduction of the assessment rolls, from which it appeared that the land in controversy was assessed, is not well taken. It was proper to show the assessment of the land in order that the court might determine whether plaintiff had paid all the taxes as required by the statute to obtain a title by prescription. Oneto v. Restano, 78 Cal. 374, 20 Pac. 743; Baldwin v. Temple, 101 Cal. 396, 35 Pac. 1008.

6. The admission of the tax receipts, if error, was without prejudice, as defendant testified to the payment and plaintiff afterwards admitted it, although claiming that he furnished the money.

7. The court did not err in refusing to strike out the testimony of M. A. Bevans as to appellant's reputation for truth, honesty, and integrity. He said he knew his reputation and that it was bad. He admitted on cross-examination that he did not know that he had heard anybody say that Mr. Spotswood was a man of bad reputation for truth, honesty, and integrity, but "I know it myself. I have heard it discussed, but I cannot tell by whom or the number." It does not appear that his knowledge on the subject was too imperfect to preclude the court from considering his testimony. No objection was made to his competency.

We have examined all the assignments of error, and find nothing in any of them to justify a reversal of the judgment. Indeed, considering the equivocal nature of plaintiff's testimony and the fact of his impeachment by proof of contradictory statements, and that his general reputation for truth, honesty, and integrity was bad, and further keeping in view the testimony in behalf of defendant, it may be assumed that, if all the rulings of which complaint is made had been in appellant's favor, a different result would not have been reached. In this view of the case, the errors, if any, should be disregarded. Silvarer v. Hansen, 77 Cal. 587, 20 Pac. 136; In re Spencer, 96 Cal. 450, 31 Pac. 453.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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(4 Cal. App. 704)

## PEOPLE v. WRIGHT. (Cr. 31.)

(Court of Appeal, Third District, California. Jan. 25, 1907.)

1. HOMICIDE — MANSLAUGHTER — APPEAL — CONCLUSIVENESS OF VERDICT.

A conviction of manslaughter will not be reversed on appeal, where there was evidence that defendant did not act in self-defense, though there was other evidence which would have sustained a conclusion that he did.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 700, 701.]

2. WITNESSES—PROOF OF DEFENDANT'S REPUTATION—RIGHT TO CROSS-EXAMINE.

Though the district attorney in a manslaughter trial stated he would not offer testimony to attack the reputation of defendant for peaceableness and quietness, it was not error to permit him to cross-examine witnesses as to such reputation, and to limit such witnesses to eight.

3. HOMICIDE — MANSLAUGHTER—INSTRUCTION —PREJUDICIAL ERROR.

Where a conviction for manslaughter in a murder trial was reversed on the retrial, defendant was not prejudiced by an incorrect instruction on the subject of murder, where a correct instruction on manslaughter was given, and the jury were instructed that because of the previous conviction, defendant could not be convicted of a higher degree.

4. WITNESSES — IMPEACHMENT—INCONSISTENT STATEMENTS—REBUTTAL.

Where, in a homicide trial, there was evidence that a witness for defendant had made a statement inconsistent with his testimony, and that his character as to honesty and integrity was bad, to rebut his impeachment it could not be shown that he had made prior consistent statements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1260.]

5. CRIMINAL LAW — CONDUCT OF COUNSEL — SUPPORTING WITNESS' STATEMENT.

Where the defense in a homicide trial attempted to impeach a state's witness by showing that he had testified differently at a former trial, and asked him if he had not been asked certain questions and given certain answers and he denied that he had, the district attorney's statement in support of witness' denial, "I'll swear that he didn't, too," though improper, was not prejudicial, since the particular fact as to which it was sought to show witness had contradicted himself was cleared up beyond dispute.

6. SAME—ARGUMENT.

In a homicide trial, a district attorney in addressing the jury said, "You gentlemen know the law, and although" decedent's wife "has been divorced from this man, * * * if meretricious relations did exist between" defendant and decedent's wife, defendant objecting to the argument as improper, the court admonished the district attorney to refrain from referring to the matter, whereupon the district attorney stated, "We claim that what I have referred to and commented upon is the testimony brought out solely and exclusively by the defense in this case and not by the prosecution." *Held* that, though defendant excepted to the remarks, since he did not ask that they be withdrawn or challenged thereto or ask to instruct the jury to disregard them, such remarks did not afford a ground for the reversal of a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2645.]

7. HOMICIDE—EVIDENCE—ADMISSIBILITY.

Where, in a homicide trial, defendants advanced the theory that decedent, when he was shot, had stooped to pick up a cap which it is claimed had dropped off the nipple of the second barrel of his gun, and that that accounted for his having received the shot in the back of his neck, testimony that about one month before the homicide witness was handling the gun and raised the hammer and the cap fell off was properly excluded.

Appeal from Superior Court, Butte County; John C. Gray, Judge.

Hulburt R. Wright was convicted of manslaughter, and he appeals. Affirmed.

Wm. E. Duncan, Jr., for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. The defendant was informed against for the crime of murder, and was convicted of manslaughter. He appeals from the judgment of conviction and from the order denying his motion for a new trial. This is the second appeal of the case. Defendant was first convicted of manslaughter, and for errors committed at the trial the judgment was reversed, and the case remanded. People v. Wright, 144 Cal. 161, 77 Pac. 877. A statement of the facts will be found in the opinion of Mr. Justice Henshaw in the decision upon the first appeal, to which we refer for convenience. In some particulars the facts are not shown to be the same in the present record as are narrated by Judge Henshaw, and whether so or not are not conclusive in the present appeal. But for the purposes of this opinion it is not necessary to point out wherein the facts before us differ from those thus appearing. The killing of Farley by defendant is not denied. His claim is that he acted in self-defense. To state the evidence in all its phases would require much space and seems to us unnecessary.

1. Upon the sufficiency of the evidence to justify the verdict we need only observe, as it is questioned, that there was some evidence from which the jury might have drawn the inference that the life of defendant was not in actual danger or his body of some great injury at the time he fired the fatal shot. The circumstance that the shot entered the back of the neck of deceased and emerged at his chin, together with other facts, might have justified the inference that deceased had at that time withdrawn from or ceased the encounter. It is true deceased had a few seconds previously fired at defendant apparently with the purpose of killing him, and defendant might, under the circumstances, have had reason to believe that deceased would continue the assault, and that his only safety was to kill or disable deceased before the latter could again fire. There is evidence which would have sustained the jury in so finding. But these were matters for the jury to determine, and with their conclusion this court cannot interfere.

2. The district attorney was asked if he intended to attack the reputation of defendant for peace and quiet and answered, "No." Thereupon the court limited the number of defendant's witnesses to prove his reputation to eight. After these witnesses had been examined in chief the district attorney cross-examined them to test their knowledge of defendant's reputation in the particulars involved. Defendant objected to this and claimed that it was an indirect attack upon defendant's reputation, and that he should not be limited to the number stated by the court. We think it was proper for the district attorney to cross-examine the witnesses on the point, though he had declared that he would not attack defendant's reputation by witnesses. This was in no sense an attack upon defendant's reputation. Defendant was but supporting the presumption that his reputation was good for peace and quiet. In doing so it was proper for the people to test by cross-examination the extent of knowledge on the subject possessed by the witnesses. If upon the cross-examination it appeared that one or more of their witnesses knew nothing of the matter, defendant cannot complain, for it was his duty to know what they would testify to and what knowledge they had. Furthermore, the presumption remained in his favor unassailed. We discover no error in the court's ruling.

3. The court gave the following instruction: "There need be no appreciable time between the attempt to kill and the act of the killing. They may be instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of the will, deliberation, and premeditation on the part of the slayer, and if such is the case the killing, if unlawful, is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other or how quickly that they may be followed by the act of killing." It is claimed that this was prejudicial error citing People v. Maughs (Cal. Sup.) 86 Pac. 187. The jury were instructed that by reason of the result of the previous trial the defendant could not now be convicted in any event of any higher crime than manslaughter. The court also instructed the jury as follows: "If you believe from the evidence to a moral certainty and beyond a reasonable doubt that the defendant is guilty of murder in the first degree, or murder in the second degree, or manslaughter, then your verdict should be, 'We, the jury, find the defendant guilty of manslaughter.'" No objection was made to these instructions. A somewhat similar point arose in People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245, and in that case full instructions were given as to the elements constituting murder. It was contended that it was error to instruct as to murder, for, as was claimed, if the evidence showed that defendant committed murder, he could not be convicted of manslaughter. Among other things the court said: "It was perhaps unnecessary to instruct the jury fully as to what constitutes the crime of murder, as the defendant was not being prosecuted for, and could not be convicted of, that crime after making his plea of once in jeopardy for murder." The court added: "But inasmuch as the offense of manslaughter is necessarily involved in the offense of murder, we cannot see that the defendant was prejudiced by instructions defining the latter crime, and in telling the jury that if the evidence war-

ranted a conviction of murder they should find the defendant guilty of manslaughter, and could not, in view of the former conviction, find him guilty of murder." Full and correct instructions were given defining the crime of manslaughter, and this was the only crime for which the defendant was on trial or could have been convicted. If the instruction complained of had been correctly given it would not have been prejudicial to the defendant (People v. McFarlane, supra), for he could not have been convicted of murder. Much less would an incorrect instruction have been prejudicial, unless it conflicted with the instruction given as to manslaughter, or was otherwise confusing and misleading, which we do not think was the case in this instance.

4. Witness Johnson had testified to certain threats he had heard deceased make against defendant. Later along the witness Hendricks testified that Johnson's character for honesty and integrity was bad. He also testified that at a certain time stated Johnson made some statements to him about what occurred when he, Johnson, met deceased, the purpose being to show that the statements differed from those given by Johnson at the trial. No objection was made to this evidence. Still later in the trial, in defendant's rebuttal, witness Evans was asked if he had a conversation with Johnson "shortly before the shooting in which Farley was killed." He answered, "Yes." He was then asked if he heard "Johnson say anything as to whether he had seen Farley waiting with a rifle about 200 yards from his house, or something like that." The question was objected to by the district attorney as irrelevant, immaterial, and incompetent, and as not in rebuttal of anything brought out by the district attorney, and as hearsay. The objection was sustained, and exception noted. It is claimed that defendant had the right to show prior consistent statements by Johnson, and thus rebut to some extent his impeachment by the witness Hendricks citing People v. Doyell, 48 Cal. 85. The general rule is that a witness cannot be corroborated by showing previous consistent statements. There are some exceptions, but this is not among them. Mason v. Vestal, 88 Cal. 396, 398, 26 Pac. 213, 22 Am. St. Rep. 310, and cases there cited. In that case the prior consistent statements which were admitted by the lower court went to the question whether the witness was a truthful man, and the court said: "The evidence has no bearing upon the issue."

5. Misconduct of the district attorney is claimed for two causes. Defendant was attempting to impeach the witness Joe Farley by showing that he had testified differently at the former trial. A series of questions and answers was read to him, and he was then asked: "Q. Did you so testify? A. No, sir; I think not. Mr. Sexton (district attorney): I will swear that he didn't, too." Exception was taken to this remark. No motion was made to strike it out, and the court apparently took no notice of it. The particular fact as to which it was sought to show that the witness had contradicted himself was cleared up beyond dispute, namely, that deceased passed out of the bedroom with his gun through a window and not through the door leading into the bedroom. When he denied having given the testimony as read to him from the purported record of the former trial, it was improper for the district attorney to bolster up his denial; but we are satisfied that no prejudice resulted to defendant.

In his address to the jury the district attorney said: "You gentlemen know the law, and although Mrs. Farley has been divorced from this man and awarded the custody of the children, that if meretricious relations did exist between Mr. Wright and Mrs. Farley—" At this point counsel for defendant interrupted: "We object to that, and ask the court to admonish the district attorney to refrain from mentioning any such relations. The only assertion that has been made is what Mr. Farley stated concerning the breaking up of his family, and the notion he had in his head that Wright was making trouble in his family. "The Court: The district attorney will refrain from referring to those matters." Defendant thereupon took exception to the remarks of the district attorney above. "Mr. Sexton: We claim that what I have referred to and commented upon is the testimony brought out solely and exclusively by the defense in this case, and not by the prosecution." To these remarks defendant took exception, but did not ask that they be withdrawn, or challenge their truth, or request the court to instruct the jury to disregard the remarks. The judgment was reversed on the first appeal in part because the prosecution was permitted to show that deceased believed that improper relations existed between defendant and Mrs. Farley. In People v. Shears, 133 Cal. 154, 65 Pac. 295, the court, speaking of certain remarks made to the jury by the district attorney to which exception was taken, said: "This was improper, but its effect would have been removed if the defendant had asked the court to instruct the jury that it was improper, and to disregard it." There are instances where the mischief done by the improper conduct of the district attorney cannot be thus cured, as where he refers to the fact that the defendant failed to appear as a witness in his own behalf. But we do not think that the conduct of the district attorney in the present instance could be classed as incurable error. In view of the ruling of the Supreme Court in the former appeal, the district attorney should have refrained from making any reference to the matter. It was, however, not such error as would justify the reversal of the case upon the record before us. It may be remarked by way of caution to district attorneys generally that reversals are made necessary in too many cases because of a desire on their part for present victory regardless of the consequences to follow on appeal. This officer owes it not only to his own reputation, but to the court and the people whom he represents, to avoid all possible errors in the conduct of cases.

6. Defendant advanced the theory at the trial that deceased, when he was shot, had stooped to pick up the cap which it is claimed had dropped off the nipple of the second barrel of his gun, and that this accounts for his having received the shot in the back of his neck. Defendant offered to prove by a witness that about one month before the homicide he, the witness, was handling this gun, raised the hammer, and the cap fell off. The court rightly sustained the objection made to the testimony. Obviously it was too remote and would cast no light upon the kind of caps used by deceased on the day of the killing.

There are no other alleged errors in the record which call for notice.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

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4 Cal. App. 745

## MAXWELL v. FRESNO CITY RY. CO.

(Civ. 287.)

(Court of Appeal, First District, California. Feb. 5, 1907.)

1. CARRIERS—PASSENGERS—DUTY OF CARRIER.

Carriers are liable for the negligent injury of passengers, being required to use the greatest care in their transportation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1085–1106.]

2. SAME—STREET RAILROADS—INJURY TO PASSENGER ALIGHTING—NEGLIGENCE—QUESTION FOR JURY.

In an action against a street railway company for injury to a passenger alighting from a car and stepping into a depression, evidence *held* not to show as a matter of law that the company was not negligent.

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a street railway company for injury to a passenger alighting from a car and stepping into a depression, evidence *held* not to show as a matter of law that the passenger was guilty of contributory negligence.

Appeal from Superior Court, Fresno County; Geo. F. Church, Judge.

Action by Mary Maxell against the Fresno City Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank H. Short and F. E. Cook, for appellant. Everts & Ewing, for respondent.

HALL, J. Plaintiff brought this action against defendant to recover damages for injuries sustained by her while a passenger on a car operated by defendant. The jury having rendered a verdict for plaintiff, defendant moved for a new trial, and this being denied, appealed from the order denying its motion for a new trial as well as from the judgment.

It is urged that the evidence in the case fails to show that defendant was guilty of any negligence, and that it does show that the plaintiff's own negligence was the cause of her injury, or contributed thereto. Plaintiff took passage on one of defendant's cars, and in stepping from such car to the ground, when the car had stopped for her to transfer to another car of defendant in order to complete her trip, her ankle was seriously injured. In her complaint she charges that defendant neglected to maintain a proper and suitable place for passengers to alight, and that on the occasion in question it carelessly and negligently operated its car so as to stop the same for plaintiff to alight at an unsuitable and dangerous place. Common carriers of passengers are bound to exercise a very high degree of care, and are liable for slight neglect. "A common carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." Civ. Code, § 2100. They are responsible for negligence, and are required to use the greatest care in the transportation of their passengers. Jamison v. San Jose, etc., R. R. Co., 55 Cal. 593; Wheaton v. North Beach, etc., R. Co., 36 Cal. 590; Carr v. Eel River, etc., R. R. Co., 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354; Fairchild v. Cal. Stage Co., 13 Cal. 599. "There can be no question that the relation of carrier and passenger continues while the passenger is expeditiously engaged in the act of carefully and prudently alighting from the car, and that the carrier is bound to exercise the same high degree of care in affording a passenger a reasonable opportunity to alight in safety as in carrying him safely." Cody v. Market St. Ry. Co, 148 Cal. 90, 82 Pac. 666. See, also, Ft. Worth & D. C. Ry. Co. v. Kennedy, 35 S. W. 335, 12 Tex. Civ. App. 654; Railway Co. v. Finley, 79 Tex. 85, 15 S. W. 266; Fairmont Ry. Co. v. Stutler, 93 Am. Dec. 714, 54 Pa. 375.

In examining the evidence in this case, it must also be borne in mind that whether the evidence shows negligence is peculiarly a question to be determined by the jury, and when different conclusions may reasonably be drawn from the proven facts, even where there is no conflict in the evidence, the question of negligence is for the jury. Hennesey v. Bingham, 125 Cal. 627, 58 Pac. 200; Fox v. Oakland Con. St. Ry., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216; Pacheco v. Manufacturing Co., 113 Cal. 541, 45 Pac. 833; Buchel v. Gray Bros., 115 Cal. 421, 47 Pac. 112; Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651; Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993; Wikberg v. Olson Co., 138 Cal. 479, 71 Pac. 511. In the case last cited (Wikberg v. Olson Company, supra) it is said: "Negligence cannot be defined and measured by any precise standard. It is always relative to particular facts and circumstances upon which it is sought to be predicated. As a general rule, it is a question for the jury to determine from the facts and the logical inferences therefrom. It is only in cases where the facts are without dispute, or the deduction inevitably that of no negligence, that the court can say, as matter of law, that no negligence was proven. The case must be a clear one, which would justify the court in holding the evidence insufficient to sustain the verdict." To same effect see Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734.

With the foregoing principles in mind, we now proceed to an examination of the evidence in the case. Defendant, at the time of the accident in question, operated a street railroad in the city of Fresno. One of its tracks ran north and south on J street, and another ran east and west on Stanislaus street, and connected with the J street track at the intersection of the two streets. Each line was a single track line. The Stanislaus track, as it approaches the J street, divides into two spurs or tracks, one curving to the north and thus connecting with and running into the J street track, and the other curving to the south and thus running into the J street track. The plaintiff on the day of the accident boarded a car on the Stanislaus Street line for the purpose of going to the Southern Pacific Depot. This car did not go to such depot, and in order to complete her trip she was obliged at the intersection of Stanislaus and J streets to transfer to a J Street car going south. The car upon which she took passage consisted of an inclosed portion in the center for the use of passengers, and an open portion at each end, also fitted for and used by passengers. It is not perfectly clear to us whether the seats on the open portions of the car extended across the car, or ran lengthwise with the car, but we infer from what appears in the record before us that the seats extended lengthwise with the car. At any rate, the seats were reached by steps extending along the side of the open part of the car, so that passengers could get on or off the car immediately opposite any given seat on the open portion of the car. Plaintiff took a seat on the northerly or right-hand side of the Stanislaus Street car going westerly toward J street, on the front open portion next to the front window. When the car reached J street it took the northerly curve, and was stopped on the curve so that plaintiff might transfer to a J Street car going south. As the track curves around the northeast corner of J and Stanislaus streets the nearest track is five feet from the sidewalk curb at the corner. The street slopes from the track to the curb, the slope being greater as it approaches the curb, thus forming a gutter. The car was stopped so that the open portion on which plaintiff sat was opposite to the corner formed by the junction of the north gutter on Stanislaus street with the east gutter on J street, and the car stood practically at right angles to a line bisecting the angle formed by the north line of Stanislaus street and the east line of J street. This seems to be the only point where the gutter approaches within stepping distance of the step of a car standing on the track. The evidence shows that at this point the distance between the second or lower step of the car and the ground immediately below was 20 inches, and at 6 inches nearer the curb it was 24 inches. The step was 1 foot and 10 inches from the curb. The distance from the lower step to the ground on the south side of the car was 13 or 15 inches. The car to which plaintiff desired to transfer having stopped on J street somewhat in front of her car, she got off her car from the side upon which she sat, and in so doing stepped into the gutter, and thereby injured her foot.

At the trial of the case a diagram of the premises was used, which is not reproduced in the transcript, but in appellant's brief there is a diagram, the correctness of which is not challenged by respondent, except that it does not show the position of the J Street car in accordance with the evidence given by plaintiff. We have therefore in our examination of the evidence used the diagram attached to plaintiff's brief. From the evidence it appears that the car could have been stopped at a point where no portion of the car from which passengers could alight would have been opposite the corner formed by the junction of the gutters, and it is certain that the car could have been so stopped that plaintiff would not have been opposite such corner. Though it is true, as claimed by appellant, that defendant had no control over the grade of the street, it did have control of its car, and could have stopped it at a safe place, or at a place where there was no unusual depression into which plaintiff would be likely to step in getting off the car. The depression into which she stepped was one of circumscribed superficial area so far as it approached near to the car track, and for that reason, perhaps, all the more dangerous, as being more liable to be overlooked by a passenger in getting off the car. The general surface of the ground about the car was much less below the level of the lower step than was the ground immediately opposite where plaintiff was sitting. The car was 27½ feet long, and the switch or curved portion of the track was 125 feet long. It appears that the car could have been stopped so that neither the portion upon which plaintiff sat, nor any portion from which a passenger could alight, would have been within stepping distance of the gutter. The car could have been stopped at a convenient point for transferring passengers where the distance from the lower step to the ground did not exceed 15 inches. The facts above referred to, we think, tend to support the conclusion that defendant did not use the utmost care for the safety of plaintiff.

Neither can we say as a matter of law that plaintiff was guilty of contributory negligence. She testified that though she had frequently ridden on the cars of defendant over this route, she had never specially noticed the conditions where she got off upon this occasion. That she did not think she had ever before sat on the north side of the car, as she lived on the south side of the street, and she was certain that she never before got off on the north side at that transfer point. When the car stopped on this occasion for her to make the transfer, she was looking at the ground in front towards the other car, and she did not take special notice of the ground onto which she stepped in alighting from the car. She had a grip with her. She said: "I looked at the ground to determine how far I should walk and where I should walk across to get the car. I stepped off the car and that is all." Although it is apparent that she made no careful examination of the ground on to which she stepped, we cannot say that the jury were obliged to say that she did not exercise the care that the average person would use under similar circumstances. By stopping the car as it did, and with steps immediately in front of her, the defendant in effect invited her to get off at that point. "While the carrier must exercise a high degree of care to safely transport and deliver its passengers, the passenger may rely somewhat on the carrier's care, and is only called upon to act as a reasonable person would under the circumstances." Nellis, Street Surface Railroads, 520.

The facts of the case at bar are in their essential particulars strikingly similar to Bass v. Concord St. Ry. Co., 46 Atl. 1056, 70 N. H. 170, where a car conductor stopped the car somewhat beyond the place where the plaintiff (a woman) desired to get off, and at a point where there was opposite to the place where she sat a depression in the ground from two to eight inches in depth, and "the distance from the running board to the ground, where one would naturally step, was greater than at the entrance to the cemetery" (the place at which she desired to alight). She testified in substance that when the car stopped she simply stepped off without making any special examination of the ground upon which she stepped. The accident occurred in the daytime. The verdict for the plaintiff was sustained, the court holding that there was sufficient evidence of negligence on the part of the defendant, and that the facts did not as matter of law necessarily show contributory negligence on the part of plaintiff. Upon this latter point the court said: "It may be conceded that if the plaintiff had looked, she would have refrained from stepping as she did, and still the defendant may be liable. The fact that more precaution on her part would have prevented the accident does not necessarily defeat a recovery. The question is whether some fair-minded men might say that, with her knowledge and in her situation, she acted with reasonable prudence, without further investigating the condition of the ground she was to alight upon. The test of her right to have the question of her care determined by a jury was not whether she did all that she could do in the way of taking precautions, but whether she did enough so that her conduct might be thought to be that of a person of average prudence." In the case at bar the jury and the trial judge visited and inspected the place where the accident occurred, and for that reason were better able to judge of the condition there than is this court.

We cannot say from the evidence before us that, as a matter of law, defendant was not guilty of negligence, or that plaintiff was guilty of contributory negligence. No other point is raised by appellant in its opening brief. In its reply brief defendant calls our attention to the refusal of the court to give certain instructions requested by defendant. It is only under exceptional circumstances that this court will consider questions not raised in the opening briefs. No such exceptional circumstances are suggested in this case. Kahn v. Wilson, 120 Cal. 643, 53 Pac. 24; Phelps v. Mayers, 126 Cal. 549, 58 Pac. 1048; Webber v. Clarke, 74 Cal. 11, 15 Pac. 431.

The judgment and order appealed from are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

150 Cal. 615

## McLEAN v. BALDWIN et al. (L. A. 1,648, 1,573.)

(Supreme Court of California. March 1, 1907.)

QUIETING TITLE—PROCEEDINGS—EVIDENCE—SUFFICIENCY.

In an action to quiet title to land, evidence examined, and *held* insufficient to support the judgment that plaintiff was not the owner of any part of the premises described in the complaint.

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Susan A. McLean against E. J. Baldwin and others. From a judgment for defendants, an order denying a motion to render a different judgment, and an order denying a motion for a new trial, plaintiff appeals. Judgment and order denying new trial reversed. Order refusing to render a new and different judgment affirmed.

Graves, O'Melveny & Shankland, for appellant. Works, Lee & Works, for respondents.

McFARLAND, J. This is an action to quiet title to a certain piece of land. The defendant Garvey made default, and defendant Temple disclaimed. Defendant Baldwin answered, denying that plaintiff had any title or right to the premises described in the complaint, averring his ownership thereof, setting up a certain judgment in bar of plaintiff's action, and praying for judgment decreeing that plaintiff has no title to said land, and that defendant is the owner thereof. The trial court found that plaintiff had no title or right to or in the premises, or any part thereof, and that defendant was the owner of certain land described in the judgment. There are two transcripts on appeal in the case, Nos. 1,648 and 1,573, and these transcripts present three appeals by plaintiff—one from the judgment, another from an order denying a motion made under section 663½, Code Civ. Proc., to render a different judgment, and the third from an order denying plaintiff's motion for a new trial. They were all submitted at the same time and will be considered together.

The evidence, including testimony of witnesses, former judgments, and other documents, and the findings and judgments herein present a case which is confused, uncertain and unsatisfactory. Indeed, it is difficult to discover what, if anything, the findings and judgment do definitely determine. It might almost be imagined that the parties and their predecessors have been trying to keep open opportunities for the luxury of future litigation. The action is to quiet title to a small piece of land lying along the boundary lines between two large adjoining tracts of land—one known as the "Rancho Potrero de Felipe Lugo" lying on the east, and the other known as the "Rancho La Merced" lying on the west. In 1872 both of these ranches were owned by F. P. E. Temple, who was the common source of title of all the parties. In 1873 he gave to the son, John H. Temple, a piece of land lying along the boundary line of said ranchos, containing about 75 acres and known as the "John H. Temple homestead." The plaintiff in the case at bar claims, through mesne conveyances, from said John H. Temple, the deeds running from said Temple to one A. N. Davidson, from Davidson to E. H. Watkins, from Watkins to his wife, and from Watkins and wife to the present plaintiff.

The main question in the case is whether the land here in controversy is on the east or the west side of the boundary line between the two ranchos. Defendant contends that the boundary is a line called the "Stevenson line," to be noticed hereafter, while plaintiff contends that the line is "the westerly boundary line of the Rancho Potrero de Felipe Lugo as said line was surveyed by L. Seebold in August, 1874." If the Stevenson line is, for the purpose of this case, to be taken as the right line, then the judgment is correct. If the Seebold line is the right one then the judgment is erroneous, at least, as to a larger part of the land in controversy. Defendant pleaded in bar, and mostly relies upon a judgment rendered in the superior court, in an action brought by defendant herein as plaintiff therein against the said John H. Temple, and designated in the superior court as "Baldwin v. Temple, No. 5,817." That action was brought to quiet title to a piece of land which is described in the complaint therein as follows: "That certain tract of land bounded on the northerly side by the boundary line between the Rancho La Merced and the Rancho Potrero de Felipe Lugo, and on the westerly side by the road leading from the Old Mission San Gabriel to the schoolhouse known as the 'Temple Schoolhouse,' and on the easterly side by the San Gabriel river, and on the southerly side by the land heretofore occupied and used by one E. Bestwick, including within said boundaries ten acres of land, more or less, the same being located in the northwest corner of the said Rancho La Merced."

The defendant therein, Temple, answered, denying the averments of the complaint, and also filed a cross-complaint in which he averred that he was the owner of a piece of land described as follows: "That certain tract of land situated in the township of El Monte, county of Los Angeles, state of California, and which is bounded on the northerly side by the road leading from the Old Mission San Gabriel to the schoolhouse known as the 'Temple Schoolhouse,' said road known as the 'Old Mission road,' and on the easterly side by the western boundary of the Rancho Potrero de Felipe Lugo, said line was surveyed by L. Seebold in August, 1874, and on the southerly side by the San Gabriel river, and on the westerly side by the land heretofore occupied and used by E. Bestwick; said tract described being a part of the John H. Temple homestead." He also averred in his cross-complaint that "said described tract is the same land described in plaintiff's complaint"; and in his answer to the cross-complaint Baldwin "admits that the land described and claimed by the plaintiff in his complaint in said action is the same land and premises described in the said cross-complaint of the defendant." That action was commenced on the 15th of February, 1887, and judgment was rendered therein in favor of Baldwin on the 28th day of May, 1897. The judgment adjudicated that Baldwin was the owner and entitled to the possession of the land as described in the complaint, and also in the cross-complaint. At the time of the commencement of that action Baldwin was and had been the owner of the Rancho La Merced. At the commencement of that action he filed a lis pendens, which has been held to give constructive notice to and to bind the successors in interest of said Temple, including the plaintiff herein. See McLean v. Baldwin, 136 Cal. 565, 69 Pac. 259.

Therefore the judgment in No. 5,817 quieted Baldwin's title to a piece of land that was described as "bounded on the easterly side by the western boundary of the Rancho Potrero de Felipe Lugo as surveyed by L. Seebold in August, 1874." But after the entry of the judgment, which was not appealed from, Baldwin caused another line to be run by a surveyor named Stevenson—being the same hereinbefore mentioned—which was different from and easterly of the Seebold line, and which Baldwin claimed as the line between the two ranchos, and in accordance with which he was put into possession by the sheriff under a writ of possession. There was no warrant under the judgment for establishing the Stevenson line. In the case at bar the court finds the facts as to this line surveyed by Stevenson, but it is doubtful whether the findings expressly declare that the Stevenson line is the correct one, although by implication they seem to so declare, and other findings seem to assume such line as the correct one. However, the description of the land quieted to Baldwin in the case at bar adopts the descriptions in the judgment in said case No. 5,817, which, of course, again describes Baldwin's land as bounded on the easterly side by "the western boundary of the Rancho Potrero de Felipe Lugo as said line was surveyed by L. Seebold in August 1874." Defendants' counsel contend that, as the court found that plaintiff was not at the commencement of the action "and is not now, the absolute nor exclusive owner in her own right as her separate property, nor the owner at all, of that certain property situate in the county of Los Angeles, state of California, and bounded and described in the first paragrapn of her complaint, or any of said described property situated within the Rancho La Merced in said county," therefore she would not be aggrieved, even though that part of the judgment which quiets certain described land to Baldwin be erroneous. But the very question whether the above finding against the plaintiff can be maintained depends upon the proper location of the disputed line between the two ranches. Counsel for respondent seem, at one place in their brief, to intimate that the alleged Seebold line has no existence and is a "myth." But documentary evidence introduced at the trial, and the testimony of witnesses, show that the Seebold line was a well-recognized line for many years. Moreover, in the case at bar the court finds that "the survey by Seebold was actually made by him on the ground in August 1874, is the same survey referred to in the pleadings in the case No. 5,817, and the Seebold line where it crossed the county road was indicated by a notch cut in the fence," and that the Stevenson line "was located upon the ground about five chains easterly from the line of the original survey by Seebold in August 1874." There is no room, therefore, for ignoring the said Seebold line.

From the foregoing it seems clear that, upon the evidence and findings as they appear in the case at bar, the Seebold line should have been taken, for the purposes of this case, as the line establishing the boundary between the land of plaintiff and defendant; and that therefore the finding that the plaintiff is not the owner of any part of the premises described in the complaint is not sustained by the evidence and is contrary to the other findings. For this reason, the judgment and order denying a new trial must be reversed. It may be noted that while the appeal from the judgment is expressed as an appeal from certain parts thereof, it is, in substance, an appeal from the whole judgment. We cannot, upon the record as it stands, reverse the order of the court below, refusing to render a new and different judgment—as set forth in transcript

5,817. To do so would be for this court to make new findings. That order is therefore affirmed.

There are many things in the record which we have not noted, and which, under the above views, are not necessary to be noticed. It is to be hoped that upon another trial the line between the parties may be definitely fixed, not merely by the name of the survey, but by an actual line traced on the ground, which will end all litigation upon the subject.

The judgment and order denying a new trial are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

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(150 Cal. 358)

## COMMERCIAL & SAVINGS BANK OF SAN JOSE v. POTT et al. (S. F. 3,802.)

(Supreme Court of California. Jan. 26, 1907. Rehearing Denied Feb. 25, 1907.)

1. Corporations—Stock—Sale—Evidence.

The fact of a sale of shares of stock, otherwise shown, is not negatived by the provision of the contract that the seller shall be the owner of all dividends on the stock; this being merely to define the rights of the seller while he holds the stock as security for payment of the notes given for the consideration, it being provided by the contract that the buyers shall have the right to sell the stock while it is so held as security.

2. Evidence—Parol Evidence.

The terms of a written contract of sale cannot be varied by evidence of the terms agreed on in the negotiations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1787.]

3. Bills and Notes—Defenses.

Where, by the contract of sale of stock by plaintiff to A. and P., the joint notes of A. and P. were to be given for part of the consideration, and their separate notes for the balance, the agreement of plaintiff with A. after the delivery of the notes and stock, that he would never have to pay any of the notes given by him, does not affect the liability of P. on the note given by him.

4. Evidence — Value — Qualification of Witnesses.

There is no error in rejecting testimony as to the actual value of stock, the witnesses not being shown to be qualified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2196, 2218.]

5. Same—Relevancy.

In an action for the purchase price of stock, testimony as to whether stock might have a fictitious market value was irrelevant, there being no evidence on which it could be claimed that the stock in question had such a fictitious value.

6. Bills and Notes—Issues Raised by Answer.

The special defense of nonliability for interest on the note sued on, under the provision of the contract for sale of stock, for purchase price of which the note and others were given, that the seller guarantied to the purchasers that the dividends on the stock would pay all interest on the notes, and that in case of deficiency the purchasers should receive credit on the notes for the deficiency, or the deficiency should be paid then in cash, at the option of the seller, is not raised by the allegations, in the special defense of fraudulent representations inducing the purchase, that by the terms of the contract, and in order to continue and consummate his fraud the seller agreed and guarantied to the purchasers that the interest on the purchase money notes would be fully paid by and out of the dividends on the stock; and that no dividends were declared or profits received by the corporation from which they could be declared.

Department 2. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by the Commercial & Savings Bank of San Jose against F. S. Pott and another. Judgment for plaintiff. Defendants appeal. Affirmed.

James H. Campbell and Edward F. Treadwell (Mastick, Van Fleet & Mastick, of counsel), for appellants. Cobb & Rea, for respondent.

LORIGAN, J. This action is upon a nonnegotiable promissory note given by the defendants, F. S. Pott and wife, to A. G. Field, and by him indorsed and transferred to the plaintiff for value before maturity. It appears from the findings that about a month prior to November 1, 1892, the defendants F. S. Pott and P. P. Austin entered into negotiations to purchase from said Field his real estate and insurance business in the city of San Jose, and also 650 shares of the capital stock of the Western Granite & Marble Company, a corporation for many years organized and existing under the laws of this state, and having its principal place of business in said city of San Jose; that said Pott and Austin, having made due and proper investigation as to the value of said capital stock of said corporation, entered into and executed a written agreement with said Field whereby the latter sold and transferred to said Pott and Austin said real estate business and said capital stock for the sum of $45,750, to be paid $10,000 in cash, which was paid, the balance to be evidenced by the promissory notes of said Pott and Austin in various amounts bearing date November 1, 1892. Said stock to be held by said Field as collateral security for the payment of said notes. In addition to the notes above referred to, which did not represent the entire payment to be made and secured by said stock as collateral, it was provided that said Pott and Austin were to give two other promissory notes of $5,000 each, to be indorsed and secured in such manner as might be approved by said Field. It was further agreed that said Pott and Austin should have full and absolute power to sell and dispose of the said capital stock at any time. All the notes, including the latter two, were given as provided for, and this suit is on one of the latter notes given by the defendant, F. S. Pott and his wife; she having signed the same as the security provided for in the contract. In negotiating for the sale of the real estate and insurance business and the capital stock the value of the former was fixed at $10,000, and the cash payment which was made represented its purchase price; the value of the capital stock was fixed at $55 per share, amounting to $35,750, represented by the various notes given, including the one in suit. This action was commenced on the note in question some five years after the sale of the stock and delivery of the note. The defense interposed was that there was no consideration for the note, it being averred that the capital stock for the purchase price of which the note was given had no value at that time. In addition to this, it was further averred that the sale and delivery of the note was occasioned through the fraudulent concealment and representations of Field as to the business and affairs of the corporation and of the value of its stock. It is claimed that an additional defense was interposed, but that will be considered later. Upon the issues specifically mentioned above the court found against the defendants, and the judgment was rendered for plaintiff for the principal and interest on said note. A motion for a new trial having been denied defendants appeal from that order alone.

While various specifications appear in the bill of exceptions relative to the insufficiency of the evidence to sustain the decision of the court, no discussion save as to one is made in the briefs. This is addressed to the finding of the court that there was a sale of the stock by Field to Pott and Austin. As against this finding, it is contended on the part of the appellants that the evidence shows that the arrangement between Field and Pott and Austin as to the shares of stock was not a sale, but simply an ingenious plan to raise money on the stock. There is no merit in this claim. By the terms of the contract it was a sale. The stock was transferred upon the books of the corporation to Pott and Austin. The contract provided for an option in Field to repurchase within two years from Pott and Austin such portions of the stock as might remain unsold. Pott and Austin paid an assessment on it long after it was transferred to them. They held it for several years after such transfer and ultimately disposed of it. The answer of the defendants treats the transaction as a sale and seeks to defeat the purchase of the note given by claiming that there was no consideration for it, and that the purchase was induced by fraudulent representations. The measures taken by Pott and Austin to ascertain the value of the shares of the capital stock pending negotiations for its purchase, and the testimony of witnesses on the trial show it was a sale. All these matters support the finding of the court that it was a sale, and there is no pretense from the evidence that it was anything else. In fact, the only basis which the counsel for appellants has for claiming that there was not a sale of the stock is that the agreement between Field and Pott and Austin recites that the latter "shall be the owners absolutely and completely of any and all dividends accruing to or payable upon said stock." It is claimed that this provision impliedly negatives ownership. We think, however, no such deduction follows. It is quite clear why this provision was inserted. The contract itself declared a sale to Pott and Austin of the stock, but provided that Field should hold it as collateral security for certain of the notes given for its purchase. In order, however, to clearly define what the rights of the purchasers should be while Field so held it, it was declared in the contract that Pott and Austin should have full and absolute power to sell and dispose of said stock while it was so held as security, and the provision quoted by appellant relative to dividends was for the purpose of giving them beyond any question the right to any dividends payable on said stock while it was so held. So that, from appellants' standpoint, there is nothing to disturb the decision of the court that it was a sale, while, on the other hand it is fully sustained by the facts which we have called attention to.

This disposes of the only point made as to the insufficiency of the evidence, and we now approach the next ground urged for a reversal, namely that the court erred in its rulings relative to the admission of evidence. Appellant offered to show that Field, the vendor of the stock, agreed to give a written guaranty to Austin that he would never have to pay any part of the principal of the note given by him for the purchase price of said stock, and it is insisted that the court erred in refusing to admit such evidence. We do not see how this evidence was material. The note sued on here is a note given by F. S. Pott, with his wife as the security required under the contract with Field. There was no privity between Austin and Pott on this note. Austin could not be held upon it. The stock was delivered upon the execution of the notes called for in the contract. It became the property of the vendees, was used by them as their own, and ultimately disposed of by them. The sale in that respect was fully executed. If any such arrangement was entered into by Field and Austin prior to the execution of the contract, it must be deemed to have been abandoned. It is no part of the written contract, and by the terms of that contract must the rights and obligations of the parties be determined. If this arrangement was entered into subsequent to the execution of the written contract, it could not affect that contract, because it would be a matter in which Austin and Field were alone concerned. Field had the right to release Austin from all obligation to him under the contract or upon the notes, and Pott could not complain that any of his rights were infringed on by reason of such release. Under the agreement Pott and Austin were to give Field their joint notes for $25,750 of the $45,750 to be paid for this capital stock and deliver to Field the stock as collateral security. In addition to this, and as part of the purchase price, they were to give two individual notes of $5,000 with other security approved by Field. In pursuance of this provision of the contract, Pott gave the note sued on with his wife as security. Austin could not be held on this note. He was not a party to it. If, as between Pott and Austin, the latter would be liable to Pott for his proportion of the amount paid on the note, any agreement between Field and Austin could not affect this liability. Independent, however, of these considerations, any agreement made prior to the contract under which the sale was consummated, or any subsequent agreement was inadmissible to change or vary the terms of the agreement as actually made and consummated.

It is further contended in this line that the court erred in rulings upon questions asked of the witnesses tending to show what the market value of the stock of the corporation was at the time of its purchase by Pott and Austin. Counsel refer to several rulings of the court in this respect, but when we examine the testimony of the witnesses during whose examination it is claimed these errors were committed, we find no ground for complaint. These inquiries were addressed to the actual value of the stock at the time of the sale, and there was no showing that the witnesses were qualified to speak on that subject, and as far as the inquiries were directed to the market value, it appears that the witnesses did testify upon the subject. Nor was any error committed on the question of a fictitious value of the stock. Counsel for appellant made inquiries of witnesses who were called by him to testify as to the market value of the stock in question as to whether stock may not have a fictitious value in the market. Conceding that it may, we do not perceive that any error was committed in refusing to allow witnesses in the case at bar to testify on that subject. There was no evidence of any facts upon which it could be claimed that the stock in question had a fictitious value, and proof that such a condition might exist as to stocks generally could have no relevancy. The very witnesses of whom this inquiry was made testified that the stock in question at the date of the sale had no market value at all, so that whether in the market stocks might have a fictitious value or not was of no consequence.

The last and the principal point made on this appeal (the point strongly urged by counsel appearing in place of those who originally filed the opening and reply briefs on this appeal, and who made no particular insistence on it) is that the court failed to find upon a material issue in the case, to wit, whether dividends were paid upon the stock sufficient to discharge the interest on the note. Counsel for appellants contend that this issue was before the court for determination, and counsel for respondent contends that it was not; that the court found on all material issues raised by the answer, which were only whether at the time of the sale the stock purchased was of any value, and whether the sale was made through fraudulent representations of Field as to the value of said stock. The contract which was entered into between Field and Pott and Austin at the time the note was given, and which is attached to the findings of the court as part thereof, contains the provision that "The said Field hereby agrees and guaranties to said Austin and Pott that the yearly dividends upon said capital stock will be sufficient in amount to pay and discharge all interest due and payable upon all said notes in case of any deficiency, or in case of any contingency whatever whereby such dividends are not sufficient in amount to liquidate and pay all of said interest, then said Austin and Pott are to receive credit upon said notes for such deficiency, or at the option of said Field said deficiency may be paid in coin."

The answer of defendants contained, among other allegations, the following: "That in and by the terms of said agreement, and in order to continue and consummate his said fraud, the said Field did agree and guaranty to said parties that the interest upon the said notes about to be executed in accordance with said agreement would be kept fully paid by and out of the dividends declared and paid upon said stock." And another allegation set forth further on in the answer stated "that no dividends whatever had been declared or paid by said corporation, or by the officers thereof, upon said or any stock of said corporation since the 1st day of November, 1892, nor have there been any profits whatever earned or received by said corporation, nor any other resources from which said dividends could have been declared."

These are the two allegations upon which it is contended by appellant that the issue was raised upon which the court failed to find that they constituted a special defense against the liability of the appellants for interest upon said notes. It is quite clear, however, when considered with relation to the main special defense interposed, and of which they formed part of the allegations—namely, fraudulent representations of the vendor Field as to the value of the property for the purchase price of which the notes were given—that these particular allegations were never intended to constitute the special defense which they are now urged to have presented. These allegations are found in a long continuous recital of facts constituting their special defense of fraud upon which appellants relied to defeat the entire action. Notwithstanding that this is clearly apparent, counsel for appellants insist that they have now a right to treat these allegations as a special defense on the subject of interest, commingled with the special defense of fraud. The difficulty, however, with this claim of a right to segregate is that there is nothing to segregate. There has been no commingling of defenses. The allegations upon which appellants rely as constituting a special defense to the payment of interest are not commingled with the other special defenses of fraud, but they are apt, material and proper allegations of facts supporting that claim alone, and were obviously not intended for any other purpose. Take the first allegation relative to the terms of the contract. It is distinctly made with reference to the defense of fraud. Up to this point in the answer the defendants were alleging fraudulent representations of Field leading up to the negotiations which eventuated in the making of the agreement, and in proceeding with their story in that respect alleged that, "in order to continue and consummate his said fraud," he made the agreement relative to the dividends. This was simply one of the particulars in which it was alleged the fraud consisted. It is not an allegation that by the contract the appellants were only under a contingent liability for interest, but it is one of the many fraudulent representations charged to have been made by Field of which appellants complained. As to the other allegation relied on that "no dividends whatever had been declared or paid," etc., this is not used in the answer in connection with the allegation last referred to except as relating to the special defense of fraudulent representations and the worthlessness of said stock when purchased, and which worthlessness they allege continued up to the filing of the answer. This is apparent from any prior and subsequent allegations. No mention is made in this allegation of interest, nor is there anywhere in all the allegations of the answer the slightest hint that these allegations, or any other allegations, have reference to a special defense of nonliability for interest. It is to be observed, too, that in the first allegation quoted the full terms of the contract between Field and the appellants with reference to liability for interest are not stated. Nor, as far as that liability is concerned, is it stated at all in the answer. The provision of the contract was that the dividends upon the capital stock would be sufficient in amount to pay and discharge all of the interest due and payable upon said notes, and in case of any deficiency, or in case of any contingency whatever whereby such dividends were not sufficient in amount to liquidate and pay all of said interest the makers of the note were to receive credit upon the notes for such deficiency, or, at the option of Field, said deficiency might be paid in coin. It will be perceived that in the allegation first quoted, which refers to such provision, only the first portion of it is alleged; only that portion in which it is agreed that the interest would be kept fully paid up out of the dividends on the stock. As constituting one of the particular misrepresentations relied on in the special defense of fraud, this was all that was necessary to be pleaded of the contract. On the other hand, had this allegation been intended to serve in a dual capacity—as an allegation of fraud and also as an allegation presenting a special defense of nonliability for interest—it need hardly be suggested that to have alleged the other portion of the provision of the contract as to the contingent liability of the makers, which was omitted, would have better indicated that nonliability as to interest was relied on. The fact that it was not alleged is some indication that the portion which was pleaded was only intended as a recital in aid of the special defense of fraud and for no other purpose.

It was also alleged in the complaint that "no part of the principal or interest of said promissory note had ever been paid and the whole thereof, principal and interest, is now due, owing and unpaid." This allegation was admitted by the defendants by failure to deny it, but to defeat the entire action thereon the defendants set up want of consideration and fraud. If the defendants had, in addition to specially pleading these defenses, also specially pleaded nonliability for interest the court might, while finding against them on the defense of want of consideration and of fraud, and that they were liable for the principal of the note, have yet found, if the evidence supported it, that under the terms of the contract they were not liable for interest. But, in order to avail themselves of this latter defense, it was their duty to plead it specially, and they did not do so. In fact, it is clear to our minds that the only special defense urged by appellants in their answer, aside from the want of consideration for the notes, was that of fraud, and that the allegations quoted were pertinent to that defense, had particular and sole relation to it and were intended to present it alone. This being true, we are aware of no rule of law which will permit us to wrest particular allegations from their plain position as part and portion of a continuous and apt recital of a special defense of fraud and treat them as allegations constituting another special defense, which it is not pretended was separately and specially pleaded, and which it is obvious they were not designed to support.

We perceive no reason why the order denying the motion for a new trial should not stand, and it is therefore affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

150 Cal. 606

## DOHERTY v. COURTNEY. (S. F. 3,871.)

(Supreme Court of California. March 1, 1907.)

1. EJECTMENT — DEFENSES — EQUITABLE DEFENSES.

In ejectment by one claiming under a deed from the deceased owner, defendant, claiming the right to possession as tenant of the administrator of the deceased, may set up any defense available to the administrator if made a party, and may defend on the ground that the deed executed by the deceased was procured by the grantee's undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 109.]

2. SAME—ISSUES—EVIDENCE.

An answer in ejectment by one claiming under a deed from the deceased owner, which alleges that the deceased was at the time of the execution thereof much impaired and weakened in mind and body and incapable of properly taking care of property, renders the question as to the condition of the deceased's mind on the date of the execution of the deed material.

3. EVIDENCE — OPINION EVIDENCE — MENTAL INCAPACITY.

Under Code Civ. Proc. § 1870, providing that the opinion of an intimate acquaintance respecting the sanity of a person may be given, a sister of a decedent, who had been living with her, is competent to give her opinion respecting decedent's mental condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2198.]

4. EJECTMENT — ISSUES — EVIDENCE — ADMISSIBILITY.

Where, in ejectment by a grantee in a deed from one who had acquired a conveyance from the deceased owner, defendant alleged that the deceased owner was mentally incompetent to execute a conveyance, and that the deed to the grantee was without consideration, defendant was entitled to prove that the grantee paid no consideration, and thereby subject the property in his hands to any infirmity attaching to the title of his grantor.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by John P. Doherty against Hanora Courtney. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Jackson Hatch and Walter H. Linforth, for appellant. Jno. B. Carson and Riordan & Lande, for respondent.

SLOSS, J. Action of ejectment, in which plaintiff recovered judgment. The defendant appeals from the judgment, and brings the case up on the judgment roll and a bill of exceptions.

Both parties claim under Catherine Black, who died some months before the commencement of this action. Plaintiff claims under a deed alleged to have been made by Catherine Black to John Pius Murphy on April 11, 1898, and a deed from John Pius Murphy dated March 18, 1902. The defendant claimed the right to possession as tenant of the administrator of Catherine Black's estate. By way of defense, the answer pleaded, among other things, that John Pius Murphy had procured the making of the deed by Catherine Black through undue influence exerted by him upon her, and in this behalf alleged more particularly that at the time of the execution of the conveyance of April 11, 1898, Catherine Black was advanced in years "and much impaired and weakened in mind and body, and incapable of properly taking care of property or property interests"; that at that time the said John Pius Murphy was the spiritual adviser of Catherine Black, and as such had acquired and possessed great influence over her; that, without any consideration therefor, said John Pius Murphy, with the intent of depriving the legatees and devisees of said Catherine Black of their natural inheritance, and by reason of his influence over her, caused her to execute the deed to him. The answer further alleged that the deed from John Pius Murphy to the plaintiff was without consideration.

At the trial the plaintiff made out a prima facie case. The defendant, being called as witness on her own behalf, testified that she was the sister of Catherine Black, had been living on the premises with her sister until the latter's death, and that she had continued to live there ever since. She was then asked the following question: "What was the condition of your sister's mind on the 11th day of April, 1898?" This question was objected to, upon the ground that it was immaterial, irrelevant, and incompetent, and on the further ground "that she claims to hold the possession of the property as the tenant of the administrator of the estate of Catherine Black, who has no standing in court either for the prosecution of an action as against these deeds, or as a defendant in this action." The court sustained the objection, taking the view that the administrator (or the defendant claiming under such administrator) had no standing to attack a deed made by the decedent upon the grounds set up in the answer; that such attack could be made only by an heir or devisee of the decedent. We think this ruling was clearly erroneous. The defendant, claiming the right to possession as tenant of the administrator, was entitled to set up any defense which the administrator could have urged to the action. Under our system of procedure, where legal and equitable remedies are administered in the same tribunal, and there are no special forms of action, a defendant may set up by way of equitable defense any matter which would, if presented by him as the basis of an original bill in equity, have entitled him to a judgment for the relief sought by his answer. The rule has repeatedly been applied to actions of the character of the present one. In Willis v. Wozencraft, 22 Cal. 607, this court said: "A mere equitable title to land, if it is of such a character as entitles the holder to possession in equity, is a sufficient defense under our system of practice to an action for the possession, brought even by the holder of the legal title." See, also, Whittier v. Stege, 61 Cal. 238; Hicks v. Lovell, 64 Cal. 17, 27 Pac. 942, 49 Am. Rep. 679; Hyde v. Mangan, 88 Cal. 319, 26 Pac. 180.

Coming to the particular ground upon which the court below based its ruling, it is now no longer open to question that in this state an administrator or executor may maintain an action to set aside a deed made by his intestate or testator on the ground of undue influence exercised by the grantee. The question was fully discussed in Collins v. O'Laverty, 136 Cal. 31, 68 Pac. 327, in which the court said: "The sole test of the administrator's right of action is the right of the estate to the possession of the property. If the right exists, then the right of action exists; and it will make no difference if, in order to recover property to the possession of which the estate is entitled, it should become necessary to cancel a voidable deed, or otherwise—according to the equity practice—to dispose of an outstanding legal title." It follows that the defendant was entitled to offer evidence in support of the allegations of her affirmative defense above set forth. One of these allegations was that the decedent, at the time of executing the deed, was "much impaired and weakened in mind and body and incapable of properly taking care of property or property interests." The question asked the defendant was relevant to the issue thus raised, and was not open to any of the objections made to it. It is not claimed, and could hardly be, that the defendant, who had testified that she was the sister of the decedent and had been living with her, was not competent, under section 1870, Code Civ. Proc., to give her opinion respecting the mental condition of Mrs. Black. The effect of the ruling was to deprive the defendant of all opportunity of proving matters set up by her in her answer, which, as we have seen, would, if established, have been a good defense to the action.

The court also excluded evidence tending to show that the plaintiff had paid no consideration for the deed to him, and was holding merely as a representative of Father Murphy. This evidence should have been admitted. The defendant was entitled to show that the property in the hands of the plaintiff was subject to any infirmity attaching to the title of his grantor.

In view of the conclusion reached, the other points made by the appellant do not require consideration.

The judgment is reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, J.; SHAW, J.

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150 Cal. 610

## L. W. BLINN LUMBER CO. v. McARTHUR (GOULD, Intervener). (L. A. 1,736.)

(Supreme Court of California. March 1, 1907. Rehearing Denied March 28, 1907.)

1. Abatement and Revival—Parties—Substitution.

Where, pending an action on a note and mortgage, they were assigned to decedent and upon his death his estate was distributed to his widow, she was properly substituted as plaintiff, under Code Civ. Proc. § 385, providing that on the death of a party in certain actions the court may allow the action to be continued by his successor in interest: her right of substitution being in no way affected, because neither her husband nor his representative had been substituted as plaintiff.

2. Bills and Notes—Action—Evidence—Weight.

Evidence *held* to sustain a finding that the note sued upon had not been paid.

3. Same—Burden of Proof.

Where it was conceded that a note was unpaid when sued upon, the burden was upon the party alleging that it had afterwards been paid to prove it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1695.]

4. Same—Prima Facie Case.

Where the payee sued upon a note and mortgage and afterward assigned it to decedent, decedent's widow, having been substituted as plaintiff, by introducing the assignment and the decree of distribution of her husband's estate to her made out a prima facie case, and nonsuit was properly denied.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the L. W. Blinn Lumber Company against Charles H. McArthur; Rebecca W. Moore being substituted as plaintiff, and Will D. Gould intervening. From a judgment for plaintiff, defendant and intervener appealed to the Supreme Court; and, the case having been transferred to the District Court of Appeal and the justices of that court disagreeing, it comes before the Supreme Court again. Affirmed.

James H. Blanchard and Will D. Gould, for appellant. Miller & Page, for respondent.

SLOSS, J. Appeals were taken to this court by the defendant and the intervener from a judgment for the plaintiff and an order denying a motion for new trial. These appeals were subsequently ordered transferred to the District Court of Appeal for the Second appellate district for hearing and determination. The Justices of that court were unable to agree, and, upon their disagreement, the cause again came to this court.

Upon the hearing in the District Court of Appeal the following opinion, prepared by Gray, P. J., and concurred in by Allen, J., was filed:

"Action upon a promissory note and to foreclose a mortgage given to secure said note. After the suit was commenced, the note and mortgage were regularly assigned to P. R. Moore, and the land mortgaged was conveyed to the intervener, Gould. Subsequently, Moore died, and his estate having been distributed to his widow, Rebecca W. Moore, the latter was substituted as plaintiff in the case. The judgment was for the plaintiff, and the defendant and intervener appeal from said judgment and from an order denying a new trial.

"1. Rebecca W. Moore having, by means of the assignment of the note and mortgage in suit to her husband and the subsequent decree of distribution, regularly succeeded to all the interest of plaintiff in the subject of the action, it was perfectly competent for the original plaintiff to consent to her substitution after her husband's death, and perfectly proper for her to be so substituted as a 'successor in interest.' Code Civ. Proc. § 385. The fact that her husband in his lifetime, and his representative after his death, had neither of them been substituted as plaintiff, in no way affected her right of substitution.

"2. The principal contention of appellant is directed at the evidence, it being contended (1) that the court should have sustained appellant's motion for a nonsuit; and (2) that the evidence shows that the note and mortgage were paid in full on the 29th day of August, 1894, by Gould, and that ever since that date Gould has been the owner thereof. On April 17, 1894, the note in suit, upon which there appears to have been then due $487.29, was assigned to Dr. Moore. On the same date Gould and his wife executed another note and mortgage on another piece of real estate for the sum of $300. The testimony of Mr. Shankland, one of the attorneys for the original plaintiff, shows that he received Dr. Moore's check for $487.29 on said 17th day of April. The transcript of Moore's account with the Farmers' & Merchants' Bank for the said month of April shows clearly, when considered with Shankland's evidence, that this check was applied as the full purchase price of the note and mortgage in suit that day assigned to Dr. Moore; and the said amount was charged to him by the bank. The books of that same bank also show that on the same day Dr. Moore drew out of his account by means of a check the specific additional sum of $300, and Gould's account was credited with exactly $300 that day deposited. This sum of $300 was not drawn out of Gould's account that day, but remained on deposit and was thereafter checked out by him from day to day during the month in small sums ranging from $18 to $100. It is conceded that Dr. Moore held possession of the note and mortgage in suit from April 17th down to August 29, 1894. Gould testifies that on April 17th he paid $187.29 on account of the note here in suit. He also testifies, and a check is introduced in evidence to show, that he paid the whole of the $300 note, and it is shown also, I believe, that the mortgage securing that note was satisfied of record. There is no evidence at all, however, to show that the remaining $300 left unpaid on the note in suit on April 17th was ever thereafter or theretofore paid, except the fact of the possession thereof being in Gould from and since August 29, 1894. But the testimony of Gould, fairly construed, shows that nothing was paid on the note in suit on August 29th, or thereafter. Gould's theory is, as we gather it from a careful examination of his testimony, that the note in suit was held merely as collateral security for the payment of the $300, and that when he paid the latter note he received both notes. The final position taken by him in his testimony is to the effect that he came out of the transaction of April 17th owing nothing on account of the note in suit to anybody, but that it was on that date satisfied and extinguished in fact, but that the mortgage securing it was left unsatisfied and the note left in the hands of Dr. Moore that it might in some way be of benefit to Gould's title to the property upon which the mortgage rested. Standing alone, the fact that the note remained in possession of Dr. Moore after the 17th day of April would tend strongly to show that it was not paid on April 17th. It was for the trial court to determine whether the reasons given by Gould for the note remaining in the possession of Moore after April 17th were satisfactory. Of course, it would be of no value as collateral security if it had been paid on April 17th, and the theory that any portion of it was paid on that date is rendered improbable, not only by the fact that it remained in the possession of Dr. Moore after that date, but also by the peculiar condition of the several bank accounts of Moore and Gould for that month of April. These bank accounts may have also shaken the faith of the trial court in Gould's statement that he paid the $187.29 on the note in suit on April 17th. At the close of business on that date Gould had in the bank considerably over $300, and the state of the account fails to disclose that he devoted any of the money he had in bank to this payment of $187.29.

"The situation is well stated in respondent's brief as follows: 'The essential question in this case is whether Paul R. Moore did or did not loan to Will D. Gould $487.29 on the 17th day of April, 1894. If yes, then plaintiff should prevail on the merits. Both sides agree that on the same day Moore loaned to Gould $300 upon a note and mortgage for that amount, which was afterwards paid and the note and mortgage canceled and satisfied. Appellants claim that this was the only loan made by Dr. Moore, and, necessarily, admit that this was the only loan that was paid back to Dr. Moore. If Dr. Moore made the loan of $487.29, he took an assignment of the note and mortgage in suit as security for it—they passed to Rebecca Moore by decree of distribution of his estate, and she is entitled to foreclose them—and finding 5, which is the essential one as the record presents itself, is justified.'

"I am of opinion that the trial court was justified by the evidence in its conclusion that there were two amounts of money advanced by Dr. Moore, one of $487.29 and the other of $300, and that the former of these sums had not been paid. It is conceded that at the time the suit was commenced the note in suit was unpaid. The intervener in his pleading assumed the burden of proving that it had been paid off and extinguished after the suit was commenced, and of course the burden was upon him to prove payment as alleged. Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Roche v. Baldwin, 143 Cal. 191, 76 Pac. 956. The plaintiff had, by the introduction of the assignment of the note and mortgage to Dr. Moore and of the decree of distribution to herself, made out a prima facie case, and the motion for a nonsuit was properly denied.

"The finding that the intervener had possession of the note by reason of his being the attorney for the parties is a finding as to an evidentiary fact, and is not essential to the support of the judgment. The essential finding along this line is the one in which it is found that the note was not paid.

"There was no error in admitting the books of the bank in evidence. McLennan v. Bank of California, 87 Cal. 569, 25 Pac. 760; Pauly v. Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98."

After examining the record and briefs, and in the light of the oral argument made, we are entirely satisfied with the views and conclusions expressed in the foregoing opinion, and hereby adopt it as the opinion of this court.

The judgment and order are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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150 Cal. 663

## Ex parte SCHMITZ. (Cr. 1,380.)

(Supreme Court of California. March 14, 1907.)

HABEAS CORPUS — NOMINAL RESTRAINT — EFFECT OF PROCEEDING.

Where, on a habeas corpus proceeding, it is shown that the petitioner is under a nominal restraint merely, and voluntarily submitted to for the purpose of making a case, the proceeding will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 10, 12.]

In Bank. Petition for writ of habeas corpus by Eugene E. Schmitz. Proceeding dismissed.

Campbell, Metson & Drew (J. J. Barrett, of counsel), for petitioner. Wm. H. Langdon, Dist. Atty., and Francis J. Heney, Asst. Dist. Atty., for respondent.

PER CURIAM. The petitioner, against whom has been found and presented an indictment purporting to charge him with the crime of extortion, seeks his discharge on habeas corpus from the custody of the sheriff of the city and county of San Francisco upon two grounds, viz.: (1) That one of the grand jurors who participated in the finding of the indictment was incompetent to act as a grand juror, by reason of the fact that he had served and been discharged as a juror by a court of record of this state within a year of the time that he was examined and impaneled to act as such grand juror; and (2) that the indictment does not charge a public offense.

Upon the hearing it was made to appear to this court—in fact, expressly admitted by the petitioner—that, being at large upon bail, he had procured himself, immediately before the application for a writ of habeas corpus, to be surrendered to the custody of the sheriff, solely for the purpose of presenting these questions for determination by this court, and that immediately upon the issuance of the writ he gave bail, in the same amount as had been previously required upon the indictment; in other words, that the alleged custody from which he seeks to be discharged was self-invoked and voluntary, submitted to only for the purpose of making a case on habeas corpus. We are unable to see why these circumstances do not bring this case fully within the rule laid down in the case of In re Gow, 139 Cal. 242, 73 Pac. 145. It there appeared that the surrender to the officer was merely for the purpose of suing out the writ, and lasted no longer than was necessary to file the petition and procure the order. It was there declared to be an abuse of the remedy by habeas corpus to apply it in cases where there is no actual imprisonment and no restraint, except that which is invited and voluntarily submitted to, in order that a merely nominal prisoner may resort to the courts for the determination of the validity of an ordinance, or some question of that sort. It was said: "Our conclusion is that such a practice ought not to be countenanced, and hereafter the court will make strict inquiry in this class of cases whether the alleged imprisonment is actual and involuntary; and if it is found to be, as in this case, a merely nominal restraint, voluntarily submitted to for the purpose of making out a case, the proceeding will be dismissed." We deem the rule here declared a most salutary one, entirely in accord with the objects and purposes of the remedy by habeas corpus, and adhere thereto. See, also, In re Dykes, 74 Pac. 506, 13 Okl. 339; In re Dill (Kan.) 11 Pac. 672; Com. v. Green, 185 Pa. 641, 40 Atl. 96; 21 Cyc. 290.

The writ is discharged, and the proceeding is dismissed.

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4 Cal. App. 723

## PEOPLE v. O'BRIEN. (Cr. 32.)

(Court of Appeal, Third District, California. Feb. 1, 1907.)

1. CRIMINAL LAW—APPEALABLE ORDERS.

Under Pen. Code, § 1237, subd. 3, providing that an appeal may be taken by defendant from any order made after judgment affecting his substantial rights, an order correcting the minutes in respect to the plea, entered by accused charged with crime, is appealable, the order affecting substantial rights.

2. SAME—REVIEW—EXCEPTIONS.

On an appeal from an order refusing to vacate an order correcting the minutes with respect to the plea entered by one charged with crime came up authenticated by the certificate of the trial judge, and showed that the order correcting the minutes was made on the ex parte application of the district attorney. *Held*, that the order appealed from was reviewable, though it did not appear to have beeen excepted to, since Code Civ. Proc. § 647, provides that an order made on an ex parte application shall be deemed to have been excepted to.

3. SAME—JUDGMENT—RECORD—AMENDMENT.

The record in a homicide case showed that accused entered a plea of not guilty, that subsequently he was brought into court "for sentence," accompanied by his attorney, that he was informed of the indictment against him for murder, and his subsequent withdrawal of said plea, "and of his entry of his plea of murder in the first degree * * * as charged," and that he was asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and that he waived time and asked that judgment be pronounced. *Held*, that there was enough on the face of the record to show that accused intended to enter a plea of "guilty of murder in the first degree," authorizing the court to correct the minutes on the district attorney's ex parte application therefor.

Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Charles O'Brien was, on his plea of guilty to the charge of murder, adjudged guilty and sentenced, and he appeals from an order refusing to vacate an order correcting the minutes in respect to the plea entered by him. Affirmed.

Sutherland & Barbour, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. This is an appeal from an order refusing to vacate an order correcting the minutes in respect of the plea entered by defendant.

The minutes show that on October 11, 1882, O'Brien and two other defendants, indicted for murder, were in court, each appearing by counsel. "The indictment presented and filed herein was read with the indorsements thereon and a copy given to attorneys for defendants, and, upon motion of defendants' attorneys, it is ordered by the court that defendants be and are hereby allowed until next Monday at 10 o'clock a. m." —presumably to plead. The minutes then show that on October 16, 1882, defendant, O'Brien, "appears at the bar of this court with his counsel, and the defendant being called upon to plead enters his plea of not guilty." The minutes next show that on November 28, 1882, "the court met pursuant to adjournment," and proceeds: "The People of the State of California vs. Chas. O'Brien et als., Defendant. Convicted of Murder of the First Degree. For Sentence. The district attorney with the defendant and his counsel F. D. Ryan came into court. The defendant was duly informed by the court of the indictment found against him for the crime of murder on the 5th day of October, 1882, of his arraignment and plea of not guilty of murder, and of his subsequent withdrawal of said plea of murder and of his entry of his plea of murder of the first degree on November 28, 1882, as charged in said indictment. The defendant was then asked if he had any legal cause to show cause why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the court, and defendant having waived time and asked judgment be now pronounced herein. Thereupon the court renders its judgment. That whereas, the said Charles O'Brien has been duly convicted in this court of the crime of murder of the first degree. It is therefore ordered, adjudged, and decreed that the said Chas. O'Brien be punished by imprisonment in the State Prison at San Quentin, Cal., for the term of his natural life. The defendant was then remanded to the custody of the sheriff of the county of Sacramento, to be by him delivered into the custody of the proper officer of said State Prison at San Quentin, Cal." The court, as appears from the transcript, called witnesses who were present at the trial, namely, Mr. C. T. Jones, who was associated with the district attorney, and Mr. William B. Hamilton, clerk of the court, by whom it was shown that defendant "withdrew his plea of not guilty and entered a plea of guilty of murder in the first degree." The record then sets forth the following: "It appearing to the court that the said minutes in said proceeding as above set forth do not conform to the facts and evidence having been taken and the court being fully advised and satisfied, it is therefore ordered, adjudged, and decreed that the record of the proceedings in said cause of the People of the State of California vs. Chas. O'Brien et al., defendants, be, and the same is, hereby corrected so as to read as follows, to wit:" The amended minutes are then set forth, and are substantially the same as the original except that the clause there reading: "The defendant was duly informed * * * of his arraignment and plea of not guilty of murder and of his subsequent withdrawal of said plea of murder, and of his entry of his plea of murder of the first degree on November 28, 1882, as charged in the indictment," was amended to read as follows: "The defendant having heretofore entered his plea of not guilty of the crime of murder as charged in the indictment filed against him, the District Attorney moved the Court that the defendant be permitted to withdraw his plea of not guilty heretofore entered herein and allowed to enter a plea of guilty of the crime of murder of the first degree as charged in said indictment." It will be observed that the amendments consisted of introducing the fact that the district attorney moved the court for leave to defendant to change his plea and the further fact that defendant entered "a plea of guilty of the crime", etc., whereas the minutes formerly read, "plea of murder," etc., omitting the words "guilty of." The judgment followed the phraseology of the minutes as they appear in the original record, omitting the words "guilty of," etc.

The proceedings leading up to the amendment of the minutes were ex parte, no notice thereof having been given defendant or his attorney, and there was no appearance for him. Subsequently defendant's attorney moved the court to set aside and vacate the order correcting the minutes as aforesaid. The motion was denied, and this appeal is from the order. There is an appeal also from the judgment and from the order amending the record of the minutes. The two latter appeals were dismissed upon stipulation without prejudice, it appearing that the appeals were not taken in time.

The attorney-general makes the point that the order denying the motion "to vacate the order of November 25, 1905, cannot be reviewed," for the reason that there was no exception stated against the ruling of the court. An order made upon ex parte application, and an order or decision made in the absence of a party, are deemed to have been excepted to. Code Civ. Proc. § 647. An appeal may be taken by the defendant from an order made after judgment, affecting the substantial rights of the party (Pen. Code, § 1237, subd. 3). See People v. McNulty, 95 Cal. 594, 30 Pac. 963, as to the scope of this provision of the statute. The order affected the substantial rights of defendant. Ward v. Dunne, 136 Cal. 19, 68 Pac. 105. Granting that the order is appealable, and that it is deemed to have been excepted to, it is still urged that it cannot be reviewed because the exception nowhere appears in the transcript. The appeal comes up authenticated by certificate of the judge who heard the motion, as follows: "The foregoing statement was presented in due time, and is correct, and is allowed and settled as correct, and it contains all the evidence taken in said proceeding." While in the certificate of the judge it is denominated a statement, it bears no designation on its face, and is in effect a bill of exceptions in support of the appeal from the order. It contains the proceedings taken by the district attorney on his motion to correct the minutes, the evidence then used, being oral testimony of witnesses who were present at the trial, the minutes of the trial and the judgment of conviction, the minutes as corrected, the order of the court making the correction, the motion to vacate said order and the order denying the same. It clearly appears that the entire record was before his honor, Judge Hart, when he passed upon the motion to vacate, and is sufficiently authenticated. The order authorizing the minutes to be amended is in the record thus authenticated, and as the law deems it to have been excepted to we can see no reason for requiring that the statement should show what the law provides for. The law has, in effect, incorporated the exception into the transcript. Appellant concedes that the judgment was sufficient in form, though not stating the plea of the defendant, and that it was not necessary for the plea to be stated in the judgment. His contention is that "it is void because the judgment roll fails to show any minutes of a plea after the withdrawal of the defendant's plea of not guilty"; that the judgment roll shows an entire absence of the minute entry of any plea contemplated by section 1017, Pen. Code, which plea is essential to the validity of any judgment by the court in a criminal case.

It is also contended that the court erred in amending the record without notice first having been given to defendant. It is undoubtedly the law that where clerical misprision has occurred, of which the record affords the evidence, a court may at any time, on its own motion or on the motion of an interested party, with or without notice, amend a judgment. Scammon v. Bonslett, 118 Cal. 93, 97, 50 Pac. 272, 62 Am. St. Rep. 226. But where an inspection of the record does not show the error, and resort must be had to evidence aliunde, courts will require notice to be given of a motion to amend a judgment to the parties affected thereby. Id. It is a general rule that an application to amend a record should be on notice to the adverse party, that he may have opportunity to show cause against the proposed alteration. 17 Am. & Eng. Ency. Pl. & Pr. 923. But it is also there stated that a record may be corrected with respect to matters of form without notice; also that where the courts have held to the doctrine that a record may be amended only by some matter of record, a nunc pro tunc entry may be made though no notice be given to the opposite party. In People v. Ward, 141 Cal. 628, 75 Pac. 306, the subject of amendments to minutes was considered at some length. In that case notice was given. The court sustained the amendment on the ground that "it satisfactorily appears that the omission was due to the neglect of the clerk, and that the place of imprisonment (which was the only substantial uncertainty) designated by the court in rendering the judgment was the State Prison at Folsom." The question as to the character of evidence competent to show an error in the recorded judgment, was passed over, "for," as the court said, "it is universally established that if the record itself furnishes the means of correction the court may order the amendment without further proof." See, also, Kaufman v. Shain, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139.

The question here, then, seems to be this: Does the record in itself show sufficient to justify the amendment as a mere clerical misprision? If the question may be answered in the affirmative, the evidence taken may be disregarded as immaterial and unnecessary in aid of the amendment; for it only established by evidence aliunde what the court could determine without it, namely, that the defendant did in fact plead not guilty of the crime charged. It appears from the record that defendant had entered a plea of not guilty; that subsequently he was brought into court "for sentence," accompanied by his attorney; that he was duly informed of the indictment found against him for the crime of murder, of his arraignment and plea of not guilty of murder, and of his subsequent withdrawal of said plea, "and of his entry of his plea of murder of the first degree on November 28, 1882, as charged in the indictment." It appears further that "he was asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none"; that he waived time, "and asked judgment to be now pronounced." It seems to us that there is enough on the face of the record to show that the defendant intended to enter a plea of guilty of murder in the first degree. When he entered a plea of murder it could by no interpretation be said to mean not guilty. He was brought into court "for sentence," the record also stating: "Convicted of murder of the first degree," from which it would appear that some steps had been taken by defendant towards his receiving sentence, upon coming into court, which could only have been done upon a plea of guilty. His declaring that he had no cause to show why judgment should not be pronounced against him, his waiving time and asking immediate judgment for the crime with which he stood charged, his long acquiescence in that judgment, and other facts appearing, all tend to show that he did, in fact, enter a plea of guilty. The proceedings are entirely consistent with this view and are utterly inconsistent with the idea that he pleaded not guilty or entered no plea at all. It is not entirely clear but that, when the whole minute record is considered, the plea, as shown, means that defendant admitted that he had committed murder of the first degree as charged in the indictment, from which it would follow that he was guilty and meant to so plead.

People v. Monaghan, 102 Cal. 229, 36 Pac. 511, is much relied upon by appellant. In that case it appeared that defendant first pleaded not guilty, but withdrew the plea for the purpose of filing a demurrer and having it argued. Later the cause was continued "for defendant to plead." The minutes failed to show that any plea was thereafter entered. When the trial commenced the clerk stated to the jury that a plea of not guilty had been entered, but this was no part of the minutes. The cause went to trial without objection by defendant that he had not pleaded. Evidence was put before the jury, and a verdict of guilty rendered. When called for judgment the defendant objected and moved in arrest of judgment on the ground that he had not been legally convicted. The Supreme Court held with defendant. The features distinguishing that case from this one is that there was no plea and no issue, and it was not claimed that there was. The defendant was put upon his trial without a plea, and it was held error for the reason that there must be a plea preceding the trial. But here there was no trial; defendant withdrew his plea of not guilty, and threw himself upon the mercy of the court by submitting his case on what, we think, was clearly intended to be and was in effect a plea of guilty as charged. The prescribed code plea is: "The defendant pleads that he is guilty of the offense charged." The plea entered was clearly not intended to be "not guilty," for he had just withdrawn that plea. It could not have been intended as a plea of jeopardy nor of former conviction, nor of any other plea open to him but that of guilty. The language used forbids any other conclusion. When he pleaded murder of the first degree as charged in the indictment, the plea could have meant nothing but guilty, for he was, in the indictment to which he referred in his plea, charged with being guilty of murder. In using the language "murder of the first degree," he indicated his intention to plead guilty, for in no other form of plea could he have properly mentioned the degree. In People v. Monaghan, supra, there was no plea of any kind, and no attempt to make a plea; but here was a plea against which the only thing that can be said is that it was an imperfect plea. As was said in People v. Ward, supra, we think that to reverse the order "would be to surrender substance to form, common sense to the most extreme technicality."

The order is affirmed.

We concur: BURNETT, J.; HART, J.

4 Cal. App. 760

## LANIGAN v. NEELY. (Civ. 261.)

(Court of Appeal, Third District, California.
Feb. 6, 1907. Rehearing Denied March
7, 1907; Denied by Supreme Court
April 5, 1907.)

1. BREACH OF MARRIAGE PROMISE — ACTION — PLEADING.

In an action for breach of marriage promise, seduction may be pleaded as an element of punitive damages, notwithstanding Code Civ. Proc. § 374, giving a woman a right of action for her own seduction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Breach of Marriage Promise, § 46.]

2. SAME—DAMAGES—EXCESSIVE DAMAGES.

Under the rule that appellate courts will not interfere with an award of damages unless it is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was influenced by passion or prejudice, an award of $8,000 damages for breach of marriage promise and seduction by one owning property worth $14,000 or $16,500, will not be set aside as excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Breach of Marriage Promise, § 47.]

3. APPEAL—REVIEW—QUESTION OF FACT.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

4. SAME — HARMLESS ERROR — ADMISSION OF EVIDENCE.

Any error in admitting evidence in an action for breach of marriage promise, that the plaintiff was "wet nursing" was harmless where the same evidence had been previously admitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170.]

5. Breach of Marriage Promise—Action—Admissibility of Evidence.

In an action for breach of marriage promise and seduction, evidence as to which relatives of the plaintiff knew of the birth of a child to her was admissible.

6. Witnesses — Impeachment — Inconsistent Statements.

Under Code Civ. Proc. § 2052, providing that a witness may be impeached by evidence that he has made statements inconsistent with his testimony, but if they are in writing they must be shown him before any question is put to him concerning them, where the defendant, in an action for breach of marriage promise, gave a deposition which could not be used at the trial, it was proper, after showing him the deposition, to ask whether he had not stated therein that when he was a young man he had auburn hair, to contradict his testimony at the trial that it was then dark.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1240.]

7. Same—Cross-Examination.

Where plaintiff, in an action for breach of marriage promise, testified that when she informed defendant of her pregnant condition he advised her to consult a physician, and gave her money to pay the fee, and requested her to write to him the result of the examination by the doctor, and she did so, but received no reply, and defendant in his direct testimony denied any promise to marry plaintiff, denied having been sexually intimate with her, and having given her money to pay the doctor, it was proper to ask him on cross-examination if he had received the letter.

8. Same — Examination — Repetition of Questions.

Sustaining an objection to a question to a witness was not error, where he had in the course of his examination already given the testimony sought to be brought out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 827.]

9. Appeal—Review—Harmless Error—Exclusion of Evidence.

In an action for breach of marriage promise, the exclusion of testimony as to defendant's reputation for integrity was harmless, where several witnesses had testified that his reputation for chastity and morality was good.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4195.]

10. Evidence — Opinions — Examination of Experts—Hypothetical Questions.

In an action for breach of marriage promise and seduction, where defendant testified that he had never abused himself, had never had venereal trouble or blood diseases of any character except rheumatism, and had never found it necessary to use a catheter or other instrument to open the canal of his organ of generation to pass water, a question to a physician, embracing these facts, and asking whether under such circumstances defendant could perform the act of copulation, was within the evidence.

11. Trial—Remarks of Counsel—Action of Court.

In an action for breach of marriage promise, the court's action in striking out and instructing the jury to disregard the statement of plaintiff's counsel, challenging a denial that he had offered to dismiss the suit if defendant would marry plaintiff and legitimize the child, cured the irregularity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 316.]

12. Same—Instructions—Requests.

The refusal of instructions is not error, where they are covered by instructions already given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Mary Lanigan against David Neely. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Snook & Church, for appellant. Sullivan & Sullivan, for respondent.

HART, J. This is an action for damages for breach of promise of marriage. The case was tried by jury, the plaintiff obtained a verdict for the sum of $8,000, and thereupon the court caused judgment to be entered in her favor in the amount found by the jury. Defendant appeals from the judgment and an order denying his motion for a new trial.

The complaint, after alleging that both plaintiff and defendant are unmarried, their mutual agreement and promise to marry, the violation and breach by defendant of such agreement and promise, and other facts sufficiently well pleaded to render the complaint immune from successful attack by a general demurrer, proceeds in paragraph six thereof: "After said promise to marry was made by defendant, as aforesaid, he seduced and had sexual intercourse with plaintiff. Said seduction and sexual intercourse were brought about and accomplished by means of said promise previously made, through defendant's persuasions and importunities, and by reason of plaintiff's reliance upon the good faith of defendant, in making said promise, and her belief that defendant intended to and would marry her, in pursuance of his said promise." Further, in paragraph 8 it is averred: "By reason of defendant's breach of his said promise to marry plaintiff, and her seduction by defendant, plaintiff became greatly distressed in mind and body, suffered humiliation and disgrace, and will suffer humiliation and disgrace the remainder of her life, became and is now sick and will remain sick for a long time to come, all to her damage in the sum of $25,000." The defendant demurred specifically and generally to the complaint, the demurrer was overruled by the court, and thereafter an answer filed, specifically denying all the material averments of the complaint. Appellant has specified a number of errors (in addition to that claimed in the order of the court overruling the demurrer), involving rulings of the court, insufficiency of the evidence to sustain the verdict, or what is tantamount thereto, excessive damages under the evidence as presented by the record, and instructions given and refused. We will take up the points in the order in which they are presented.

Undoubtedly, the theory upon which counsel for respondent drafted the complaint in this action, and, manifestly, the one upon which it was tried by the court below, was that for the breach of a marriage contract, with averments of seduction for the purposes merely of enhancement or aggravation of damages. But appellant contends that the demurrer to the complaint should have been sustained, because there is contained therein a misjoinder of causes of action, in that an action ex contractu has been improperly united with an action ex delictu, claiming that if respondent attempted to rely upon her action upon contract, with allegations of seduction only in aggravation of damages, she has failed to accomplish her purpose, because it appears from the complaint itself that the character and manner of the averments of seduction necessarily involve the statement of a substantive cause of action in tort, independent of and distinct from that of contract, upon which she declares in the first count of her pleading. Appellant also contends that, assuming the complaint is not obnoxious to the criticism thus made, and that seduction is therefore well pleaded for the purpose of enhancement of damages, he was nevertheless entitled to the ruling on his demurrer, inasmuch as plaintiff is given, by the express terms of the statute (Code Civ. Proc. § 374), a right of action for her own seduction. This claim has its inspiration in the reasoning of some of the cases cited by appellant, to be hereafter noticed. And it is further claimed that if she be permitted in her action for breach of promise of marriage to allege seduction in aggravation of damages, she is thereby allowed to do indirectly what the law does not permit to be directly done, that is, uniting an action upon contract with an action upon tort. But a much more serious result, which is seen by appellant in pleading seduction in aggravation of damages in an action upon a breach of promise of marriage, is that if she should in such a case obtain judgment, she could still prosecute and maintain her action for seduction, because the judgment in the former treated properly, of course, as an action upon contract, could not be set up in bar of the latter. We have not been able to find, nor have counsel in their briefs cited us to, any California cases which discuss and adjudicate the precise questions thus presented by the demurrer. An instruction to the jury, in Moore v. Hopkins, 83 Cal. 273, 23 Pac. 319, 17 Am. St. Rep. 248, to the effect that "a man who enters into a contract of marriage with a woman with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman for which she is entitled to exemplary damages," was criticised and held to be error, because "there was no evidence whatever in the record to show that the defendant, if he entered into a marriage contract with the plaintiff, intended to make any effort to undermine her chastity, or to do any other improper act of that sort." The court in that case does not decide that allegations in the complaint which would make the quoted instruction pertinent would be proper or improper, but neither does it hold that the matters to which the instruction would relate, and which would be the basis of an action ex delictu if relied upon alone, could not be pleaded in the action for breach of promise in aggravation of damages.

The crux of the whole matter, as appellant views it, seems to be in paragraph 8, and it is charged that therein are contained "substantive averments of the ground of damages resulting from seduction." Is this true? After alleging mutual promises to marry, refusal on part of defendant, etc., appellant is alleged in paragraph 6 to have succeeded in seducing and having sexual intercourse with plaintiff—we construe the allegation in our own language—through and by reason and as the result of said "promise previously made," and that the same were "brought about and accomplished" how? In the language of the paragraph in question, "by means of said promise previously made, through defendant's persuasions and importunities (founded on the promise of marriage), and by reason of plaintiff's reliance upon the good faith of defendant, in making said promise and her belief that defendant intended to and would marry her in pursuance of his said promise." There can be nothing clearer than that paragraph 6 intends to and does allege seduction only in enhancement of damages. And we do not think that an analysis of paragraph 8, keeping in view the averments of paragraph 6, will justify the criticism to which it is subjected by appellant. It, in reasonably clear language, states facts which describe the effect upon plaintiff, resulting from the breach of the promise and the seduction accomplished by means of such promise —facts, it may be said, which common experience teaches would ordinarily be the consequences of such conduct. It merely charges, to paraphrase the paragraph, "that because of the violation of the contract heretofore alleged, and because of the seduction of plaintiff, as the result of the alleged broken contract," plaintiff became greatly distressed in mind and body and became sick, etc. Strike out the allegation of seduction, and still the language of the paragraph that she became "greatly distressed in mind and body, and became sick, suffered humiliation and disgrace," etc., would not necessarily be inappropriate nor without truth, because it would be by no means unnatural that such consequences would flow from the violation of a marriage contract, unintensified by the fact of seduction. The act of seduction alleged against appellant is charged to have grown out of and been the direct result of his promise to marry, and it is reasonably certain from the averments of the complaint that seduction would not have occurred but for the previous promise of marriage. We can perceive no analogy between this case and Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56, cited by appellant. There, in the third paragraph of the complaint, plaintiff alleges a trespass upon her real property as a ground for damages. In the fourth paragraph she sets out personal injury as a ground for damages. The court said: "The complaint cannot be sustained upon the ground that the action is brought to recover damages merely for a trespass upon the real property of the plaintiff under circumstances of such aggravation as entitle her to exemplary damages. It is not in terms limited to a recovery for such trespass, but the fourth paragraph thereof contains substantive averments of the other grounds of damage above shown; and that the complaint was not so considered by the plaintiff is shown by the fact that at the trial she offered proof of the injuries to her person, and of the effect produced thereby upon her health, not merely at the time of the trespass, but continuing down to the day of trial."

In the trial of the case at bar, as suggested at the outset of this discussion, the case was treated by the lower court upon the theory that it was an action for a breach of promise, under circumstances of such aggravation as to entitle plaintiff to exemplary damages, and the instructions to the jury upon the question of seduction were given upon the hypothesis that the evidence thereon was to be limited, and confined to a consideration and determination of the question of exemplary damages alone.

The other points urged under the demurrer, that the allegation of seduction in enhancement of damages is not permissible for the reason plaintiff has her right of action for seduction for such injury, and that a judgment secured in a case of breach of promise, with seduction averred in aggravation, could not be offered in bar of an action for seduction, we believe to be, under the authorities, equally as untenable as the first. Some early cases have appeared to hold a different view from that entertained by us on this question; but we believe the weight of authority and the best-reasoned cases sustain our position. It would indeed be a singularly unreasonable rule in pleading and practice, which would prevent full disclosure of all the facts necessarily growing out of and connected with the breach of a contract of the nature of the one under consideration which would show or tend to show the extent of the injury to the complaining party by reason of the violation of the terms of the agreement. We do not assail the position of the Supreme Court of Indiana, in Felger v. Etzell, 75 Ind. 420, cited as an authority by appellant, in the declaration that "illicit sexual intercourse is not the natural, necessary, or even customary concomitant or the result of the mere promise of marriage," nor do we claim that the fact is of itself a circumstance tending to prove such a promise, but we do say that if it can be shown that it was the result of a promise to marry, then there is no conceivable reason, either in law or in logic, why it should not be pleaded and proved as an essential part and element of the injury sustained by the breach of the promise. This practice surely would, without, we think, offending against section 427, Code Civ. Proc., conform to the spirit of the reformed procedure, intended to simplify the practice and minimize the trouble, confusion and expense often attending litigation, and one of whose fundamental and central conceptions was to allow, as far as it could be done consistently with well-established rules of pleading and practice, all cognate matters of difference between the same parties to be litigated and finally adjudicated in one and the same action. It is said in some of the early cases that, although an action upon a breach of promise of marriage is assumpsit in form, it has always, as to measure of damages, been classed with actions of tort. Chitty on Pl. 148, and cases cited. And it must be admitted that the effect upon the complaining party resulting from the injury in cases of breach of promise, unaccompanied by seduction, although the wrong arises primarily through the breaking of a contract, so nearly approximates that resulting from acts of strictly a tortious character, that the former are differentiated from actions of tort more in the degree and extent of the injury than from any actual or intrinsic distinction. Even under the rigorous rules of common law procedure, with its stubborn and unyielding forms and numerous fictions, in an action upon breach of promise of marriage, it was allowable to plead and prove seduction under the promise as an element of punitive or exemplary damages. To now hold that under our modern procedure, distinguished for its simplification of methods for the administration of justice, this cannot be done, must, it seems to us, force the admission that in this respect at least our procedure has made no advance upon that of the common law.

In King v. Kersey, 2 Ind. 402, it was held that in an action for breach of a marriage contract, the plaintiff might prove seduction to enhance damages. In Cates v. McKinney, 48 Ind. 565, 17 Am. Rep. 768, the Supreme Court uses language which would seem to overrule its former decisions on this point. It is there said: "When the cases in this court were decided, a woman could not prosecute an action for her own seduction. Now, by the Civil Code, she can maintain such action. If, in an action for a breach of marriage contract, she can receive damages for seduction also, without alleging it, she can contrary to all rules of correct pleading, evidence and practice, sue upon one cause of action and give in evidence and recover upon two. And if she can unite them in the same complaint or paragraph, she can unite a cause of action upon contract with another founded upon a tort"—citng Parsons on Contracts, 70. But even in that case the court declines to decide whether or not in an action for violation of a marriage contract seduction can be alleged and proved. It says: "All that we need decide, and all that we do decide, is that under a complaint in such case, which contains no allegation of seduction, evidence of that fact cannot be admitted to enhance the damages." Perkins v. Hersey, 1 R. I. 494, supports the view that seduction cannot be alleged to enhance damages in a breach of promise action, because "we have a statute which affords the plaintiff a remedy for the injury thus done her in more appropriate form." Conn v. Wilson, 2 Overt. (Tenn.) 234, 5 Am. Dec. 663, is to the same effect, as are also Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 159, and Gring v. Lerch, 3 Atl. 843, 112 Pa. 244, 56 Am. Rep. 314. The case of Gillet v. Mead, 22 Am. Dec. 578, 7 Wend. (N. Y.) 193, also cited by appellant, is not in point. That was an action for seduction, for debauching plaintiff's servant, for damages for loss of service. Evidence was admitted of defendant's promise of marriage to her previous to having carnal knowledge of her. The master (plaintiff) was in no way interested in any contract between the female and the defendant. His injury, which rested alone in tort, consisted in the loss of service of the female. He was not and could not be injured in any manner or degree by a breach of the contract of marriage, if any existed. Hence, averments and evidence thereof were immaterial. Judge Parsons, in his work on Contracts (volume 2 [9th Ed.] p. 71), seems to be of opinion that exemplary damages for seduction are not recoverable in an action for breach of promise, and adds, "that by strict rules of law should, we think, be excluded, where the plaintiff was in actual or constructive service, or lived in a state in which the statute law gave her an action for the seduction, and not otherwise."

The case of Felger v. Etzell, supra, relied upon by appellant, was where the trial court struck out of the complaint for breach of promise of marriage allegations of seduction in enhancement of damages. Upon the trial, however, the court permitted the plaintiff to prove that at about the time the defendant promised to marry her, as alleged, they engaged in illicit sexual intercourse. The evidence was admitted upon the theory that the circumstance was one competent to be considered in the determination of the question of whether or not a contract was made by the parties to the action, and in its instructions the court limited the consideration of the fact of seduction by the jury to that question alone, saying that it could not be considered as affecting the question of the amount of the damages which they might assess against defendant. The Supreme Court, upon the authority of Cates v. McKinney, supra, as to the point that the evidence could not be considered in enhancement of damages because the fact of seduction was not pleaded, and upon principle as to the purpose for which it was admitted and to which it was limited by the trial court, reversed the case. We have examined all the cases cited by appellant bearing upon the point under discussion, and, while some of them seem to sustain his view, we yet feel sure of our position that it is not well taken. If it be admitted that the cases reported in 48 and 75 Indiana support the contention of appellant (and we do not concede that they clearly and explicitly do so) then the rule therein enunciated has been subsequently changed and reversed, not only by the Supreme Court of Indiana, but by all the courts of last resort where the precise question has been presented. And we think, as we have before asserted, that the reasoning in the cases cited by respondent upon the point is by far and infinitely stronger and more conformable to principle than that which leads to the other conclusion.

In the case of Haymond v. Saucer, 84 Ind. 9, an action of breach of promise and seduction in aggravation of damages, the court says: "There is some plausibility in the suggestion, that to uphold the instruction results in combining in the same action matters of contract and of tort; but this objection, we think, ought not to prevail. It would exclude the consideration of seduction, also, as an element of damages in such a case, the admissibility of which, when pleaded, this court, as well as others, has often recognized"—citing a large number of cases. In that case the court further says: "The fact that seduction, accomplished under some circumstances, is a crime, is no reason why it may not be the subject of a civil action; and if, instead of making a separate cause of action, the injured party chooses to plead it as a cause for aggravation of damages in a suit for a breach of the promise of marriage, under which it was accomplished, there is no good reason why it may not be done." In Indiana, at the time of the decision in Haymond v. Saucer, there was a statute, similar to our own, authorizing an unmarried female to maintain an action in her own right for seduction. In Spellings v. Parks, 104 Tenn. 351, 58 S. W. 126, upholding the ruling denying the demurrer to a complaint in a suit for breach of promise and seduction, the court said: "This is not error. The seduction is merely alleged in aggravation of damages, and it has been held in a number of our cases that in an action for breach of a marriage contract the plaintiff may give in evidence, in aggravation of damages, that she was seduced by the defendant." In that state was also, when that case was decided, a law giving an unmarried female a right of action for her own seduction. "It is well settled," says the court, in Davis v. Pryor, 58 S. W. 660 (an Indian Territory case), 3 Ind. T. 396, "that evidence of seduction is admissible in aggravation of damages," in an action for breach of a marriage contract. In Poehlmann v. Kertz, 204 Ill. 420, 68 N. E. 467, it is said: "But aside from this consideration, it was competent, under the pleadings, to prove the seduction if it occurred in consequence of the promise. It is permitted, in such a case, to be shown in aggravation of the damages." The court then quotes as follows from Fidler v. McKinley, 21 Ill. 308: "In a case of a breach of promise accompanied with a seduction, the injury is infinitely greater than where there is only a breach of promise." The court proceeds: "Counsel argues that seduction is not the natural result of a promise of marriage. Certainly not; but when seduction follows in consequence of the promise, degradation, loss of character and happiness are the direct result of a breach of that promise. In other words, the injury results from the breach—not the making of the contract." And it is so held in Leavitt v. Cutler, 37 Wis. 46; Giese v. Schultz, 69 Wis. 521, 34 N. W. 913; Musselman v. Barker, 26 Neb. 737, 42 N. W. 759; Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; McKinsey v. Squires, 32 W. Va. 41, 9 S. E. 55; Osmun v. Winters, 25 Or. 260, 35 Pac. 250. The Oregon statutes allow an action for seduction by an unmarried female over the age of 21 years. Section 35 of the General Laws of Oregon. In the Oregon case cited (Osmun v. Winters) the court said that: "The common-law practice is substantially uniform in admitting such evidence (of seduction in enhancement of damages), and is, we think, based upon sound principles." In Sheahan v. Barry, 27 Mich. 219, the opinion of Justice Campbell is so interesting and the reasoning so cogent that we quote therefrom in extenso: "The seduction which is allowed to be proven in these cases is brought about in reliance upon the contract, and is itself in no very indirect way a breach of its implied conditions. Such an engagement brings the parties necessarily into very intimate and confidential relations, and the advantage taken of those relations by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee, or guardian, or confidential adviser, who cheats a confiding ward, or beneficiary, or client, into a losing bargain. It only differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has been thus deceived cannot fail to be aggravated in fact by the seduction. The contract is twice broken. The result of an ordinary breach of promise is the loss of the alliance and the mortification and pain consequent on the rejection. But in case of seduction there is added to this a loss of character, and social position, and not only deeper shame and sorrow, but a darkened future. All of these spring directly and naturally from the broken obligation. The contract involves protection and respect, as well as affection, and is violated by the seduction as it is by the refusal to marry." And the learned justice then meets the claim by appellant here that there is danger, if seduction can be pleaded and proved in such an action, that it would not operate as a bar to a second action by plaintiff for seduction, in the following language: "And it is better for all parties, and more consonant with public policy, that where justice can be fully accomplished in one suit, no one should be driven to begin more than one. And where this rule is respected, there can be no danger of injustice by a second prosecution. The maxim 'that no one shall be twice vexed for the same cause of action' will always prevent any plaintiff from suing twice for the same damages. If they can be recovered in this action under the pleadings, a recovery in this will necessarily be a bar to any future action."

There are many other cases which are in line with those from which we have quoted. We have examined them with care, and find that they clearly and by unimpeachable reasoning sustain the contention of respondent that under our system it is permissible to plead seduction in aggravation of damages in an action for the violation of a marriage contract. We will not take the time to present excerpts from all those decisions, for we think it sufficient to say, finally, that from our investigations of the questions discussed we feel persuaded of the soundness of the rule contended for by respondent, and are further convinced that a recovery in an action for breach of promise where seduction is alleged in enhancement of damages would, if pleaded, be a bar to an action for seduction founded upon the same facts set up in the former suit.

It is urged that the damages awarded to the plaintiff are excessive, and that for this reason the verdict should be set aside. The rule in this state is so well settled by judicial decision that it has become elementary, that the appellate courts will "not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury" in the rendition of its verdict was actuated and influenced by passion or prejudice. Marshall v. Taylor, 98 Cal. 55-63, 32 Pac. 867, 35 Am. St. Rep. 144; Wilson v. Fitch, 41 Cal. 386; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845; Wheaton v. N. B. & M. R. R. Co., 36 Cal. 590; Howland v. Oakland C. St. Ry. Co., 110 Cal. 513, 42 Pac. 983; Aldrich v. Palmer, 24 Cal. 513. In Lee v. Southern Pacific R. R. Co., 101 Cal. 118, 35 Pac. 572, it is said: "While the verdict in these cases, as in all others, is subject to review by the court, it will not be disturbed merely upon the ground that the damages are excessive, nor because the opinion of the court differs from that of the jury, but only where it appears that the excess has been given under the influence of passion or prejudice."

But in the case at bar it is argued that because the principal testimony in the cause on behalf of plaintiff was that given by plaintiff herself, and that the same was "squarely contradicted" by that of the defendant, and because, further, the defendant's physician gave testimony tending to show impotency in the defendant and his consequent incapacity to perform the act of sexual intercourse, it is the duty of this court to set aside the verdict. This we cannot do. There is no rule more firmly settled or better understood than the one which removes from within the practice of appellate courts the duty of weighing the testimony or of settling and reconciling discrepancies in the testimony. This duty, under our system, is, happily, committed to the jury who see and hear the witnesses, and who, having thus heard the evidence, must weigh it by the light of all the tests afforded by legal rules, and finally determine the truth concerning the questions in dispute. And when they have thus reached a conclusion in cases upon evidence in which there appears a substantial conflict, their findings are conclusive upon us, and cannot be disturbed. But do the facts disclosed by the evidence justify the contention of counsel that the verdict is excessive? The rule that the pecuniary condition of the defendant may be considered in determining this question is conceded. According to his own testimony, the defendant owned, at the time he is alleged to have agreed to marry plaintiff, money and real property of the aggregate value of $14,009.83. To this amount, it is contended by plaintiff, should be added the sum of $2,500, which defendant claimed to have paid to his nephew. This would bring the extent of his wealth, measured in money, up to a total of $16,509.83. It is insisted that the amount of the verdict, when compared to the total value of defendant's possessions, is so excessive as to warrant us in declaring or indulging the presumption that it was brought about by passion or prejudice. We think that, under all the circumstances of the case as found by the jury the verdict is not excessive in any view of the case, even if the item of $2,500 mentioned is not to be computed in estimating the value of his estate. The injury inflicted upon the plaintiff by the conduct of the defendant is irreparable. The acts superinducing that injury were incomparably reprehensible. We must believe the facts as the jury found them, and, so believing, we do not hesitate to say that there is even no act denounced as criminal of which the meanest of the human family is capable so diabolical and dastardly as the impulse which prompts any man, old or young, in the full possession of his intellectual faculties, to wantonly and ruthlessly rob, by means as false as they were ignominious, a young and inexperienced maiden, without the protecting care and cautious solicitude of a father, and, still worse, the daughter of a life-long friend, between whom and his family the most cordial and intimate social relations had existed, of the richest and most cherished of the traits which go to form human character. Mercilessly thrown out into the world, so to speak, rejected by the man who deliberately and by false pretenses betrayed her, and, thus dismantled of the priceless armor of virtue and honor, and exposed to the scorn and contumely of her friends and acquaintances, and, it may even be added, to relentless humanity in general, is it possible that money damages can repair, in any degree, so grievous an injury? We think the verdict is not excessive. The defendant, advanced in years, and to a point in life where the probability of his living much longer does not exist, with no one dependent upon him for sustenance and support, is still left with a competence upon which he can subsist by the practice of ordinary habits of frugality. If, under these circumstances, he cannot do this, then, in the absence of other features of the record than those urged justifying us in declaring the verdict to be excessive, we must leave him to reap the fruits of his own folly and perfidy. The rule that appellate courts will not disturb the verdict where there is a substantial conflict in the evidence renders it unnecessary for us to take up a detailed discussion of the testimony in this case; yet there can be no impropriety in saying that the record shows much more evidence than merely the testimony of the plaintiff and the "flat contradiction" (as it is put by appellant) of the same by the defendant, as is contended. Indeed, there are many circumstances testified to by the mother and sister of the plaintiff which tend strongly to corroborate the story of the plaintiff. The cross-examination of the defendant revealed weaknesses in his statement, and it may be added that if we felt called upon to search for reasons why the jury discredited the testimony of defendant, we need go no farther than that portion of his testimony in which he declared that he had sold a piece of his realty for $2,500 and had paid the money to his nephew to liquidate, as he termed it, "a debt of honor." He said that this relative had told him in the lifetime of his wife, that the latter had borrowed from him certain sums of money; the exact amount of which he never apprized defendant of. He said that he had never mentioned the matter to his wife, and, when pressed for an answer as to how much the "debt of honor" amounted to, he replied that he did not know how much it was, whether it was $10 or $1,000—but that all that he did know about it was what his nephew had told him. So improbable a story, coming from a man whose intelligence is not impeached, could not be believed even by the most credulous.

Certain rulings of the court are complained of. The mother of plaintiff was asked on her direct examination, "What is your daughter doing?" referring to the time just previous to and about the date of the trial. She replied: "She is wet nursing." This question was objected to. The plaintiff had previously been asked a similar question and returned a similar reply. If there was error in overruling the objection (and we do not decide that there was), the reply of the witness was harmless. The plaintiff was asked: "State, Miss Lanigan, the names of any of your relatives, if there be any, who knew of the birth of this child." Objection to this question was overruled and she replied: "My mother and sister. I haven't seen any of my other relations. I don't know whether they know it or not." In Reed v. Clark, 47 Cal. 198, evidence was introduced that the plaintiff, within a few days after the proposal of marriage by defendant and acceptance by her, had announced the fact of the engagement to a number of ladies with whom she was intimate and whom she invited to attend the wedding. The evidence was objected to but allowed. The Supreme Court, in approving the ruling of the lower court, said: "It cannot be doubted that knowledge of the fact of a marriage engagement by the intimate friends and relatives of a party to the contract, with whom she has frequent and familiar intercourse, would increase in a considerable degree the annoyance and mental suffering occasioned by a sudden discontinuance of the relationship." The fact was offered as an element to be considered in the estimation of damages, and the evidence limited to that point by the trial court. To the same purport is the ruling in Liebrandt v. Sorg, 133 Cal. 572, 65 Pac. 1098. We can see no distinction in principle in the rulings in those cases and the one now under consideration in the case at bar. If, as we have held, seduction may be proved in aggravation of damages, when pleaded, what reason can be suggested why the knowledge of the fact of the birth of the child, claimed to have been the result of the seduction alleged, by other people, offered as an element in the assessment of damages, would not be relevant, material and competent testimony? We know of no reason. The answer of the witness could not, however, in any view, have done the defendant injury, as the mother and sister of plaintiff had previously testified, without objection, that they knew of the fact of the birth of the child, and the answer of the witness only involved a fact of which the jury had already been made cognizant.

Before the trial, the deposition of the defendant was taken at the office of the attorneys for the respondent. The deposition was transcribed, but was not read to the witness and corrected and subscribed by him, required as a prerequisite to its use as a deposition by section 2032 of the Code of Civil Procedure. At the trial, on cross-examination, the defendant was asked as to the color of his hair when he was a young man. In reply he stated that its color then was dark. The purpose of the question was evidently to establish a resemblance between defendant and the child born to plaintiff and which was in court during the trial. Counsel, upon the answer thus given by defendant, then asked him if he did not testify when giving his deposition that his hair, when he was a young man, was of auburn color. The question was read from the deposition, time, place, and persons present being given; but there was no objection to the form of the question or upon any other ground, except that the purported deposition was not one in fact or in law, because it had not been read to the defendant and an opportunity given him to correct it if he so desired, and that he had not subscribed his name thereto. The objection was without merit and the court's ruling thereon eminently proper. "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them." Section 2052, Code Civ. Proc. The document upon which this cross-examination was based was offered to the defendant to read before requiring a reply. That the question propounded was clearly within the rule authorizing the impeachment of a witness is beyond doubt. The late case of Gasquet v. Pechin, 143 Cal. 521, 77 Pac. 481, puts the question beyond all cavil. There are, however, many California cases in support of the correctness of the ruling of the lower court. People v. Lambert, 120 Cal. 176, 52 Pac. 307; People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549; People v. Gardner, 98 Cal. 132, 32 Pac. 880; People v. Turner, 65 Cal. 540, 4 Pac. 553; People v. Bosquet, 116 Cal. 75, 47 Pac. 879.

The defendant, according to the testimony of plaintiff, when the latter informed him of her condition, advised her to consult a doctor, and gave her a small sum of money with which to pay the fee. He requested her to write to him from her home in San Francisco the result of the examination by the doctor. In accordance with this arrangement, the plaintiff consulted a physician, and was told by him that she was in a delicate condition. She thereupon addressed a letter to the defendant, imparting to him this information. No reply was made to the letter. Upon cross-examination he was asked if he had received such letter, and was required, against the objection of his counsel, to answer the question. It is claimed that this was not proper cross-examination. We do not think the court erred in its ruling. The defendant had in his direct testimony made denial of a promise to marry plaintiff, denied having been sexually intimate with her, denied having given her money for the purpose of paying the doctor, and, in short, denied in toto all the inculpatory statements against him testified to by plaintiff. The question was in principle the same as if he had been asked if he had not been personally accused by plaintiff of the paternity of the child and had made no reply to the accusation. The plaintiff testified that the letter not only conveyed to defendant the information concerning her condition, as the doctor had diagnosed it, but reminded defendant "that he must now keep his promise [of marriage], as there was no time to lose." If the defendant received such a letter and remained silent under the charges which by inference it contained, then the fact of its receipt and his failure to reply might tend in a degree to contradict his denial of the promise of marriage and seduction, or at least discredit to some extent his testimony. "Great liberality should be allowed in the cross-examination of a witness, for the purpose of testing his accuracy and credibility; and where questions asked appear to relate to facts and circumstances within the general scope of the direct examination, it is error to exclude them." People v. Westlake, 124 Cal. 452, 57 Pac. 465. And "the extent to which the cross-examination of a witness shall be carried is, in some degree, a matter of discretion in the trial court; and its ruling will not be disturbed upon appeal if no abuse of discretion appears." Grimbley v. Harrold, 125 Cal. 24, 57 Pac. 558, 73 Am. St. Rep. 19. We think the question was within the general scope of the direct examination.

On direct examination Dr. Rowell, defendant's physician, was asked: "State whether or not the objective symptoms confirmed the subjective symptoms upon your examination in 1900?" The court sustained an objection by plaintiff to this question. The ground of the objection, that it was irrelevant and incompetent, and not proper redirect examination, was perhaps not well taken, but the court refused to allow the question to be answered because it was a mere repetition of what the witness had already testified to. The witness on direct had fully explained, referring to defendant's alleged impotency, that in his examination of defendant the subjective and objective symptoms of such incapacity concurred; or, in other words, the physical condition of the defendant coincided with what the defendant had told him of his symptoms as they manifested themselves to him. There was no necessity of repeating the testimony, and, while no harm could have come from permitting the answer, we can perceive none in refusing it. A number of witnesses were permitted to testify on the part of defendant as to his general reputation where he resided for chastity and morality. The witness Schmidt, in addition to the question propounded as to his knowledge of defendant's general reputation for the traits mentioned, was also asked, having said that he knew the general reputation of defendant for integrity, whether it was good or bad. To this question the court sustained an objection. Counsel for appellant insists that the ruling was error because the word "integrity" means, among other significations, "moral soundness," which, he says, is a trait involved in the charge of seduction. Schmidt had already testified, without objection, as had several other witnesses, that defendant's reputation for chastity and morality in the community in which he lived was good. Assuming the ruling to be error, which it is not necessary for us to decide here, we do not think it was prejudicial in view of the other evidence admitted directly bearing upon his reputation for chastity and morality. The hypothetical question propounded to Dr Fraser, called as an expert witness for the plaintiff, was within the evidence. The objection was that the question assumed facts not in proof. The defendant was called to the witness stand by plaintiff in rebuttal and asked a number of questions, the answers to which involved information as to whether or not in his lifetime he had ever suffered from any disease of the genital organs, or had in any manner abused himself so as to affect or impair the vitality of those organs. His replies to these questions were to the effect that he had never abused himself, had never had venereal trouble or blood disease of any character, except rheumatism, and had never found it necessary to use a catheter or other instrument to open the canal of his organ of generation in order to pass water. The hypothetical question embraced all these facts and was whether or not, "under such circumstances, and assuming them to be true, that man could perform the act of copulation?" The answer was: "He could, without doubt." There was no error in the ruling on this question.

It is charged that the attorney for plaintiff in the course of his argument to the jury was guilty of misconduct which prejudiced the rights of defendant. Counsel used this language: "We challenge counsel to deny that we offered to dismiss this suit, if the defendant would marry the plaintiff, and legitimize this child." There was no evidence offered or received which warranted the use of the quoted language. It seems to have been used in reply to certain comments made by counsel for defendant in his argument upon matters foreign to the record. It would save much trouble and expense and serious disappointment to litigants if lawyers could practice and acquire an equanimity of temperament which would prevent the exhibition of the inordinate zeal during the trial of a case which often leads to prejudi-

**cial error. The language imputed to counsel, and which, in fact, he admits to have used, was wholly without warrant from the record, but we think the court's action in striking it out and immediately instructing the jury to disregard it, cured the irregularity.** It is claimed, however, that the irregularity complained of is not properly before the court, because, under sections 657, 658 of the Code of Civil Procedure, when an application for a new trial is made for "irregularity in the proceedings of the court, jury, or adverse party," it "must be made upon affidavits." It is not necessary, in the view we have taken of the point, to decide this question. Objections to certain instructions given by the court involve the points we have discussed, and disposed of against the contention of appellant raised on the court's order overruling the demurrer. It is insisted, however, that the court erred in refusing to give instructions 16 and 20, requested by defendant. We have carefully examined the instructions given by the court, and think the law of the case was fully covered by them. Instructions 24, 25, and 28, which were read to the jury, embrace all the matters contained in the rejected instructions. This was sufficient. We know of no rule of law requiring the court to repeat its instructions upon any point in a case, where the law applicable thereto has already been given in clear and perspicuous language.

We have given the record careful consideration, and have not been able to find any errors prejudicial to the rights of the defendant.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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4 Cal. App. 730

## PEOPLE v. YEE FOO. (Cr. 67.)

(Court of Appeal, First District, California. Feb. 4, 1907. Rehearing Denied April 5, 1907.)

1. Criminal Law—Order of Proof—Defense—Rebuttal.

Where, in a homicide case, accused offered evidence in support of the defense of alibi, the prosecution was entitled to call witnesses in rebuttal on the question of alibi.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1615.]

2. Same.

Where, in a homicide case, accused offered evidence in support of the defense of alibi that he was at the time of the homicide in San Francisco about 200 miles from the place of the homicide, evidence that on the day following the homicide accused was seen near the place thereof purchasing a railroad ticket, and there boarding a train bound for San Francisco, was admissible in rebuttal to contradict the defense of alibi, though it also showed flight.

3. Witnesses—Impeachment—Foundation.

Where a witness on cross-examination was asked with respect to his having made statements to a third person and understood the circumstances of time and place, a sufficient foundation was laid for the introduction of the testimony of the third person as impeaching testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1233–1242.]

4. Same.

Where a witness for accused denied, on cross-examination, that he had attempted by corrupt means to dissuade a witness for the prosecution from attending the trial, or from giving certain evidence, the prosecution was entitled to offer evidence to contradict him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1267.]

5. Criminal Law—Record—Review—Presumption.

In the absence of a showing to the contrary, it will be presumed that the court in a homicide case admonished the jury not to converse among themselves nor with any one else on any subject connected with the trial, or to form or express any opinion until the case is finally submitted as required by Pen. Code, § 1122.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2761.]

6. Homicide—Murder in the First Degree—Premeditation.

To constitute murder in the first degree, there need be no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind—and it is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation; and where such is the case, the killing is murder in the first degree, no matter how rapidly the acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 36–38.]

7. Criminal Law—Trial—Instructions.

Where, in a homicide case, the court charged that the presumption of innocence "attaches to every stage of the proceeding," and that the burden on the prosecution to prove each fact beyond a reasonable doubt "remains through the entire case," the refusal to charge that the presumption of innocence does not cease at any time during the trial nor when the case is finally submitted, but that accused is presumed to be innocent through the case, and the jury in their deliberations must examine the testimony in the light of that presumption, was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1991, 2011.]

8. Same—Argument of Counsel—Harmless Error.

Where, in a homicide case, the theory of the prosecution was that the killing was the result of an order of a Chinese society known as "Highbinders," and there was evidence that a third person belonged to the society, and that accused was employed by him, and that accused in attempting to prove the defense of alibi attempted to show that he was with the third person at his residence, the argument of the district attorney that the society was an "alibi factory," and that if another person named had been a member and accused and his associate highbinders had killed him on the night of the homicide, and they had gone back from the place of the homicide to the residence of the third person, and had reported to him and given an account of what they had done, accused would not be retained in the employ of the third person for other murders, etc., was not reversible error.

9. Same—Record—Review.

Where the record in a homicide case shows that certain language of the district attorney was excepted to as unsupported by evidence and as prejudicial to accused, but there was nothing to show that the court was asked to strike out the objectionable language, or that it ruled on the exceptions, there was nothing on appeal to review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2681.]

10. SAME—ARGUMENT OF COUNSEL.

It is not error for the district attorney in a homicide case to merely refer to the failure of one jointly indicted with accused to testify in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1670–1673.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Yee Foo was convicted of murder in the first degree, and he appeals. Affirmed.

W. D. Tupper and Everts & Ewing, for appellant. U. S. Webb, Atty. Gen. (Frank Kanke, of counsel), for the People.

COOPER, P. J. Defendant was charged by the district attorney of the crime of murder in killing one Louie Mong with malice aforethought on the 3d day of October, 1905, in the city of Fresno. After a trial, he was found guilty of murder in the first degree, and judgment was accordingly entered, sentencing him to imprisonment for life. This appeal is from the judgment and order denying his motion for a new trial.

There was evidence to the effect that shortly after 10 o'clock p. m. of the day named in the information the deceased was shot and killed while in his room in Chinatown in the city of Fresno by the defendant, who had just entered the room accompanied by four other Chinamen, all of whom were armed, and some of whom took part in the killing. After the killing the defendant and the four other Chinamen, who were evidently acting in concert with him, left the room and came out of the stairway of the house into the lighted alley with their guns still in their hands. No claim is made as to the insufficiency of the evidence to justify the verdict; but it is argued that certain errors of law occurred during the trial to defendant's injury, for which a new trial should have been granted, and of such character as to call for a reversal of the judgment by this court.

The first claim made by defendant is that the court erred in allowing the prosecution to call witnesses in rebuttal upon the question of an alibi relied upon by defendant, who had introduced several witnesses to prove that he was in San Francisco and not in Fresno at the time of the homicide. The claim is made that the testimony so received is not rebuttal, and that it was incumbent on the prosecution to prove as a part of its original case the whereabouts of defendant at the time of the killing, and to make such proof by all the witnesses it intended to call upon the question under any circumstances. In other words, the proposition contended for is that if the prosecution should prove the commission of a crime at a certain time and place by the two or three witnesses who were present, and the defendant afterwards calls 10 witnesses who each testifies to the effect that at the same time the defendant was at a certain room in a certain house in a different place, the people should not be allowed to call any witnesses in rebuttal. If such a proposition could be maintained, the people in many cases would be powerless, and crime would go unpunished. The district attorney might have evidence to show that each of the 10 witnesses was not in the place testified to by them, but in a different place at the time and at the moment of the homicide, and yet the rule contended for would preclude him from showing it. The defense of an alibi is an affirmative one, and, if established, a complete one, and the burden is upon the defendant to prove it. The object of the trial is to get at the truth, and while the rights of the defendant should be always carefully guarded, and the procedure designed for his protection substantially followed, yet the law will not reduce its rules to an absurdity in order to prevent a fair and full investigation by the prosecution. The district attorney had no reason to anticipate the defense of an alibi, and the evidence was competent, and in rebuttal. State v. Lewis, 69 Mo. 92; Commonwealth v. Moulton, 4 Gray (Mass.) 39; State v. Maher, 74 Iowa, 77, 37 N. W. 2; Goldsby v. U. S., 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343; Wade v. Thayer, 40 Cal. 584.

One Leu Tun was called by the prosecution, and, under defendant's objection, was allowed to testify in rebuttal that on the 4th day of October, 1905, the day after the homicide, the defendant purchased a ticket at Madera, and there boarded the north-bound train for San Francisco, and that witness went to San Francisco with him on the same train. It is said that the testimony was not rebuttal, but independent evidence tending to show flight of the defendant from the scene of the homicide. The evidence, if true, showed that the defendant was going from the vicinity of Fresno toward San Francisco the day after the homicide. The defendant claimed and endeavored to establish by witnesses that he was at a certain room in San Francisco on the night of October 3d when the homicide was committed. The fact that a little after noon on the following day he was seen to purchase a ticket and board a train at a station north of Fresno, and nearly 200 miles south of San Francisco, tended at least in some degree to disprove the defendant's claim that he was in San Francisco at the time of the homicide. It also tended to prove the theory of the prosecution that he was in Fresno and committed the murder. The fact that the evidence might have tended to prove the flight of the defendant did not make it, for this reason, inadmissible. The main purpose and object of the testimony was to be considered in determining its admissibility. If all evidence should be excluded because it might be objectionable on certain theories for certain reasons, or because it might tend in a more or less degree to prove indirectly some other fact, the administration of justice would be impracticable, and in many cases impossible. The law aims to arrive at the truth upon broader lines and by all legal means which tend to prove the fact under investigation.

Defendant's counsel argues at considerable length that the court erred in permitting evidence tending to impeach defendant's witness, Jue Doe Men, who testified in direct examination that he was at the Chinese theater in the city of Fresno at the very time of the homicide, and that he then and there saw Wong Dock, who is jointly charged with defendant, at the theater. In cross-examination the district attorney called the attention of the witness to a conversation with one Edgar, who was a witness for the prosecution, in which conversation the witness was asked, in effect, if he did not offer, or intimate to Edgar, that he would give him $20 if he would testify that he was not positive that he saw defendant in Fresno about the time of the homicide. The conversation to which the attention of the witness was called, if true, would tend to show that he was an interested witness, and not worthy of credit. It is said that the attention of the witness was not called to the parties present at the time of the alleged conversation. This was not one of the grounds of objection to the question, and if it had been it would not have been a valid objection. The objection on this ground should have been to the impeaching testimony of Edgar when offered. It appears by the record that this was done, and Edgar's testimony objected to upon the ground that the proper foundation had not been laid. The better course would have been to have called the attention of the witness, Jue Doe Men, to the persons present at the alleged conversation, but the omission to do this is not necessarily fatal to receiving the impeaching testimony. The attention of the witness was called to the circumstances of time and place, and it clearly appeared that he understood the occasion referred to, and the conversation to which his attention was directed. He gave his version of the conversation, and denied that he offered Edgar $20. His words were: "I say this way, I say: 'You know darn well Yee Foo never came on train. You see one. You never know him.' I say: 'You know darn well not Yee Foo.' I say: 'I bet you I pick 50 Chinamen, just like workingmen, take them in China theater, you can't pick Yee Foo out.' That is what I told him." If the witness understood the circumstances of time and place, the object of this section of the Code is satisfied. Lewis v. Steiger, 68 Cal. 200, 8 Pac. 884. Where a witness for defendant has attempted corruptly to dissuade a witness for the prosecution from attending the trial, or from giving certain evidence, and denies on his cross-examination that he has done so, the plaintiff is entitled to give evidence to contradict him in this respect. A distinction is made between the right to contradict a witness as to any fact relating to his conduct in connection with the action on trial and the right to impeach him by showing that he is not a man worthy of credit generally. Lewis v. Steiger, supra; People v. Lambert, 120 Cal. 170, 52 Pac. 307; Barkly v. Copeland, 86 Cal. 483, 25 Pac. 3.

The record fails to show that the court admonished the jury at each adjournment, as required by section 1122 of the Penal Code, not to converse among themselves nor with any one else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted. In the absence of a showing to the contrary we will presume that the court did its duty, and gave the proper admonition at each adjournment. In the case of People v. Coyne, 116 Cal. 295, 48 Pac. 218, it appeared affirmatively that the court did not admonish the jury at a certain adjournment of court, and the court said: "But the error in this regard is technical, and not of that importance to demand a reversal of the judgment and a new trial." In People v. Thompson, 84 Cal. 598, 24 Pac. 384, cited by defendant, it appeared affirmatively that the court did not admonish the jury, and yet the court said: "In the present case no injury appears to have resulted, and there may have been no prejudicial error." In People v. Maughs (Cal. Sup.) 86 Pac. 187, the opinion does state that the record should disclose the fact that the jury were admonished, but the case was not reversed on this point. The learned judge who wrote the opinion in the Maughs Case cites no authority for the statement that the record should disclose the fact of such admonition being given. The only case cited is People v. Thompson, and it expressly states that the court did not admonish the jury.

The court, at the request of the prosecution, instructed the jury as follows: "There need be no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer; and if such is the case the killing is murder of the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing." It is seriously urged that the court erred in giving the above instruction, and it is claimed that the Supreme Court expressly so held in People v. Maughs, supra. It is said that the instruction should have read: "It is only necessary that the act of killing be preceded by and the result of a concurrence of will," and so forth, and that the omission of the words "result of" is fatal, because under the instruction as given a killing, which was not the result of deliberation and premeditation, but which had at any time been preceded by it, would be murder in the first degree. The argument would be plausible in the case of a killing in a sudden quarrel or heat of passion, or under circumstances that might authorize the jury to find a verdict of manslaughter or murder in the second degree, but in this case there is no pretense of any evidence that would justify any such verdict. The defendant had left San Francisco, armed himself, and with four associates entered the room of deceased and began shooting, and without any attempt at justification killed the deceased. There was no question of self-defense. There was no conflict as to who began the shooting. There was not even a word said by the deceased to justify the defendant in becoming angry at him. But aside from this the defendant's counsel did not insert in their brief two very important sentences which immediately precede the instruction. This part of the instruction, which must be read with it and as a part of it, is as follows: "The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation." By this the jury are expressly told that the killing must be the result of deliberate premeditation. We cannot conceive that a reasonable person of common understanding would be misled by this instruction as given. An instruction identical with the one complained of here was given in People v. Suesser, 142 Cal. 354, 75 Pac. 1093, as appears by the transcript in that case. It was approved by the court in bank. In People v. Weber (Cal. Sup.) 86 Pac. 671, the instructions were approved and held not to be erroneous, and the transcript in that case shows an instruction in the same language as the one complained of here. The same instruction in effect was approved in People v. Nichol, 34 Cal. 215; People v. Iams, 57 Cal. 115; People v. Williams, 43 Cal. 344. In the Maughs Case there was testimony that the defendant in self-defense shot decedent, a young and vigorous man, his physical superior, who was making an assault upon him with a deadly weapon. The case was reversed upon several grounds, and not solely upon the instruction omitting the words "result of." Not only this, but the instruction was not preceded by language similar to that quoted as part of the instruction in this case. We, therefore, are not disposed to extend the doctrine of the Maughs Case beyond its own facts, and we apprehend there will be few cases in which it cannot be distinguished.

The court refused to give, at the request of the defendant, the following instruction: "The presumption of the defendant's innocence does not cease at any time during the taking of the testimony or of the argument, nor does it cease when the case is finally submitted to you for your consideration, but this defendant is presumed to be innocent all through the case, and, in your deliberations in the jury room, you are to examine the testimony in the light of that presumption." The instruction might well have been given, but the failure to give it is not such error as to justify a reversal of the case. The jury were elsewhere told that the presumption of innocence "attaches to every stage of the proceeding," and that the burden is upon the prosecution to prove each material fact beyond a reasonable doubt and to a moral certainty, and that this burden "remains through the entire case."

We have examined the other alleged errors as to giving and refusing instructions, and find no occasion for discussing them separately. The instructions as a whole gave to the jury a full and fair statement of the law pertaining to each and every phase of the case.

Counsel have devoted a great part of their brief to discussing certain remarks made by the district attorney in his address to the jury. We have carefully read the record and the briefs, and conclude that the matter to which our attention is called would not justify a reversal of the case. District attorneys, in their zeal to obtain convictions, often overstep the proper bounds, and by intimation, innuendo, or statement, get before the jury matters not in evidence. When such course has been willfully pursued, or where something is stated and represented as a fact, and the statement is damaging and not borne out by the record, the courts of appeal have not hesitated to reverse the case and grant a new trial. But in the argument of a case, where counsel has become zealous in his cause, and upon his own view of the case works his mind up to believe certain things, he is apt to exaggerate and draw upon his imagination. We apprehend that this is well known to juries, and for this reason it would have to be a clear case of such misconduct on the part of the district attorney to justify a reversal. In the case at bar it is evident that the theory of the district attorney was that the killing was the result of a decree or order of the Highbinders, or of a society known as the "Bing Kung Tong." There is evidence that one Jake Num, living at 41 Sullivan alley, in the city of San Francisco, belonged to the Bing Kung Tong. One Hammel was employed as his bodyguard. Defendant was the cook employed by Jake Num. Other Chinamen were there, and it was at this place, 41 Sullivan alley, where defendant attempted to locate himself at the time of the homicide by the testimony of several witnesses. The district attorney, after referring to the society and what he called "the alibi factory," used the language of which most complaint is made, and which appears the most objectionable, which is as follows: "Suppose Lew Suey had been a member, and Yee Foo and his associate Highbinders had killed him on that evening, and they had gone back, as he did go back, by a conveyance to Madera, and from there to San Francisco, and had reported to Jake Num and given an account of their stewardship, and he said: 'What have you done—killed Louie Mong?' 'We killed him.' 'Is that all?' 'Well, there was another fellow there, and we thought we best kill him.' 'Yes; but who was he?' 'Why, it was Lew Suey, a member of the Bing Kung Tong.' Now, I don't suppose that Yee Foo would be retained in the employ of Jake Num for other murders if, when he goes out to do his bidding to kill one man of the Hip Sing Tong, that he at the same time, and simply for the purpose of covering up his tracks, kills a man of the Bing Kung Tong, one of their own members."

It is evident that the district attorney was partly drawing upon his imagination by way of illustration. He finally said, "Now, I don't suppose Yee Foo would be retained in the employ of Jake Num for other murders if," etc. Defendant appeared from the testimony to have been in the employ of Jake Num. The evidence justified the district attorney in claiming that defendant committed murder in the case in which he was tried. As to whether or not he would be retained for other murders had reference to the future. He did not accuse the defendant of having ever committed any specific crime other than the one for which he was being tried. He did not state anything as a fact against defendant that was not in evidence. In the leading case of Tucker v. Henniker, 41 N. H. 323, the court said: "The right of discussing the merits of the case, both as to the law and the fact, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, fortify, or condemn motives, as far as they are developed in the evidence; assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as varied as the resources of his genius, his argumentation as full and profound as his learning can make it, and he may, if he will, give play to his wit, or wings to his imagination." This case was referred to and approved in People v. Molina, 126 Cal. 505, 59 Pac. 34. In People v. McMahon, 124 Cal. 436, 57 Pac. 224, the district attorney, after speaking of the defendant as "Old Harris, the whiskey seller," said that he "ought to be in the penitentiary," and the court held that the language was not sufficient to call for a reversal of the case. In People v. Wheeler, 65 Cal. 77, 2 Pac. 892, it was held not to be error when the district attorney said to defendant: "You sought this trouble with him and made a cowardly attack on him." In People v. Glaze, 139 Cal. 159, 72 Pac. 965, the language of the district attorney was (referring to defendant): "When this foul fiend of hell sent Trewella to his maker, the motive came from a heart as black as the crime committed." It was held not to constitute error. In People v. Soeder (Cal. Sup.) 87 Pac. 1016, the remark was, "This man Leon Soeder would cut another man's throat any day in the week, whether he wanted to marry Catherine Flatley or not," and it was held not to constitute error. In People v. Weber, supra, the Attorney General stated his solemn belief in the guilt of defendant, and it was claimed that he committed error in so doing. The court said: "A prosecuting officer, therefore, has the right to state his views, his beliefs, his conviction as to what the evidence establishes." See, further, People v. Romero, 143 Cal. 460, 77 Pac. 163; People v. Salas (Cal. App.) 84 Pac. 295; Hawkins v. State (Tex. Cr. App.) 71 S. W. 756; State v. Millmeier, 72 N. W. 275, 102 Iowa, 692.

We have discussed the latter point upon its merits, but we might well have held the remarks not subject to review for another reason. The record merely shows that the language of the district attorney "is excepted to as unsupported by any evidence, and as prejudicial to the substantial rights of the defendant." The court was not asked to strike out the objectionable remark, nor does it appear that the court ruled upon the exception. It is but fair to require defendant's attorney, in case of objectionable remarks by the district attorney, to call the court's attention to them then and there, and invoke the aid of the court to prevent the remarks from injuring the defendant, before he will be allowed to urge the matter as error in this court. In such case this court will not hold the remark error upon which to reverse the case. People v. Shears, 133 Cal. 159, 65 Pac. 295; People v. Beaver, 83 Cal. 419, 23 Pac. 321; People v. Ah Fook, 64 Cal. 383, 1 Pac. 347; People v. Kramer, 117 Cal. 650, 49 Pac. 842; Lunsford v. Dietrich, 93 Ala. 565, 9 South. 308, 30 Am. St. Rep. 79.

There was no error in the reference of the district attorney to the failure of Wong Dock, who was jointly charged with defendant, to testify in the case. No reference was made to the failure of the defendant to testify, and no reason occurs to us why the remark was not legitimate argument as to a codefendant. The law does not exempt a defendant, who is jointly charged, from being a witness either for or against his codefendant. Ex parte Stice, 70 Cal. 51, 11 Pac. 459; People v. Plyer, 121 Cal. 162, 53 Pac. 553. If such codefendant should be called, and should refuse to testify on the ground that his evidence might tend to incriminate himself, that would present a different question. Wong Dock was a competent witness, and was in the county jail, and subject to the process of the court. He could have been called by the prosecution or by the defendant. The cases cited by defendant were most of them where the law, under which the decision was rendered, makes the wife, or husband, or codefendant, an incompetent witness. Of course, if the law were such that Wong Dock was prohibited from being a witness, the cases cited would apply, and there would be much reason for following them. The case principally relied upon by defendant (People v. Smith, 121 Cal. 355, 53 Pac. 802) is not in point. There the district attorney, after commenting on the fact that defendant had not called John Smith, his brother, who was present at the shooting, continued, after objection was made, and said: "The defense is afraid of it, or they would never squeal;" and again, after a further objection was made, the district attorney said: "The presumption of the law is that if John Smith had testified before you gentlemen as to the facts in this case—the presumption of the law is that his testimony would have been adverse to the defense." The defendant's counsel, objecting to the statement of the district attorney, asked the court to instruct him not to pursue it, and the court overruled the objection, and apparently approved the conduct of the district attorney, and told defendant's counsel not to "interrupt him any more." The court below, by its rulings, had, as the Supreme Court said, "impliedly told the jury that both the statement of fact and the deduction made by the district attorney were proper matters for their consideration." In the case at bar there was nothing said to the jury as to a presumption from the failure to call Wong Dock. The court's attention was not called to the matter, and no ruling made. The defendant merely excepted to the statement. That it is not error for a prosecuting attorney to refer to the fact that a codefendant has not been called to testify has been held in State v. Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135. See, further, State v. Millmeier, 72 N. W. 275, 102 Iowa, 692; United States v. Candler (D. C.) 65 Fed. 308; Commonwealth v. McCabe, 39 N. E. 777, 163 Mass. 98; Commonwealth v. Clark, 14 Gray (Mass.) 367; Hall v. State (Tex. Cr. App.) 22 S. W. 141.

We have carefully read the affidavits in regard to newly discovered evidence. The main portion of them relates to statements as to evidence that would be cumulative. Several of them relate to statements that could only be admissible by way of impeachment. There were counter affidavits, and the learned judge who tried the case considered them in the light of all that had occurred during the trial. The court does not appear to have abused its discretion in denying the motion on this ground. People v. Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141; People v. Warren, 130 Cal. 683, 63 Pac. 86; People v. Clarke, 130 Cal. 642, 63 Pac. 138; People v. Buckley, 143 Cal. 375, 77 Pac. 169; People v. Weber, supra.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

5 Cal. App. 8

## ELLIOTT v. CLARK. (Civ. 330.)

(Court of Appeal, First District, California. Feb. 8, 1907.)

TRUSTS—CONSTRUCTIVE TRUSTS—ESTABLISHMENT—ACTION—LACHES.

Where a complaint alleged that plaintiff's intestate gave defendant's intestate a sum of money to be invested for plaintiff's intestate, and that defendant's intestate purchased real estate, taking title in his own name, and it was sought to enforce a trust, but it appeared that the transaction occurred 45 years before the bringing of the action, the complaint was demurrable for laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 568–573.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by F. A. Elliott, as administrator of the estate of Ada M. Hudson, deceased, against Charlotte K. Clark, as special administratrix of the estate of George Hudson, deceased. From a judgment in favor of plaintiff, defendant appeals. Reversed.

M. C. Hassett and D. H. Whittemore, for appellant. Wm. H. Chapman and R. F. Mogan, for respondent.

HALL, J. Appeals from judgment and order denying defendant's motion for a new trial.

Plaintiff, as administrator of the estate of Ada M. Hudson, deceased, brought this action against Charlotte K. Clark, as special administratrix of the estate of George Hudson, deceased, to obtain a decree that certain real property, the legal title to which was in said George Hudson at the time of his death, was acquired and held by him in trust for Ada M. Hudson, and for her estate since her death, and for an accounting of the rents, issues, and profits of said property. Defendant demurred to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and defendant now urges that the court erred in so doing, and we think this contention must be sustained. The real point of the demurrer is that the complaint upon its face shows such laches on the part of plaintiff and his intestate as to bar any right of action upon the matters set forth as plaintiff's cause of action. That this defense may be raised by general demurrer to the complaint where the laches is apparent upon the face of the complaint is well settled in this state. Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516; Bell v. Hudson, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791.

This action was commenced on the 16th day of June, 1899. It is alleged in the complaint that Ada M. Hudson and George Hudson intermarried on the 21st day of December, 1853, and continued to be husband and wife until the death of Ada M. Hudson, which occurred on the 17th day of May, 1897. George Hudson died March 12, 1898. It is further alleged that prior to the said marriage Ada M. Hudson did deliver to George Hudson the sum of about $4,000 to be invested for her by him; that he did, on the 21st day of November, 1853, purchase a certain piece of real estate, and as a part of the purchase price thereof paid the said $4,000, but took the title thereto in his own name; that he thereafter sold said property for $13,000, and, with the consent of his said wife, invested the proceeds in real estate, and thereafter in various ways invested her money, so that when he died he held in his own name several described pieces of real property. It is alleged "that, as a portion of the consideration for the conveyance to him of all of said real property so owned by him at the time of his death, the said George Hudson did pay and deliver the said moneys, and the accumulations thereof, of said Ada M. Hudson, so delivered to him by said Ada M. Hudson in trust to invest the same for her use and benefit." In other words, it is charged that a portion of the property held by George Hudson at the time of his death was purchased with proceeds arising from the $4,000 delivered to him by Ada M. Hudson in 1853. It is further alleged that neither said George Hudson nor the defendant ever rendered an accounting "of such moneys received by said George Hudson as aforesaid." It is thus seen that plaintiff is endeavoring to obtain the aid of a court of equity to establish and enforce a trust and claim growing out of a transaction that occurred more than 45 years before the bringing of the action; the action being brought after both parties to the original transaction have died.

We think the facts set forth in the complaint bring this case within the rule laid down in Kleinclaus v. Dutard, supra, where the defense of laches, raised by demurrer to a complaint to enforce an alleged trust growing out of a transaction 35 years old, was sustained. In this latter case the suit was brought by the brother and sister of Hypolite Dutard, and the administratrix of the estates of the father and mother of said Hypolite Dutard, against the executors of the will of said Dutard. It was alleged that on the death of the father of said Dutard in 1865 he took possession and charge of a produce business of the father, in trust to manage and conduct the same for the benefit of his mother, brothers, and sisters, and himself. He managed the business until the death of the mother in 1875, and then again repeated his promises to manage and conduct the business and property for the benefit of his brothers and sisters and himself. It was expressly alleged that "he never denied or repudiated said trust or his said agreements and promises, but always kept and lived up to them"; that "he did always, from his father's death until his death, admit and acknowledge his said promises; and that he always promised to account and pay over the respective shares whenever the same were demanded." It was also in terms alleged that he had never accounted or paid over to any of the beneficiaries anything, except that he had in part supported his mother during her life. It appeared that from the proceeds of the original business Dutard accumulated a large fortune. It was held that a court of equity in such a case should refuse to entertain the action by reason of the laches of plaintiffs. It was there said: "Following the maxim that 'equity aids the vigilant and not those who slumber on their rights,' it has been universally declared that only conscience, good faith, and reasonable diligence can call a court of equity into activity, and that, entirely independent of any statutory period of limitations, stale demands will not be aided, where the claimant has slept upon his rights for so long a time, and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof. Where such is the condition, the demand is, in a court of equity, barred by laches. * * * The doctrine of laches may be invoked in every class of cases, even in the case of an express trust."

In the case at bar the alleged trust arose out of a transaction occurring more than 45 years before the bringing of the action, and after both parties to the original transaction were dead. The alleged trust arises out of the investment of $4,000 belonging to Ada M. Hudson, who was then Mrs. Elliott, in a piece of property bought by George Hudson in his own name, and the entire purchase price of which is not given in the complaint. It is simply alleged that the $4,000 was paid "as part of the purchase price of the said real property." If this were true, a resulting trust arose in favor of Ada M. Hudson to an interest in said property in the proportion that $4,000 bore to the entire purchase price of the property. It is next alleged that the property was subsequently sold for $13,000, and the proceeds of such sale again invested by said George Hudson. Under the allegations of the complaint some part of that $13,000 was presumptively the property of George Hudson. It is next alleged that George Hudson in various ways did invest the money of Ada H. Hudson, and was at the time of his death the owner of five several pieces of land, a portion of the purchase price of which was paid out of the money delivered by her to him and the accumulations thereof. From the whole complaint it is apparent that the court could only arrive at the respective rights of the parties by going into an investigation of the particulars of purchases and sales of property covering a period of over forty years.

Both parties to the original transaction, out of which plaintiff's alleged claim arose, being dead, it is manifest that it would be practically impossible for a court at this late day to do complete justice. This is a ground for a court of equity to refuse relief. Story's Eq. Jurisprudence, § 1520a; Kleinclaus v. Dutard, supra; 18 Am. & Eng. Ency. of Law, 105.

We think the complaint upon its face shows such laches as to bar any right of action in plaintiff, and the demurrer should have been sustained. The conclusion to which we have come on this point makes it unnecessary to discuss the question as to the sufficiency of the evidence to sustain the findings of the court.

The judgment and order are reversed, and the cause remanded, and the court directed to sustain the demurrer.

We concur: COOPER, P. J.; KERRIGAN, J.

(150 Cal. 624)

## WILLIAMS v. SOUTHERN PAC. R. CO.

(L. A. 1,711.)

(Supreme Court of California. March 7, 1907.)

1. APPEAL — RECORD — REVIEW — PRESUMPTIONS.

Where, in an action for trespass, a demurrer was sustained to an amended complaint on the ground that limitations had barred the action, if the original complaint was filed within the period fixed by statute for bringing the action, the burden is on plaintiff on appeal to make that fact appear in the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3670.]

2. LIMITATION OF ACTIONS — TRESPASS — ACCRUAL OF CAUSE.

Where defendant company constructed a railroad on plaintiff's land without commencing condemnation proceedings, the injury was of a permanent nature, the entire cause of action for damages accruing therefor when the trespass was committed, and hence plaintiff's cause for damages brought four years later was barred, under Code Civ. Proc. § 338, subd. 2, providing that an action of trespass must be brought within three years after accrual of the cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 303.]

3. SAME.

The fact that a complaint in an action against a railroad company for damages for trespass prays also for an injunction against the railroad company does not change the action from one for trespass to one governed by some other period of limitation.

Department 1. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by A. B. Williams against the Southern Pacific Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

C. A. Storke, for appellant. Henley C. Booth, for respondent.

SLOSS, J. A demurrer to an amended complaint was sustained, and, on plaintiff's declining to amend, judgment was entered in favor of the defendant. From this judgment, the plaintiff appeals.

The amended complaint was filed on March 23, 1904. It alleged that plaintiff was the owner of a parcel of land in the town of Lompoc, extending along and to the center line of Laurel avenue, a public highway; that on January 1, 1900, while plaintiff's predecessor in interest was the owner of the property, the defendant, a railroad corporation, without the consent of the owner, and without any condemnation proceedings, had entered upon the part of said land within Laurel avenue, and laid a railroad track thereon; that ever since said last-named date the defendant had operated its railroad over said track, and occupied said lands within the lines of the street, to the exclusion of the plaintiff, thereby obstructing said street, and depriving the plaintiff of access and approach to the street, and diminishing the value of his premises in the sum of $600. The prayer was for judgment for $600 damages, "or that the defendant be permanently enjoined from operating said railroad along said street." The demurrer was based on various grounds, but it will not be necessary to consider any but those setting up the bar of the statute of limitations. The principal provisions pleaded in the demurrer were sections 335, 338, subd. 2, and section 339, subd. 1, of the Code of Civil Procedure.

The complaint alleges a trespass upon plaintiff's land. Under subdivision 2 of section 338, an action for trespass upon real property must be commenced within three years after the accruing of the cause of action. If the cause of action here sued upon accrued at the date of defendant's entry, it would seem to fall within the purview of this statute, since more than four years have elapsed between the date of such entry and the filing of the amended complaint. (The record as presented does not contain the original complaint, nor show the date of its filing. If such original complaint was filed within the three years, it was incumbent upon the appellant, who alleges error, to make that fact appear.) The appellant seeks to avoid the bar of the statute by the contention that, since the injury complained of (viewing it either as a mere trespass, or as a trespass constituting a nuisance) was in its nature continuing, a new cause of action arose at each moment of its continuance, and that successive actions might be brought, in each of which the plaintiff might recover damages accruing up to the time of the commencement of the action. This rule is properly applicable in cases where the injury or trespass is temporary in character, since in such cases it is not presumed that the wrongful conduct will be continued. The plaintiff in such cases can recover only the damages which have accrued up to the institution of the action. 8 Am. & Eng. Ency. of Law (2d Ed.) 684. It follows that an action may be brought at any time to recover the damages which have accrued within the statutory period, although the original trespass occurred before that period, provided that the plaintiff has not permitted such time to elapse as will vest in the defendant a right by prescription. On the other hand, where the injury or trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is inflicted or the trespass committed. 8 Am. & Eng. Ency. of Law (2d Ed.) 684. As this court said in Beronio v. S. P. Co., 86 Cal. 415, 24 Pac. 1093, 21 Am. St. Rep. 57: "Whenever by one act a permanent injury is done, the damages are assessed once for all." Civ. Code, § 3283. The action must consequently be commenced within the statutory period after the doing of the wrongful act. Indianapolis, etc., R. R. Co. v. Eberle (Ind.) 11 N. E. 457; Strickler v. Midland R. R. Co., 25 N. E. 455, 125 Ind. 412; Stodgill v. C., B. & Q. R. R. Co., 5 N. W. 495, 53 Iowa, 341;

Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792; Town of Troy v. Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177; Conlon v. McGraw, 33 N. W. 388, 66 Mich. 194. See, also, Daneri v. Southern Cal. Ry. Co., 122 Cal. 507, 55 Pac. 243.

The injury complained of in this instance is the construction and operation of a steam railroad. The great weight of authority is to the effect that such an act is permanent in its nature, and an action to recover damages for the injury inflicted thereby must be commenced within the statutory period after the original infliction of the injury. Frankle v. Jackson (C. C.) 30 Fed. 398; City of Denver v. Bayer, 2 Pac. 6, 7 Colo. 113; Railroad Co. v. Loeb, 8 N. E. 460, 118 Ill. 203, 59 Am. Rep. 341; Doane v. Railway Company, 46 N. E. 520, 165 Ill. 510, 36 L. R. A. 97, 56 Am. St. Rep. 265; Rosenthal v. Railway Company, 15 S. W. 268, 79 Tex. 325; Railway Company v. Matthews, 10 South. 267, 99 Ala. 24, 14 L. R. A. 462; Railway Company v. Lockwood, 15 South. 327, 33 Fla. 573; Railway Company v. O'Neill, 78 N. W. 521, 58 Neb. 239; Strickler v. Midland Railway Company, supra; Stodgill v. C., B. & Q. R. R. Company, supra; Town of Troy v. Cheshire R. R. Company, supra. In Robinson v. Southern California Railway Company, 129 Cal. 8, 61 Pac. 947, it was held that an action to recover damages for a wrongful entry by a railroad company upon the land of plaintiff, and the construction of its railroad thereupon, without proceedings for condemnation, and without plaintiff's consent, is barred if not commenced within three years after the road was built and operated. Upon the principle declared in these cases, which we think to be sound, the demurrer was properly sustained. It is true that there are authorities laying down a contrary rule. Prominent among them is a line of New York cases, of which Uline v. Railroad Company, 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661, and Galway v. Railroad Company, 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788, are examples. These cases rest upon the proposition that "no action at law can be maintained by an owner to recover prospective damages for injuries inflicted upon real property," a proposition which is not in accord with the law of this state where the injury complained of is permanent in character. Civ. Code, § 3283; Beronio v. S. P. Company, supra. The rule of these New York cases, says the Supreme Court of the United States, "has not prevailed in analogous cases decided in other jurisdictions." N. Y. E. R. R. Company v. Fifth National Bank, 135 U. S. 433, 10 Sup. Ct. 743, 34 L. Ed. 231. The cases of Hopkins v. W. P. R. R. Co., 50 Cal. 190, and Ford v. Santa Cruz R. R. Co., 59 Cal. 290, also seem to decide that in a case of this character only the damages accruing up to the time of the commencement of the action can be recovered. While these cases have not been in terms overruled, the later decisions above referred to are inconsistent with them, and they cannot be regarded as declaring the law of this state in the particular under discussion. It may be remarked that the plaintiff himself regarded and treated the injury here alleged as permanent in character. This is shown by the allegation that the acts of the defendant have diminished the value of plaintiff's premises in the sum of $600, the amount sought to be recovered. This was evidently intended to show a permanent injury to the land, and not merely damage sustained up to the time of the filing of the complaint.

The fact that an injunction is sought as an alternative to the prayer for damages does not affect the conclusions above reached. The provisions of our Code relative to limitation of actions make no distinction between equitable and legal proceedings. Boyd v. Blankman, 29 Cal. 19, 44, 87 Am. Dec. 146. Under our system there is but one "form of civil action." Code Civ. Proc. § 307; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674. The sections providing periods of limitation refer to actions for the enforcement of various rights, and are to be applied "so as to make the right sought to be enforced, and not a form of procedure, the test as to whether or not the statute applies." Redwood County v. W. W. & St. P. L. Co., 40 Minn. 512, 41 N. W. 465, 42 N. W. 473; Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. Ed. 701. "The nature of the cause of action, and not the form of the action, determines the applicability of the statute of limitations." Miller & Lux v. Batz, 131 Cal. 402, 63 Pac. 680; Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820. No doubt the prayer of a complaint will, in many cases, be of assistance in ascertaining the nature of the cause of action relied on, and accordingly in determining the section of the statute of limitations which may be applicable. But it is not contended here that the prayer for injunction has the effect of changing the cause of action from one for a trespass upon real property to one governed by some other period of limitation. It still remains an action for trespass upon real property, and in such action the right to relief, whether legal or equitable, is barred in three years.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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(150 Cal. 650)

## PIERCE v. EDWARDS et al. (L. A. 1510, 1518.)

(Supreme Court of California. March 9, 1907.)

1. VENDOR AND PURCHASER — CONSTRUCTION OF CONTRACT—GIVING POSSESSION OF PROPERTY.

Where a vendor agrees in writing to sell a ranch and "to deliver such ranch" to the vendee by a specified date, the vendee agreeing "to take" the ranch and pay the price, the vendor must turn over the actual physical possession of the property before he can demand payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 113–121.]

2. Evidence—Parol Evidence—Contradicting Terms of Written Contract.

Where a vendor agrees in writing to sell a ranch and "to deliver such ranch" to the vendee, the vendee agreeing "to take" the ranch and pay the price, evidence of a contemporaneous oral agreement that the tenants on the land should remain and become tenants of the purchaser is inadmissible, since it directly contradicts the terms of the writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1719–1728, 2048–2051.]

Department 1. Appeal from Superior Court, Santa Barbara County; Felix W. Ewing, Judge.

Action by Annie J. Pierce against Hannah M. Edwards and Hiram C. Pierce. From judgments in favor of defendant Hannah M. Edwards, the plaintiff and the remaining defendant appeal. Affirmed.

W. S. Day and B. F. Thomas, for appellants. H. P. Starbuck and Canfield & Starbuck, for respondent.

SLOSS, J. The plaintiff, Annie J. Pierce, brought this action to recover damages for the breach, by the defendant Hannah M. Edwards, of a contract whereby said Hannah M. Edwards agreed to buy of the codefendant, Hiram C. Pierce, a certain tract of land. The plaintiff sought to establish a cause of action in herself by alleging that Hiram C. Pierce, who was her husband, had taken title to the land under circumstances which, as she claims, made him a constructive trustee for her, and accordingly entitled her to receive the fruits of any contract made by him respecting the land. Hiram C. Pierce answered, denying the facts on which the claim of a trust relation is based, and filed a cross-complaint in which he sought, on his own behalf, to recover damages from Mrs. Edwards for breach of the contract of purchase. In effect, therefore, the Pierces were separately, as plaintiffs, seeking to recover from Mrs. Edwards damages for the alleged breach of the same contract. Demurrers of Mrs. Edwards to a second amended complaint of plaintiff and to an amended cross-complaint of defendant Hiram C. Pierce were sustained, and, further amendment being waived, judgments were entered in favor of Mrs. Edwards against the plaintiff and against the defendant Hiram C. Pierce. From these judgments, respectively, the plaintiff and the defendant Pierce appeal.

The only question that need be considered here is whether either the complaint or the cross-complaint demurred to states a cause of action against Mrs. Edwards. Omitting the allegations which are inserted in the said complaint for the purpose of showing the plaintiff's right to enforce the contract, the two pleadings in question contain a number of allegations in common. Thus, each sets out in full the contract relied on, which was in writing, and reads as follows: "Samuel Edwards Orchard Farm. Saticoy, Ventura Co., Cal. March 24, 1902. Santa Barbara, Cal. I, Hiram C. Pierce, agree to sell to Mrs. Samuel Edwards my ranch in the Santa Ynez Valley called 'San Lucas Rancho' for the sum of Thirty-five thousand dollars, $35,000 Cash—and I hereby agree to deliver said Rancho to Mrs. Samuel Edwards by the first of May—said Rancho consists of Tracts A & B of the subdivision of the Rancho 'Lomas de la Purificota'; and Mrs. Samuel Edwards agrees to take said rancho and pay the above sum. Hiram C. Pierce. Annie J. Pierce. Hannah M. Edwards." (The "Mrs. Samuel Edwards" named in this writing is the defendant Hannah M. Edwards.)

It is alleged in both the second amended complaint and in the amended cross-complaint "that said memorandum of contract was not intended to and did not embrace all the details of the contract." It is also alleged that at the time the contract was made the property was subject to a trust deed to secure indebtedness and to two mortgages. Both the second amended complaint and the amended cross-complaint contain an allegation that on the 1st day of May, 1902, the plaintiff (cross-complainant) tendered to the defendant Hannah M. Edwards a good and sufficient deed of the premises, a duly executed reconveyance releasing the trust deed, and good and sufficient releases of the mortgages, and that said defendant refused to accept said tenders or to pay the said sum of $35,000. There is no allegation in either pleading under consideration that delivery or possession of the property was tendered to Mrs. Edwards.

We are of opinion that under the contract above quoted the purchaser was entitled to be put in the actual possession of the ranch, and that until such possession was tendered her she was not in default. That the contract provides for a delivery of possession as well as a transfer of title is, we think, obvious from a mere reading of its terms. The vendor agrees to sell the ranch for the sum of $35,000, and agrees "to deliver said rancho to Mrs. Samuel Edwards by the first of May." The purchaser agrees to take the rancho and pay the above sum. If the agreement had contemplated merely a transfer of the title in consideration of the payment of a certain sum, it would not have been necessary to say anything more than that the vendor agreed to sell the ranch and the purchaser agreed to pay the specified sum. The parties, however, inserted the additional clause binding the vendor "to deliver" the property at a certain time, and binding the vendee "to take" said property. The obligation assumed by the vendor to deliver the property, as used in this connection, cannot be taken to mean anything else than an obligation to turn over the actual physical possession. The case is very similar to Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249. In that case there was a contract of sale which contained these words: "Possession of lot given and guaranteed to purchaser on transfer of title." It was held that under this contract the purchaser was entitled not only to a transfer of title, but to a delivery of possession before being called upon to make his payment. The court said: "The word 'possession,' as used in this connection, is to be understood and construed in its ordinary and popular sense." While in the contract here under consideration we do not find the word "possession," we think the language here used, i. e., an agreement to deliver the rancho, is to be interpreted as requiring a delivery of the physical possession.

Both the plaintiff and the cross-complainant in framing their pleadings saw the force of this point and sought to evade it by further allegations. The plaintiff alleges in her second amended complaint, as has been stated, that the written instrument was not intended to and did not embrace all the details of the contract, and avers that "it was also stipulated and agreed between the parties and as a part of said contract that the tenants on said land should remain and become the tenants of the purchaser, Hannah M. Edwards." Under the well-established rule requiring pleadings to be construed most strongly against the pleader, it must be inferred from this allegation that the land was in the possession of tenants, and that an actual delivery thereof was not tendered to the purchaser. Did this clause obviate the necessity of such actual delivery? We think not. "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Civ. Code, § 1625. "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives no evidence of the terms of the agreement other than the contents of the writing." Code Civ. Proc. § 1856. And these sections declare a rule of law so long and so well established that it is needless to cite further authority in its support. It is true that there is an exception to this rule; that it does not apply where the parties have not incorporated into the instrument all of the terms of their agreement (Guidery v. Green, 95 Cal. 630, 30 Pac. 786; Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571; Sav. Bank v. Asbury, 117 Cal. 96, 103, 48 Pac. 1081); and the plaintiff has sought to bring herself within this exception by her allegation that the memorandum of contract "was not intended to and did not embrace all the details of the contract." But the exception allowing oral evidence of terms of an agreement not included in a writing is itself subject to the qualification that the oral stipulations sought to be proved are not inconsistent with the terms embraced in the writing. Guidery v. Green, supra; Sivers v. Sivers, supra; Sav. Bank, etc., v. Asbury, supra. Here the contemporaneous understanding relied upon is directly in conflict with the terms of the writing. By the writing the parties agreed to deliver the property, an agreement which means, and can mean, only that they were to transfer the actual possession. An agreement that the possession was not to be transferred, and that the persons in possession should hold under the vendee, instead of under the vendor, is not an addition to the terms of the writing, but a direct contradiction of them. The following language from the decision in Benson v. Shotwell, supra, illustrates the divergence between the written instrument and the asserted additional understanding: "It is claimed on the part of respondent that the tenants who were under lease from plaintiff said while there that they would acknowledge the defendant as their landlord and attorn to him, and that this was all that was required. But this was not the measure of plaintiff's obligation, according to the letter of his bond. According to that paper, defendant was entitled to an actual possessio pedis of the whole lot. The language of the contract implied nothing less. Constructive possession, and the duty to attorn, would follow the title; and, if that was all that was meant, there was no need to have said anything about possession in the contract." So here, if the contract had said nothing about delivery, the mere transfer of the title would have entitled the grantee to receive the rents from the tenants. Civ. Code, § 1111. To allow any force to the stipulation that the tenants on the land should become the tenants of the purchaser would be equivalent to striking from the contract the provision that the vendor agreed to deliver the rancho to the vendee by the 1st of May. For these reasons we think that the second amended complaint failed to state a cause of action against the defendant Edwards, and it is therefore unnecessary to consider the further point made by the respondent that the facts averred were insufficient to show a constructive or resulting trust in the contract in favor of the plaintiff.

The allegations of the amended cross-complaint are somewhat different. There is no averment of an agreement by the vendee to accept any of the tenants as her tenants. In this behalf the cross-complainant alleges merely "that said premises were leased at the time to one Newel Kane, who consented and agreed to and with said Hannah M. Edwards to become and be her tenant on said premises." If the construction heretofore given to the writing be correct, this cross-complaint comes even more clearly than the complaint within the reasoning of Benson v. Shotwell, supra. It is not alleged that this agreement of the tenant was a part of the contract between Hiram C. Pierce and Hannah M. Edwards. All that is said is that the tenant in possession of the land undertook to acknowledge the purchaser as his landlord. But this was not sufficient. The purchaser was entitled to actual possession, and since the cross-complaint not only fails to allege a delivery of such possession, but shows affirmatively that the possession was in the third party, no cause of action is stated. It is claimed that the matter alleged shows a waiver by the purchaser of actual delivery, but this cannot be. It is not alleged that such purchaser agreed to accept Kane as her tenant. The most that can be said is that Kane agreed to become her tenant—a thing which, as we have seen, he would under the law have been obliged to do without any agreement. Again, the vendor was not a party to any such agreement, and cannot take advantage of it for the purpose of relieving himself from the effect of failure to perform the stipulations of his contract.

It is suggested that the fact that the purchaser knew, at the time she made her contract, that the property was in the possession of tenants, should be considered in construing the contract so as to make the obligation to deliver merely an obligation to deliver the land in the condition in which it was, i. e., as subject to lease and in the possession of tenants. But we see no force in this. The same argument would lead to the result that an agreement to sell land which is known by the purchaser to be subject to certain incumbrances requires the purchaser to take and pay for the land notwithstanding such incumbrances. The purchaser, knowing that the land was in the possession of third parties, stipulated for its delivery to her. She is entitled to stand upon this stipulation, which may have been insisted upon for the very reason that she knew of the tenancies. The contract bound the seller to terminate the tenancies, or in some other way place himself in position to comply with his undertaking to deliver the rancho by the 1st of May.

Each of the demurrers was properly sustained. The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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150 Cal. 607

## SAN DIEGO REALTY CO. v. CORNELL et al. (L. A. 1,709.)

(Supreme Court of California. March 8, 1907.)

1. TAXATION—RESTRAINING SALE FOR TAXES.

Where county officers propose to execute a tax deed to the state containing a description legally sufficient to charge property with delinquent taxes, and thereby create the presumption of the regularity of the antecedent proceedings, the owner is entitled to relief in equity to prevent the execution of the deed, on the ground that it will cast a cloud on his title, though the description of the property given in the assessment roll is void.

[Ed. Note—For cases in point, see Cent Dig. vol. 45, Taxation, § 1500.]

2. SAME.

An owner of real estate, in a suit to restrain the issuance of a tax deed conveying his land because of the invalidity of the assessment, tendered the legal amount for which the property could have been taxed, and the court decreed that the amount should be received by the tax collector, and granted the relief prayed for. *Held*, that the county officers could not complain that the owner had been decreed to pay the legal amount for which the property could have been taxed.

3. SAME.

Under Code Civ. Proc. § 187, providing that, when jurisdiction over any matter is conferred, all means necessary to carry the same into effect are conferred with it, as well as independent of the provision, the court, in a suit to restrain the issuance of a tax deed because of the invalidity of the assessment, has authority to decree that the sum which the state has fixed as due for taxes shall be paid before it will grant the relief prayed for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1502.]

Department 2. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the San Diego Realty Company against A. F. Cornell and others. From a judgment for plaintiff, defendants appeal. Affirmed.

U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Deputy Atty. Gen., and Cassius Carter, Dist. Atty., for appellants. Smith & Collier, for respondent.

HENSHAW, J. Plaintiff brought this action against the defendants, who are county officers of San Diego county, for the purpose of enjoining them as county officers from issuing tax deeds to certain of its property, following assessment and sale. Plaintiff alleges that the assessment was void, and avers that the defendants propose to execute the tax deed to the state of California, conveying their land so attempted to be assessed by the void assessment; that the deed so made will cast a cloud upon plaintiff's title; that, had the property been assessed according to law, the taxes assessed against it would have amounted to the sum of $2.08 for all the years wherein the property was not legally assessed and for which taxes were not paid and for which the property could now be reassessed. Plaintiff has tendered this sum of $2.08 to the proper officers, who have refused to accept it. It continues its offer to pay this money, and upon payment asks the decree of the court restraining the officers from clouding the title to its realty. The court found in accordance with the complaint, accepted the tender directing payment of the money to the county treasury, and granted the injunction sought. Defendants appeal.

The description given in the assessment roll which is attacked is as follows: "In the county of San Diego, state of California, and described thus: Lot 1, block 17, Ocean Beach." This description is admitted by appellants to be void, upon the authority of Labs v. Cooper, 107 Cal. 656, 40 Pac. 1042, and Miller v. Williams, 135 Cal. 183, 67 Pac. 788; but appellants argue that, as the assessment is void, no cloud is cast upon the title, and that there is therefore no occasion for the interposition of equity. The answer to this is found in the allegations of the complaint that the defendants propose to execute a deed to the state by a description legally sufficient to charge the property, and by this, together with all the presumptions which follow such a deed, with the prima facie regularity of antecedent proceedings which it carries with it, a cloud will be cast upon the property and injury to the plaintiff thus result.

The second proposition advanced by appellant is that the court was without jurisdiction to find and declare that the sum of $2.08 was the just and legal amount for which the property could have been taxed, and to direct the reception of this sum by the tax collector. It is said, if the assessment complained of was merely irregular, it might be conceded that, under appropriate allegations tendering a payment of what in equity and good conscience should be paid, a court of equity might have rendered assistance (Esterbrook v. O'Brien, 98 Cal. 673, 33 Pac. 765; Ellis v. Witmer, 134 Cal. 253, 66 Pac. 301); but that, because plaintiff contends and proves that the assessment is void, then and therefore nothing was due, nothing need be tendered, and the tender, if made, was but an idle act. But this contention, even if upheld, cannot avail appellants. The fact that a litigant going into equity offers to do more than equity has never been held a ground for refusing him the relief to which he is entitled. If a tender and payment were unnecessary, it scarcely lies in appellants' mouths to complain that their adversary has been decreed to pay that which in equity he was not called upon to pay. Still further, their counsel, who takes this position in this case, successfully contended for the opposite in Couts v. Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168. The gravamen of his attack in the Couts Case—an action in character precisely like the one here under consideration, and based upon assessments void for the same defect which vitiates this one—was that the complaint did not make tender of the amount equitably due, and this court held that relief would not be granted, in the absence of such tender; that there was distinctly a moral obligation to pay, as well as a quasi legal obligation, which latter the state could easily cast into the form of a strictly legal obligation by authorizing an amendment to the assessment, or by reassessing.

A further contention of the appellants is that the action of the court in finding and declaring the amount due for taxes, and its recordance and acceptance of the tender which had been made, with directions that the money should be received and deposited in the county treasury on account of the taxes upon the property, was a judicial usurpation of a function of government, which function is vested in the Legislature alone; that it was an attempt by the court to impose taxes and to regulate their collection. This difficulty is purely imaginary. Of course, if it had become necessary for the court, in determining the amount due from plaintiff, to value the property, to make an assessment, or to fix a rate, no court for a moment would undertake to perform these purely legislative duties. But in every case where a court without usurpation of the functions of the fiscal department can determine the amount due from a plaintiff in equity, it will fix that amount and decree its payment. Here there was no question of the court being called upon to exercise the machinery of the taxing power in levying taxes. All that had been done by proper authority. The amount of taxes, the value of the property, the tax rate, and the amount due had all been fixed. In effect, all that the court was called upon to decide was whether the penalties and impositions for delinquency were justly chargeable against the property where the assessment was void. It held, and properly held, that it was not, but decreed that the sum which the state had fixed as due for taxes should be paid before it would grant relief. Thus the court was not called upon to reassess or to make a new rate, but merely to adopt those already made, those which the taxing officers themselves would have had to readopt if a new assessment had been made under the law. St. 1893, p. 290, c. 207. If there could be any question of the general powers of a court in equity to render such a decree, there can be none as to its power in this state by virtue of section 187 of the Code of Civil Procedure, which provides that, whenever jurisdiction over any matter is conferred, all means necessary to carry the jurisdiction into effect are conferred with it.

The judgment and order appealed from are therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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150 Cal. 65?

## RUEF v. SUPERIOR COURT OF CITY & COUNTY OF SAN FRANCISCO et al.

(S. F. 4,770.)

(Supreme Court of California. March 11, 1907.)

HABEAS CORPUS—DISMISSAL OF WRIT—WRIT OF ERROR—EFFECT TO STAY PROCEEDINGS ON INDICTMENT.

Where a party under indictment and awaiting trial in the Superior Court was granted a writ of habeas corpus, but upon a hearing was remanded to custody, and obtained a writ of error to the Supreme Court of the United States on the claim that the order of remand was in contravention of his rights under the United States Constitution, the writ of error does not stay proceedings in the court having jurisdiction of the indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 109, 110.]

In Bank. Application by Abraham Ruef for writ of prohibition, prayed to be directed against the superior court of the city and county of San Francisco, and Hon. Frank H.

Dunne, judge thereof, to restrain defendants from proceeding with his trial. Writ denied.

Samuel M. Shortridge, for petitioner.

PER CURIAM. The petitioner, who was under indictment and awaiting trial in the superior court, applied to another department of the same court for a writ of habeas corpus, which was granted. Upon a hearing he was remanded to custody, and thereupon applied for, and obtained from the judge or court issuing the writ of habeas corpus, a writ of error to the Supreme Court of the United States; it being claimed that the order of remand was in contravention of petitioner's rights under the Constitution of the United States. The proceedings necessary to perfect the issuance and service of the writ of error and the citation thereunder were taken. The petitioner now applies for a writ of prohibition to restrain the court in which the indictment is pending from proceeding with his trial. We are satisfied that the writ of error, if it was properly issued, does not operate to stay proceedings in the court having jurisdiction of the indictment.

The petition is denied.

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(150 Cal. 665)

### Ex parte RUEF. (Cr. 1,391.)

(Supreme Court of California. March 14, 1907.)

1. Grand Jury—Qualifications of Jurors—Presence of Incompetent Juror—Effect on Indictment.

Code Civ. Proc. § 199, provides that no person is competent to serve as a grand juror who has served and been discharged as a juror by a court of record of the state within a year of the time he was summoned and impaneled as grand juror. Pen. Code, § 995, enumerates the grounds upon which an indictment may be set aside; one being any which would have been good ground for challenge to any individual grand juror. Section 896 enumerates the grounds for challenge to an individual grand juror, none of which are that he has served as a juror in a court of record in the state within the year. *Held*, that the fact that one of the grand jurors had within the year served as a juror in a court of record of the state would not invalidate an indictment; any statutory incompetency not made a basis for challenge under Pen. Code, § 896, being regarded as a mere direction to the court impaneling the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Grand Jury, § 15.]

2. Habeas Corpus—Questions Reviewable—Sufficiency of Indictment.

Where an indictment purported to charge extortion, a crime defined by Pen. Code, § 518 et seq., and within the jurisdiction of the superior court, the question whether the facts charged are sufficient to constitute such offense will not be inquired into on habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 92.]

3. Same — Admission to Bail — Petition — Sufficiency—Proceedings—Statutes.

Where a petition for a writ of habeas corpus does not show that the defendant has not appeared for trial, under Pen. Code, § 1129, giving the court discretion to grant or refuse bail to a defendant who has appeared for trial, the court may refuse to admit him to bail.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 99.]

In Bank. Proceedings by Abraham Ruef for a writ of habeas corpus directed against W. J. Biggy, an elisor appointed by the superior court of the city and county of San Francisco. Writ denied.

Samuel M. Shortridge, Frank J. Murphy, Chas. H. Fairall, and Henry Ach, for petitioner. Wm. H. Langdon, Dist. Atty., and Francis J. Heney, Asst. Dist. Atty., for respondent.

PER CURIAM. A petition for a writ of habeas corpus is presented by A. Ruef, who alleges that he is restrained of his liberty and held in custody under bench warrants issued by the superior court upon five indictments purporting to charge him with the crime of extortion. Three grounds for the issuance of the writ are urged.

1. It is alleged that one of the members of the grand jury which found and returned the indictments was not competent, by reason of the fact that he had served and been discharged as a juror by a court of record of this state within a year of the time that he was summoned and impaneled to act as such grand juror. Code Civ. Proc. § 199. We are of opinion that this does not affect the validity of an indictment found by the grand jury. The Penal Code enumerates the grounds upon which an indictment may be set aside. Pen. Code, § 995. One of these grounds is "any ground which would have been good ground for challenge—to any individual grand juror." Penal Code, § 896, provides for a challenge to an individual grand juror for six specified grounds only. The particular incompetency here relied on is not included. We think that the Legislature, in declaring that persons who had been discharged as jurors within a year should not be competent, and at the same time denying to a defendant indicted by a grand jury including one or more such persons any remedy by way of motion or challenge, in effect provided that, if the statutory rule prohibiting the service of such persons were not obeyed, the departure should not invalidate any indictment found. Cf. Pen. Code, § 901. Any statutory incompetency which is not made a basis for a challenge under Penal Code, § 896, must be regarded as a mere direction to the court impaneling the jury.

2. It is claimed that the indictments fail to state a public offense. On habeas corpus the inquiry into the sufficiency of an indictment is limited. We think the true rule is that, where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus. Here the indictments clearly attempt to charge extortion, a crime defined by section 518 et seq. of the Penal Code, and within the jurisdiction of the superior court.

Without expressing any opinion as to whether these indictments should be held to be good on demurrer or other direct attack, they are at least not, under the rule stated, so defective as to permit us to hold them void in this proceeding.

3. It is claimed that the writ should issue to admit the petitioner to bail, it being alleged that the superior court has refused to so admit him. Under section 1129 of the Penal Code, the trial court has discretion to grant or refuse bail to a defendant who has appeared for trial, and may commit him to custody to abide the judgment or further order of the court. The petition before us does not show that the defendant has not appeared for trial. This showing should be made affirmatively, in order that a case be presented entitling petitioner to bail.

The petition is denied.

150 Cal. 640

## In re HAINES' ESTATE. (L. A. 1,878.)

(Supreme Court of California. March 9, 1907.)

1. WILLS—CONSTRUCTION—CREATION OF LIFE ESTATE.

A will devising certain lands to the two grandchildren of testatrix, providing that their mother should have full control and all incomes of the lands during her life, except that she should every year put out $100 at interest (to be divided between her two children) until her youngest child attained the age of 20 years, gave a life estate to the mother, subject only to a charge of $100 per annum in favor of the two grandchildren ($50 for each) until the younger child attained the age of 20 years.

2. PERPETUITIES—DIRECTION FOR ACCUMULATION OF INCOME—VALIDITY.

Civ. Code, §§ 723, 724, allow the accumulation of the income of property directed by will, etc., only during the minority of the beneficiary. Section 725 provides that, if the direction for accumulation is for a longer term than during the minority of the beneficiaries, the direction is void as to the time beyond such minority. Testatrix devised certain lands to her two grandchildren, providing that their mother should have full control and all incomes during her life, except that she should "every year put out $100 at interest (to be divided between her two children) until her youngest child attains the age of 20 years." *Held*, that the direction for accumulation was valid in the case of each child for the period of his minority, and void as to the time beyond such minority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, §§ 67–73.]

3. WILLS—TRUSTS—CREATION.

Testatrix, by directing that all her moneys, notes, etc., should be divided between her two daughters and four grandchildren, the daughters to have exclusive control of their children's money and invest it as they thought best until the children became of age, intended as to the share of each grandchild to create a trust in its mother, to continue during its minority; the bequest to be subject to such trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1575, 1576.]

Department 1. Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

In the matter of the estate of Charlotte Haines, deceased. Appeal from a decree of final distribution. Modified, and, as modified, affirmed.

H. L. Poplin, for appellants. B. T. Williams and Williams & Bowker, for respondents.

ANGELLOTTI, J. This is an appeal from a decree of final distribution. The deceased died testate, leaving two surviving daughters, S. Maude Henderson and Edith M. McDivitt, and four surviving grandchildren, viz., Haines T. Henderson and Gladys Henderson, children of S. Maude Henderson, and Frank Paul McDivitt and Edith Bernice McDivitt, children of Edith M. McDivitt. All the children are minors. By her will, which was olographic, she first made certain absolute bequests and devises to her daughters. The will then proceeded as follows: "To my grandchildren, Haines T. Henderson and Gladys Henderson, I give 38 acres in lot 19, Norway survey; also 3 acres in the same lot; * * * also one-half of my interest in subdivision 91 of Los Posas tract, containing 532 acres. To F. Paul McDivitt and Edith Bernice McDivitt, my grandchildren, I give and devise 42.53 acres on lot 34, Norway survey, being my home place; also one-half of my Los Posas land: Provided that my daughters, Maude Henderson and Edith McDivitt, shall have the full control and possession and all rentals and incomes of the lands willed to their children during their natural lives, except that each one shall every year put out $100 at interest (to be divided between her two children) until her youngest child attains the age of 20 years. All moneys, notes, etc., which I may have to be divided between my two children and four grandchildren, and my daughters to have exclusive control of their children's money and invest it as they think best until they (the children) become of age." The controversy here is as to the effect of the proviso in the devises to the McDivitt grandchildren and the provision giving the exclusive control of the personal property bequeathed to them to their mother, until they become of age; such grandchildren being the only appellants, and appealing only from such portions of said decree as relate to these provisions.

The court below distributed to each of said children the realty described in the devises to them, with this proviso, viz.: "Providing that Edith M. McDivitt, the mother of said children, shall have the full possession and ownership of all the land, issues and profits thereof, during her natural life," in one case; and the following, viz.: "Provided * * * that Edith M. McDivitt, the mother of Frank Paul McDivitt and Edith Bernice McDivitt, shall have the full possession and ownership of the rents, issues, and profits of her children's share thereof during her natural life." In another part of the decree, and as a distinctly independent provision having no reference to the lands devised, it was ordered that said Edith M. McDivitt "each year place the sum of $100 on interest in some safe interest-bearing securities, to be approved by this court, to the credit of her two children, Frank Paul McDivitt and Edith Bernice McDivitt, to be divided equally between the said children upon the said Edith Bernice McDivitt arriving at the age of 20 years." To each of said grandchildren was distributed $1,634.-73, "provided, however, that Edith M. McDivitt, the mother of said child, shall have the exclusive control of said sum of money, and to invest the same in interest-bearing securities, to be approved by this court," until the said child shall have attained the age of majority.

There is no great difficulty in determining the intention of the testatrix from the provisions of her will, notwithstanding that this intention might have been expressed in more apt language by one versed in legal phraseology. As to the land concerning which the devise to the grandchildren was made, it was clearly intended to give a life estate to their mother, subject only to a charge of $100 per annum in favor of the two children ($50 for each), until the younger child attains the age of 20 years, and to subject the devise to the grandchildren to this estate for life in the mother. The devise to the grandchildren is expressly made subject to the proviso, and the proviso is that the mothers "shall have the full control and possession and all rentals and incomes of the lands willed to their children" during their natural lives. Herein is to be found every element going to make up a life estate. The exception as to the $100 per annum that is to be put out at interest for the children, which creates a charge upon such life estate, also makes clearer the intention of the testatrix that the respective mothers were to have life estates in the lands otherwise given to their children. It is elementary that it is the duty of the courts to carry into effect the intention of the testator as the same is expressed in his will, provided that such intention be consistent with the rules of law. It cannot, of course, be successfully claimed that there is any rule of law that is violated by a devise of an estate for her life to the mother, burdened with an annual charge on the rents and profits in favor of her living children for a specified time, and a devise of the lands subject to such life estate to such children.

It is claimed, however, that the exception as to the $100 per annum for the benefit of the children constitutes a direction for the accumulation of the income of property for a period longer than the minority of the beneficiaries, the youngest child being the daughter, Edith Bernice, who is five years younger than her brother, Frank Paul, and that such exception is, therefore, void under the provisions of sections 723 and 724, Civ. Code, which allow such accumulations only during the minority of the beneficiaries, and that it is also void for the reason that it may unduly suspend the absolute power of alienation. The provision simply is that the mother shall "every year put out $100 at interest (to be divided between her two children) until her youngest child attains the age of 20 years." The necessary implication from this language appears to us to be that each child was to have, so long as he or she lived, until the youngest child attained the age of 20 years, or would have attained that age if living, the sum of $50 per annum out of the life interest given to the mother, and that these sums were to be invested for his or her benefit and remain at interest during said period. Reading the provision in connection with the provisions immediately preceding it, it is plain that to the extent stated it is an attempted disposition of the income of the real property and a direction for the accumulation thereof. So construed, however, there is no forbidden suspension of the absolute power of alienation; such suspension being permitted for a period not longer than during the continuance of lives of persons in being at the creation of the limitation or condition. We have here two provisions, one for the accumulation of $50 per annum for the older child until the younger attains, or would, if living, attain, the age of 20 years, and one for the accumulation of $50 per annum for the younger child for the same period. The provision for accumulation for each child, being for the sole benefit of such child, cannot by any possibility suspend the absolute power of alienation for a longer period than during the life of such child. If the older child die before the specified time, the trust for accumulation for his benefit at once determines for lack of a beneficiary, and the property already accumulated immediately vests in his heirs. The same is true as to the younger child. In neither case can the trust for accumulation continue longer than during the life of the designated beneficiary in being at the time of the creation of the trust. Civ. Code, §§ 715, 716; Estate of Hendy, 118 Cal. 656, 50 Pac. 753; Estate of Steele, 124 Cal. 533, 539, 57 Pac. 564. Under the provisions of section 724, Civ. Code, the accumulation cannot be for a longer term than the minority of the beneficiary. Section 725, Civ. Code, provides that, if the direction for accumulation is for a longer term than during the minority of the beneficiaries, "the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority." It follows that the direction for accumulation here should be held valid in the case of each child for the period of his or her minority, and void as respects the time beyond such minority.

As to the "money, notes, etc.," divided between her two children and four grandchildren, it is clear that as to the share of each grandchild the testatrix intended to create a trust in his or her mother, to continue during his or her minority, and that the bequest of the property is subject to such trust. No reason appears why this intention could not be carried into effect. See Estate of Reith, 144

Cal. 314, 77 Pac. 942. In view of what has been said, it is apparent that the court below did not err in the manner of distribution of the $1,634.73 awarded to each of the appellants. Substantially this property is distributed to the trustee for the purposes of the trust, and, subject to such trust, to the appellants. See Estate of Reith, supra. Nor did the court err in distributing to the mother of appellants, for her natural life, the full possession, and ownership of all the rents, issues, and profits, of the land devised to them, which we take to be the effect of the decree in this regard. But, for the protection of appellants' respective rights created by the provision as to the annual investment of $100 for their benefit, the distribution to the mother should have been made subject, in terms, to the annual charge upon the property distributed of $50 for each appellant. This result is not accomplished by the independent provision in the decree as to the annual investment of $100 by the mother. Nor is that provision entirely in accord with the intention of the testatrix, so far as that intention can be legally carried into effect.

The decree should be modified to the extent of adding to the so-called provisos in favor of the mother in the distribution of the lands to appellants the following, viz.: "The life estate in the above-described land hereby distributed to Edith M. McDivitt is distributed to her subject to the following charges, which shall constitute liens on said interest, to wit: (1) The sum of $50 each and every year during the continuance of said life estate until her daughter, Edith Bernice McDivitt, attains the age of 20 years, or would attain that age if living, for the benefit of her son, Frank Paul McDivitt, the same to be during the whole period of the minority of said Frank Paul McDivitt kept by said Edith M. McDivitt on interest in some safe interest-bearing securities to be approved by this court, and accumulated for his benefit; provided, always, that, in the event of the death of the said Frank Paul McDivitt before the time specified above, said annual charge shall thereupon cease and determine, and all accumulations thereof at once vest in his heirs. (2) The sum of $50 each and every year during the continuance of said life estate until her daughter, Edith Bernice McDivitt, attains the age of 20 years, for the benefit of said daughter, Edith Bernice McDivitt, the same to be during the whole period of the minority of said Edith Bernice McDivitt kept by said Edith M. McDivitt on interest in some safe interest-bearing securities to be approved by this court and accumulated for her benefit; provided, always, that, in the event of the death of the said Edith Bernice McDivitt at any time before attaining the age of 20 years, said annual charge shall thereupon cease and determine, and all accumulations thereof at once vest in her heirs." The provision now in the decree as to the annual $100 investment should be stricken out.

It is ordered that in the respects suggested the portions of the decree appealed from be, and the same are, hereby modified, and, so modified, the decree is hereby affirmed.

We concur: SHAW, J.; SLOSS, J.

150 Cal. 620

## CARTER v. OSBORN. (L. A. 1,735.)

(Supreme Court of California. March 7, 1907.)

1. TAXATION—TAX SALE—STAMPING SUBSEQUENT ASSESSMENT ROLL.

The statute is sufficiently complied with, and the owner given notice of the fact of sale, so as not to render void a tax sale where the assessment roll, for the year ensuing that for the taxes of which sale was made, was stamped with the words "sold to state," merely, without a statement that it was "sold for taxes."

2. SAME—CERTIFICATE OF SALE.

The statute providing for a certificate of sale having been repealed before a tax sale was made, the sale, which was for the correct amount, was not invalidated by a mistake in computation in the certificate of sale which was made, as the certificate may be disregarded.

3. SAME — DELINQUENT LIST — SHOWING AMOUNT DUE.

A tax sale is not void because in the delinquent list the amount due was indicated only by the word "amount," and immediately under it the figures "4 00," without any dollar sign, but with a space between the figure 4 and the two ciphers, as they usually appear when intended to mean dollars.

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Robert S. Carter against Kitturia B. Osborn. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

P. B. Lloyd, for appellant. O. B. Carter, for respondent.

McFARLAND, J. This is an action to quiet plaintiff's title to a piece of land in the city of Los Angeles, county of Los Angeles, described as "lot fifty-four (54) of the Wiesendanger tract as per map recorded in Book 9, p. 68, miscellaneous records of said county." Judgment went for plaintiff, and from this judgment defendant appeals.

The plaintiff had the legal title to the lot in question; the same having been conveyed to him on February 3, 1904, by one Berger Kallander, who then owned it, unless such title passed from said Kallander and vested in defendant by virtue of certain tax proceedings and deeds. The defendant claims title through an assessment for the year 1894, a tax deed to the state executed July 6, 1900, and a deed to defendant from the state. The court made only two findings of ultimate facts, namely, that plaintiff "is the owner" of the land in question, and that defendant has "no right, title or interest therein." However, the bill of exceptions and the points of counsel show upon what theory the case was tried. That theory was that the tax proceedings and deeds were, for various reasons, void, and conveyed no title. Objections to the introduction of the tax deed to the state were sustained; the main objection being that the "deed does not recite the time when the right of redemption had expired." Various objections were also sustained to other documents and to the assessment for 1894. But nearly all these points were decided against the contention of respondent and adversely to the rulings of the court in the recent case of Baird v. Monroe et al. (L. A. 1,623, Cal. Sup.) 89 Pac. 352, the opinion in which was filed February 16, 1907. It was there held that the alleged defect in the tax deed to the state was cured by the act of the Legislature approved February 28, 1903 (St. 1903, p. 63, c. 59), the purpose of which act was to "confirm, validate, and legalize" certain tax deeds. In the case at bar respondent contends, and the court must have found, that said act was unconstitutional; but the question was elaborately discussed in Baird v. Monroe, and the act held to be constitutional and valid. It was there also held that the objections made in the case at bar to the said assessment are not well taken. Indeed, nearly all the points made by the respondent in the case at bar, and sustained by the court, were decided in Baird v. Monroe adversely to respondent's contention, and it would be useless to restate here the reasoning of the exhaustive opinion delivered in that case. It is sufficient to refer to it as determinative of those points.

One or two points are made in the case at bar which, perhaps, were not covered in the Baird Case, and they will be here noticed. It is contended that the tax sale was void because on the assessment roll for the next ensuing year, 1895, there was stamped the words "sold to state," without a statement that it was "sold for taxes," and the date of the sale. We think, however, that the words used sufficiently comply with the statute, and fully answer the purpose of giving notice to the owner of the fact of such sale.

A certificate of sale was introduced, and it is objected that, while the total amount of the tax is correctly given at $3.10, yet the items given amount to only $2.43, which with a penalty of 90 cents, makes only $3.33, instead of $4, for which it was sold. The assessment showed the total amount of tax to be the $3.10, which, with the 90 cents penalty, makes $4. We do not deem it necessary to consider whether this slight mistake in the computation would, in any event, affect the validity of the sale which was made for the correct amount, because we are of the opinion that the certificate may be disregarded, for the reason that at the time of the sale sections 3776 and 3777, which provide for such certificate, had been repealed (St. 1895, p. 19, c. 11), and the attempt afterwards to amend the repealed sections (St. 1895, pp. 327, 328, c. 218) was of no effect (Pol. Code, § 330; Fletcher v. Prather, 102 Cal. 418, 36 Pac. 658).

It is contended that the tax sale was void because in the delinquent list the amount due was not stated. There is in said list the word "amount," and immediately under it are the figures "4 00"; there being a space between the figure 4 and the two ciphers as they usually appear when they are intended to mean "dollars," but there is no dollar mark. For this contention respondent relies on certain early California cases—Hurlbutt v. Butenop, 27 Cal. 50; Braly v. Seaman, 30 Cal. 610; People v. S. F. Sav. Union, 31 Cal. 132; People v. Hastings, 34 Cal. 571—and also the later case of Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356, which merely refers approvingly to the said early cases. In those cases it does not clearly appear how the figures intended to represent dollars were written, although it does appear that there were no dollar marks, and we will assume that, if they had been exactly as those in the delinquent list in the case at bar, the rulings would have been the same. But in all those cases the defect was in the assessment itself, not in any subsequent document, as, for instance, the delinquent list. In People v. S. F. Sav. Union, supra, it was contended that the omission by the assessor to make a valuation of assessed property might be amended by the auditor by prefixing the dollar mark to the figures; but the court said that the assessment roll "is the basis of all subsequent proceedings," that under the Constitution the assessor must fix the valuation of property which is to be taxed, and that the "valuation is the very foundation of proceedings for enforcing and collecting the tax upon property" and "is essential to the validity of a property tax." Indeed, the assessment is very much in the nature of a judgment and must therefore be in every way definite and precise, and the court in the case just quoted from illustrates its meaning by supposing a judgment which merely awarded to a party certain naked figures without any designation of what they represented. But we do not think that this stringent rule as to the original assessment, which is the foundation and source of the asserted tax, is applicable to all subsequent proceedings. The delinquent list in the case at bar, with the word "amount" and under it "4 00," clearly gave notice to any intelligent person that dollars were meant, and the absence of the dollar mark does not invalidate the assesment or the tax sale.

There are no other points calling for special notice.

The judgment appealed from is reversed, and the cause is remanded for a new trial to be conducted in accordance with the views expressed in this opinion and in the opinion in the said case of Baird v. Monroe (Cal. Sup.) 89 Pac. 352.

We concur: LORIGAN, J.; HENSHAW, J.

150 Cal. 629

## REYNOLDS v. PENNSYLVANIA OIL CO.

(L. A. 1,492.)

(Supreme Court of California. March 8, 1907.)

1. Bankruptcy — Stay of Proceedings in State Court.

Bankr. Act July 1, 1898, c. 541, § 16, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], provides for a stay of proceedings on the filing of a petition in bankruptcy until after an adjudication or the dismissal of the petition, and that, if there is an adjudication of bankruptcy, such action may be stayed until 12 months after the date of such adjudication, and that "the court may order the trustee to enter his appearance and defend any action pending against the bankrupt." *Held*, that the filing by defendant of a certified copy of an order adjudging him a bankrupt, and a notice that defendant would move to dismiss the proceedings by reason thereof, was no ground for suspension of the proceedings, as it was discretionary with the bankruptcy court to order suspension or order the trustee to enter and defend.

2. Compositions with Creditors — Nature and Requisites.

In an action on a note of a corporation, it appeared that plaintiff's assignor and other creditors of the corporation had signed an agreement with the maker, whereby it was to deliver to trustees certain property for the benefit of all parties and to pay debts of the corporation, including the note in question. The agreement did not purport to transfer all the maker's property nor to be signed by all the creditors, and did not provide for the time within which payments might be made, but provided that the agreement should remain in force until all the claims were paid. The agreement did not provide that creditors who had signed it should be barred from prosecuting actions, and there was no covenant on the part of creditors to discharge their claims on payment of less than the full amount. *Held*, that the agreement lacked essential covenants of a composition agreement, and was no bar to an action on the note.

3. Pleading — Verification — Execution of Written Instruments.

In an action on a note, the answer set up a composition agreement, a copy of which was annexed to the answer, signed by plaintiff by an attorney. *Held* that, as plaintiff did not file an affidavit denying due execution of the contract, the authority of the attorney to sign was admitted, under Code Civ. Proc. § 448, providing that a document so relied on shall be deemed duly executed unless denied by affidavit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 877.]

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by W. P. Reynolds against the Pennsylvania Oil Company. From a judgment in favor of defendant, plaintiff appealed to the District Court of Appeal of the Second District, and the cause was certified to the Supreme Court on the disagreement of the justices of the Court of Appeal. Reversed.

George A. Corbin, for appellant. Tanner & Taft and Mr. Odell, for respondent.

PER CURIAM. This cause was certified to this court upon the disagreement of the justices of the District Court of Appeal of the Second District. While the action was pending before that court, the following opinion was prepared by Judge York, justice pro tem., called in for the purpose of the hearing and decision of this case. That opinion is hereby adopted as the opinion of this court, and its completeness renders unnecessary any further elaboration of the questions presented: "This action was prosecuted by plaintiff and appellant to obtain a judgment against defendant and respondent upon a claim assigned to appellant by A. M. Cates for services as an attorney and counsellor at law, and upon a promissory note made by respondent in favor of Mrs. M. B. Dorland and indorsed and assigned to appellant. The respondent has filed in this court a certified copy of an order made by the United States District Court adjudging respondent a bankrupt, which order was made subsequent to the appeal in this case. The respondent has not presented the bankruptcy proceedings to this court in any other form except by a notice that it would move to dismiss this appeal by reason of said adjudication in bankruptcy. In the absence of any appearance to make the motion noticed, we assume respondent's position to be that the adjudication of respondent's bankruptcy deprives this court of jurisdiction to proceed against it. Section 11 of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]) provides for a stay of proceedings on the filing of a petition in bankruptcy against a party until after an adjudication or the dismissal of the petition, and that, 'if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication'; and, also, that 'the court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.'"

The utmost, therefore, that can be contended for in behalf of the respondent is that it is discretionary with the bankruptcy court to order the parties to this action to suspend proceedings, or order the trustee to enter his appearance and defend the action on behalf of the creditors of the bankrupt. In Collier on Bankruptcy the author says: "It is in no sense the duty of the state court to stay merely because it hears of the bankruptcy of a suitor. It must be informed of the fact by proper pleadings." Page 128. "Save in the interval between the filing of the petition and the adjudication, a stay is always discretionary." Page 129. "A court of bankruptcy may but need not order the trustee to intervene in a suit against a bankrupt. The state court cannot, on the other hand, compel him to intervene." Page 131. "When the right of the state court is to be questioned, it can be done by the intervention of the trustee only." Brandenburgh on Bankruptcy, § 251. It follows that the proposition that this court must in this case take judicial notice of the bankruptcy proceedings on a showing of their pendency only, and suspend proceedings in this cause, finds no support in reason or justice. Metcalf v. Barker, 9 Am. Bankr. Rep. 37, 23 Sup. Ct. 67, 187 U. S. 165, 47 L. Ed. 122; Pickens v. Roy, 9 Am. Bankr. Rep. 47, 23 Sup. Ct. 78, 181 U. S. 177, 47 L.

Ed. 128. See, also, Brandenburgh on Bankruptcy, §§ 276, 277, and 282. We therefore conclude that respondent's having been adjudicated a bankrupt is not in the way of a decision of this appeal on the merits.

The sole defense to this action urged by respondent is a certain agreement, as follows: "This agreement, made on the twenty-fifth day of January, 1902, between the Pennsylvania Oil Company, an incorporation, and the undersigned creditors of said corporation, witnesseth: That it is hereby agreed between said company and its said creditors that the company will forthwith deliver into the possession of three trustees, representing said creditors, viz., A. J. Munn, Corry B. White, and S. T. Peet, its plant, wells, tanks, pipes, pipe lines, franchises and all personal property and equities, oil on hand, books and accounts, and contracts, to be by said trustees administered for the mutual benefit of all parties hereto, and particularly for the payment of the debts of the corporation hereinafter enumerated, upon terms and conditions here following, to wit: Said trustees shall execute their said trust without compensation for their said services. They shall proceed in a proper manner to operate the pumping plant and take the products of the wells, being empowered to employ for such purposes all necessary help, and they shall carry out all existing contracts now binding upon said corporation, for the sale of products, operation of the plant, et cetera, and from the proceeds they shall: First. Pay all operating expenses, including help bills, necessary repairs and current obligations, inclusive of interest upon notes or other evidences of indebtedness, and all proper and necessary expenses for executing said trust, and also any and all claims not herein represented, which may become, or, in the judgment of the trustees are liable to become, liens upon the property of said company. Second. They shall, from the net proceeds of such operation, make the following payments: (A) The note due Emma A. Summers, February 5, 1902, for $1,200.00 and interest in full. (B) The following claims, which, for the purposes of this agreement are hereby established as preferred, upon which payments shall be made as often as funds on hand will warrant, pro rata (provided, that if the claim of the Crane Company for $818.90, interest and costs, shall, or is liable to become a special lien against the property of the company, or collectible out of the bond given in the proceedings heretofore instituted by said company in the superior court, then the trustees may, before paying anything upon the other preferred claims, discharge said obligation to said Crane Company in full: [Here follows a list of said claims, stating the names of the claimants and the amounts due each, including Crane Company, $818.90.] (C) After the payment of said preferred claims, said trustees shall, in like manner, pay the following claims: [Here follows a list of said last-mentioned claims, stating the names of the claimants and the amount due each, including appellant's assignors, viz.: "Mrs. M. B. Dorland, 300.00; A. M. Cates, 362.25."] Said trustees are hereby authorized to pay interest upon all of the above claims, which are in the form of accounts stated, at the rate of 8 per cent. per annum, from the day when the same become due. And it is further agreed and understood that the foregoing marshaling of claims, both preferred and otherwise, is solely for the purposes of this agreement, and that in case the trustees shall, for any reason, fail to administer said trust to its contemplated conclusion, then each and every of said claims, or what may remain unpaid of any of them, shall be restored to the legal status it occupied prior to the execution of this agreement.

"It is further agreed and understood that the statement of the amounts of all the foregoing claims is subject to correction, and no such correction shall in any way invalidate the force and validity of this agreement as to any creditor. And the undersigned, A. J. Munn, hereby agrees that as long as this trust is administered by said trustees at a net profit from the business of not less than $500.00 per month, he will extend the time of payment upon the principal of his admitted claim of $2,000.00, which is not included in the above composition. And it is agreed that this contract shall remain in full force and effect until all of said claims are fully paid; provided that said corporation may, at any time, repossess itself of whatever property and rights which may be in the hands of said trustees, upon payment to them of an amount sufficient to discharge what then remains due upon the claims intended to be paid under this trust. And said trustees will, when they have fully performed the duties cast upon them hereunder, and have made full payment of the amounts as hereinbefore set forth, deliver to said company, its successors or assigns, all of the property, rights and equities whatever at that time in their possession. In case of the death, disability or resignation of any trustee hereunder, the remaining trustees shall select his successor from among the creditors enumerated herein. It is further expressly understood and agreed by and between the parties hereto that in no case shall this trust endure for a longer time than the lives of the natural persons in being, parties hereto or the survivors of them.

"In witness whereof, said corporation has, by resolution duly adopted by its board of directors, and entered in its minutes, authorized the execution of this agreement by its vice president and secretary, and attested by its seal. Pennsylvania Oil Company, by Geo. T. Gillette, Vice President, and C. C. Harris, Secretary. [Seal of the Pennsylvania Oil Company—Incorporated. 1900.]

"And the creditors above enumerated have set their hands the day and date first in this agreement written; this agreement being executed in duplicate. [Here follow the names of the creditors whose names appear in the contract, including signatures as follows: "Mrs. M. B. Dorland, by A. M. Cates, Her Attorney." "A. M. Cates."]

"We, the undersigned, hereby accept the above trust on February 1st, 1902. A. J. Munn. C. B. White. S. T. Peet."

Defendant had judgment in the superior court. The appeal is from the judgment and an order denying plaintiff's motion for a new trial.

Appellant contends that said contract is not a bar to his prosecution of this action. The contract does not purport to transfer all respondent's property to its trustees for its creditors. For aught that appears in the contract, it might have had ample property for the payment of all its debts. Neither does the contract purport to have been signed by all its creditors. It does not provide for any time within which payments may be made upon claims of the class of appellant's, and yet it provides that the contract shall remain in force and effect until all of said claims are fully paid. For aught that appears in the contract, nothing might be received by the trustees in excess of operating expenses. There is nothing whatever in the contract providing that the creditors who have signed it shall be debarred from prosecuting actions upon their respective claims. There is no covenant on the part of the creditors to discharge their claims against the debtor on the payment of less than the full amount of their claims. As a composition agreement it lacks essential covenants. In Pierson v. McCahill, 21 Cal. 123, the contract which was set out in full in the opinion of the court is more definite and certain than the contract under review in this case. In that case there was as assignment of the debtor's stock of goods and his accounts and notes and a covenant that when the creditors should have received 50 cents on each dollar of the indebtedness he should be replaced in possession of the remaining stock. But it was not deemed sufficient, without reformation, to bar an action by one of the creditors who had signed the agreement. In speaking of a composition agreement in Kullman v. Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150, the court, quoting approvingly from Solinger v. Earle, 82 N. Y. 393, say: "A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt." In Wilson v. Samuels, 100 Cal. 514, 35 Pac. 148, a "composition agreement" between debtor and creditors is defined as "an agreement made upon a sufficient consideration between an insolvent or embarrassed debtor and his creditors, or a considerable proportion of them, whereby the latter, for the sake of immediate or sooner payment, agree to accept a dividend less than the whole amount of their claims, to be distributed pro rata, in discharge and satisfaction of the whole."

The only clause that respondent could contend would have the effect of barring plaintiff's cause of action is that wherein it is stipulated that "the foregoing marshaling of claims, both preferred and otherwise, is solely for the purposes of this agreement, and in case the trustees shall for any reason fail to administer said trust to its contemplated conclusion, then each and every of said claims, or what shall remain unpaid of any of them, shall be restored to the legal status it occupied prior to the execution of this agreement." Considering the whole contract so as to give effect to every part, if reasonably practicable, there is only an inference that the contract wrought a change in appellant's "status." A "status," as applied to a claim such as those upon which this action was brought, can mean nothing more than its standing, state, or condition. Anderson's Dic. of Law, 968. There was a change in the status of appellant's claim in this: His assignors having assented to the transfer of certain of respondent's property to trustees for respondent's creditors, and having joined with respondent's creditors in that contract, one of the terms of which was that certain claims were to be paid in the execution of that trust in preference to the claims of appellant's assignors, their right to proceed against that property was lost or suspended. A restoration of that status, therefore, would have the effect of enabling appellant's assignors or appellant to cause the property so transferred to trustees to be levied upon to secure said indebtedness. We therefore hold that said contract was not a bar to plaintiff's action.

The signature of Mrs. M. B. Dorland to said contract, signed "M. B. Dorland, by A. M. Cates, Her Attorney," was called in question on the trial of the case, and A. M. Cates testified with regard to his authority to sign the name of Mrs. M. B. Dorland, wherein it appears that said Cates was not authorized to sign Mrs. Dorland's name to said contract. The court, on motion, struck out this testimony, presumably on the ground that the plaintiff did not, within 10 days after receiving a copy of respondent's answer, file an affidavit denying the due execution of the contract, as required by section 448 of the Code of Civil Procedure. We think that the action of the court was correct. This was substantially decided in the case of Knight v. Whitmore, 125 Cal. 198, 57 Pac. 891. In that case the defendant had set out in her defense an agreement in writing, signed "Knight, Simpson & Harpham, by C. M. Simpson." The execution of the agreement was not denied by affidavit, as provided in said section, and it was held that the genuineness and due execution of the instrument should have been deemed to have been admitted for all the purposes of the trial. It was claimed by the plaintiffs on the trial that the firm of Knight, Simpson & Harpham had been dissolved prior to the signing of said instrument, and that said Simpson had no authority to bind the plaintiffs by the contract he entered into with defendant in behalf of plaintiffs. It was held that plaintiffs, by their failure to deny by affidavit within 10 days the due execution of the contract signed as above stated, admitted the genuineness and due execution of the contract; that such admission carried with it the genuineness of the signatures and the fact of its execution, and also, necessarily, the further fact that Simpson had authority to sign the names of the plaintiffs to the document. On this point we fail to see any distinction in principle between the case at bar and the case last above cited; and on the authority of that case we hold that the trial court did not err in striking out the evidence of Cates with regard to his authority to sign Mrs. Dorland's name to the contract above set forth.

It follows, however, from our interpretation of the contract, that the court erred in rendering judgment in favor of the defendant in said action.

It is therefore ordered that the judgment and order appealed from be reversed.

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150 Cal. 658

## OSCAR BONNER OIL CO. v. PENNSYLVANIA OIL CO. (L. A. 1,441.)

(Supreme Court of California. March 14, 1907. Rehearing Denied April 10, 1907.)

1. Bankruptcy — Stay of Proceedings in State Courts.

Where defendant showed that he had been adjudged a bankrupt, and moved that the trustee in bankruptcy be substituted in his place, but it did not appear that the court in bankruptcy had directed the trustee to intervene, and the trustee himself made no motion, the application would be denied.

2. Corporations—Authority of Officers.

On an issue as to whether the secretary of a corporation to which another was indebted had authority to sign a composition with creditors, executed between such other person and creditors, the secretary testified that he had no authority to sign the agreement, but that he had asked the president of the company about it, and he stated that, while he was not in favor of it, if the secretary could get the consent of the other directors, the president would have no objection; that he never consulted any one further, but signed the agreement believing that his action would be ratified. It appeared that the by-laws of the corporation provided that the president and secretary should constitute an executive committee which should audit and pay bills, and that prior to the making of the composition agreement the directors had passed a resolution that the president and treasurer should sign checks and drafts. *Held*, that the signature of the secretary was not binding on the corporation.

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Oscar Bonner Oil Company against the Pennsylvania Oil Company. From a judgment in favor of plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Tanner & Taft, for appellant. George A. Corbin, for respondent.

LORIGAN, J. This action was brought to recover upon a promissory note executed by defendant for $515, with interest, in favor of plaintiff. The complaint set forth a copy of the note sued on dated August 14, 1901, and alleged nonpayment. The complaint then further alleged the making on January 25, 1902, of a composition agreement between the defendant and certain of its creditors whereby certain designated property of the defendant consisting of its plant, wells, pipes, pipe line, etc., was delivered to trustees to be managed and operated by them for the mutual benefit of the company and its creditors signing the agreement, and whereby the proceeds from the operation of the plant, etc., were to be applied to the payment of the debts due the creditors of the company, as particularly set forth in the agreement; that said agreement purported to have been consented to and executed by plaintiff through its secretary, it being signed "Oscar Bonner Oil Company, by A. M. Cates, Secy."; that the consent of plaintiff was never given to the making of said contract, nor was it ever ratified or authorized by resolution of its board of directors, nor was it signed or executed by any officer of plaintiff authorized to do so. The answer admitted the execution of the note and its nonpayment and the making of the composition agreement as alleged in the complaint (the agreement was appended to the complaint as an exhibit and made part thereof), denied nonexecution thereof by plaintiff as alleged in the complaint, and set up affirmatively that the plaintiff duly and legally caused said agreement and contract to be signed and executed by its secretary; that thereby the same became binding on plaintiff; that by its terms the obligation to pay—the note sued on—and its maturity were postponed, and that at the time this action was commenced there was nothing due or payable to plaintiff on said note. Upon these issues the case was tried, and the court found that the consent of plaintiff was never given or obtained to the making of said composition contract; nor was it ever authorized or ratified by resolution of its board of directors; nor was it ever signed, executed, or delivered by any officer thereunto authorized, nor under the corporate seal of said plaintiff company. Thereupon judgment was rendered for plaintiff for the sum of $515, with interest, and from the judgment and an order denying its motion for a new trial defendant appeals.

Before considering the appeal upon its merits, it will be necessary to refer to and dispose of a suggestion and motion made and submitted when this appeal came up for argument in this court. The suggestion was that on May 15, 1905, in the District Court of the United States for the Southern District of California, the appellant had been adjudged a bankrupt. The motion was that C. B. White, the trustee in bankruptcy, be substituted as appellant in place of the Pennsylvania Oil Company. No reason was given, when the suggestion and motion were presented, why it was necessary to have the trustee in bankruptcy intervene by substitution, nor how any benefit could possibly accrue to the bankrupt's estate, as far as creditors are concerned, by the substitution. This action was commenced against defendant in 1902 long prior to the adjudication in bankruptcy. In Brandenburgh on Bankruptcy, § 276, it is said: "Suits begun against a bankrupt before the latter's bankruptcy may be defended or stayed in the discretion of the court of bankruptcy according as the interests of the bankrupt's creditors may require, and if it is decided to defend them the trustee is entitled to be made a party, and the bankrupt will be enjoined from interfering. The court in which an action is pending against the bankrupt will not compel the trustee to become a party." And Id. § 251: "When the right of the said court is to be questioned, it can be done by the intervention of the trustee alone." In Collier on Bankruptcy, it is stated (page 131): "A court of bankruptcy may, but need not, order the trustee to intervene in a suit against the bankrupt. The said court cannot, on the other hand, compel him to intervene." Now, it does not appear from anything in the suggestion or motion that the court in bankruptcy has directed the trustee in bankruptcy to intervene in this appeal, nor is the trustee himself moving to intervene, nor asking that this court substitute him as a party appellant in the action. The application is made solely by and on behalf of the appellant and presented by the attorneys for the appellant. But appellant, as the bankrupt, has no right to make such motion for the trustee. This, according to the rules above stated, must proceed from the trustee himself, and, as he has not sought to intervene, the appellant is not warranted in injecting him into the case on his own volition. The motion to substitute is therefore denied. See Reynolds v. Penn. Oil Co. (L. A. 1,492, filed March 8, 1907) 89 Pac. 610.

Now, as to the merits of the appeal: The only defense urged in the trial court was the composition agreement referred to, and it is insisted by appellant that the finding of the court respecting it is not sustained by the evidence. As to the evidence upon the subject of the execution of that contract: A. M. Cates was called as a witness upon the trial, and testified that he was secretary of the plaintiff corporation at the time the note sued on was delivered by defendant to plaintiff; that no part of said note had been paid; that he was also secretary of plaintiff corporation at the time the agreement sued on in plaintiff's complaint was executed; that he signed the name of plaintiff to said agreement as secretary, but that he had no authority to do so; that he had asked his brother, Dr. H. G. Cates, who was then a director and also the president of the company, whether he should sign the agreement on behalf of the company, and his brother replied that he was not personally in favor of the company's executing it, but that, if he (the secretary) could get the consent of all the other directors of the company, he (the president) would have no objection; that he never spoke to any of the other directors about the matter and never obtained their consent or direction about it, but signed the name of the company to the agreement on his own motion, believing that his action would be ratified; that it was not ratified, as there had been no meeting of the board of directors of the plaintiff corporation since that time; that there was no consideration moving to the plaintiff company for his signature to the agreement; that he was never the attorney of the plaintiff company, and was never an officer of the defendant company. On cross-examination he testified that there had been no meeting of the board of directors of plaintiff since June 28, 1901; that the board of directors of plaintiff never authorized the acceptance of the note sued on; that witness accepted it from defendant as secretary of the plaintiff corporation without any authorization; that he was at the time of the execution of the agreement set out in the answer as the attorney for defendant corporation, and was present at the meeting of the creditors at which said agreement was made. H. G. Cates, president of the plaintiff corporation, testified to the same matters stated by the secretary with reference to the signing of the agreement, before it was signed; and, further, that, when informed by the secretary that he had signed it, the witness told him he should not have signed the articles, that he did not do anything further with regard to the secretary's action, did not call the board of directors together, and did nothing until about the time of the institution of this action, when he authorized the bringing of it. The defendant offered the following by-law of the plaintiff corporation: "The president and secretary of this company shall constitute ex-officio an executive committee, who shall attend to the business of the company, and who shall audit and pay the current bills of the company, all under the general direction of the board of directors"—also the following from the minutes of the board of directors held on July 21, 1900: "Resolved, that H. G. Cates, president, or Simpson McClure, vice president, and J. W. Hinton, treasurer of this corporation, be, and they are hereby, authorized to sign checks and drafts for and on behalf of this corporation, and that each of them be and he is hereby authorized to endorse checks and drafts payable to this corporation." Evidence was further offered by defendant to show that A. M. Cates was the attorney of the defendant corporation and secretary of the plaintiff corporation, and that he had acted as the representative of the plaintiff in the transactions leading up to the execution of the note sued on herein.

We think that under this evidence the court was fully warranted in making the finding it did. It certainly appears that A. M. Cates had no direct authority to sign the corporate agreement, unless it was derived from the by-law and the resolution offered in evidence; but under the by-law it is quite apparent that no authority was conferred upon the secretary to execute contracts of the character here involved, and it is equally apparent that, whatever business he and the president were authorized to attend to could only be done by them conjointly. The resolution offered did not even remotely suggest any authority to execute such a contract, and certainly does not confer any power at all upon the secretary of the corporation to do anything. It is claimed by appellant, however, that, if the secretary did not have express authority to execute the contract, he was at least the ostensible agent of the corporation for that purpose, and that his act is binding on it. But we cannot perceive anything in the evidence which can support a claim of ostensible agency. There is nothing in it to show that at any time A. M. Cates represented the plaintiff in the execution of any written contract by it of any kind whatever. It seems that he received from the defendant the note sued on and represented it in the transactions which led to its execution; but that circumstance could not constitute him the agent, ostensible or otherwise, of the plaintiff, to bind it by signing the composition agreement concerning the note. We do not think that there was substantial conflict in the evidence as to want of authority upon the part of the secretary to execute this contract. In fact, we do not think that under the evidence any other finding could properly be arrived at.

It is claimed by respondent that, independent of this finding, plaintiff had the right, even under the composition agreement, to maintain this action; that there is nothing, directly or inferentially, in the contract, precluding the subscribing creditors from prosecuting actions upon their respective claims; but, as we have concluded that the finding by the court that the plaintiff never executed the contract is sustained by the evidence, the construction of that contract is properly eliminated from consideration.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

150 Cal. 647

## CITY OF LOS ANGELES v. LOS ANGELES FARMING & MILLING CO.

(L. A. 1,720.)

(Supreme Court of California. March 9, 1907.)

1. Quieting Title—Determination of Adverse Claims—Nature—Statutory Provisions.

An action to determine adverse claims to real property is not brought within Code Civ. Proc. § 749, providing that the complaint in an action to determine adverse claims may include as defendants all unknown persons, etc., to be described as "all other persons unknown," etc., by the fact that certain persons are made defendants under fictitious names; it being alleged that their names are unknown to plaintiff, but not that the persons are unknown nor that the action is against all unknown persons.

2. Judgment—Default—Proof of Cause of Action.

Under Code Civ. Proc. § 585, providing that judgment may be had if defendant fail to answer the complaint in certain cases, and that, if the taking of an account or the proof of any fact is necessary to enable the court to give judgment, the court may take the account or hear proof, etc., where defendant defaults in an ordinary action to determine adverse claims to real property, the court need not hear evidence in proof of plaintiff's case.

Department 1. Appeal from Superior Court, Los Angeles County, M. T. Allen, Judge.

Action by the city of Los Angeles against the Los Angeles Farming & Milling Company. From an order denying defendant's motion to set aside a default and judgment, it appeals. Affirmed.

R. M. Wedney, for appellant. W. B. Mathews, H. T. Lee, and J. R. Scott, for respondent.

SHAW, J. On July 24, 1903, plaintiff recovered judgment against the defendant above named. The judgment was rendered upon the default of said defendant, duly entered, for its failure to appear after due personal service of summons. On October 24, 1904, more than a year afterward, the defendant served on plaintiff a notice of motion to set aside the default and judgment. The ground of the motion, as stated in the notice, was that the judgment is void on the face of the record for want of jurisdiction. The motion was denied, and the defendant appeals from the order.

The complaint states, in the usual form, a cause of action to determine adverse claims to real property, as provided in section 738 of the Code of Civil Procedure. The summons is in the form prescribed in section 407 of the Code of Civil Procedure. The service was made on the president of the defendant, the default was regularly entered, and the judgment was given in all respects in the regular mode provided for judgments in such actions. No ground for the motion is apparent.

The contention of the defendant is that the cause of action stated in the complaint is not an action under section 738 of the Code of Civil Procedure, but that it is a cause of action against all persons, whether known or unknown, who make any adverse claim, an action of the the character authorized by sections 749, 750, and 751 of the Code of Civil Procedure, and that the entire proceeding is void because it is not in compliance with the special provisions of those sections regarding that special proceeding. We need not particularly consider the merits of the argument made in that behalf. The premises on which the argument is based are lacking. The cause of action stated is, as already said, an action under section 738. It alleges the title of the plaintiff in fee to the real property described, and in the usual manner avers that the defendants, without right, make some claim thereto adversely to plaintiff's title and estate. There are no allegations of actual, exclusive, and adverse possession by plaintiff continuously for 20 years, nor any of the special averments required in an action under section 749. The action was begun on April 25, 1903, which was after the act of March 8, 1903, amending sections 749, 750, and 751, took effect, and therefore the question whether or not it is a proceeding under those sections is to be determined by the terms of the sections as then amended. We have no doubt it was an ordinary action, and not a proceeding as in those sections authorized. Four other persons were made defendants under the fictitious names of John Doe, Richard Roe, Jane Doe, and Mary Roe; it being alleged that their names were unknown to plaintiffs. This does not bring the case within section 749. It is not averred that the persons are unknown. Nor is the action against all unknown persons, nor even against all persons whose names are unknown. It is against four certain persons who make adverse claim, and their true names only are unknown.

We would not be understood to intimate by anything in this opinion that a judgment in a proceeding under sections 749, 750, and 751 against a named defendant who was personally served with the summons would be void if the proceedings were lacking in the respects in which it is claimed the present proceedings fail. As this is not such a proceeding, it is unnecessary to consider whether or not the alleged defects would render it void, if it was a proceeding of that character.

It is claimed that the judgment is void because the record does not show that the court heard or required evidence in proof of the plaintiff's case. This was not necessary on default in an ordinary action where the summons is personally served, except where the taking of an account, or the proof of damages or of some other fact, is necessary to enable the court to give judgment or carry it into effect. Code Civ. Proc. § 585. Here no such proof was required. The default of the defendant in an ordinary action of this character admits, so far as such defaulting defendant is concerned, the absolute verity of all the allegations of the complaint. No amount of evidence could establish the facts more effectually for the purpose of rendering the judgment as against such defendant.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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5 Cal. App. 12

## JANSEN v. SOUTHERN PAC. CO. (Civ. 248.)

(Court of Appeal, Third District, California. Feb. 9, 1907.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE AS PROXIMATE CAUSE—INSTRUCTIONS.

Where the negligence of a person injured, assuming it to exist, continued, up to the very moment of the accident, unbroken by any new independent cause, and without which that event would not have occurred, there could be no controversy as to whether his contributory negligence was proximate or not, and an instruction omitting the word "proximate," or its equivalent, was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 391.]

2. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In an action for personal injuries, where there was no evidence and no issue raised as to any wanton and intentional injury by defendant, an instruction on that question was not prejudicial to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4220.]

Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by Robert P. Jansen against the Southern Pacific Company. From a judgment for defendant, plaintiff appeals. Affirmed.

D. M. Delmas and Gibson & Woolner, for appellant. P. F. Dunne, for respondent.

BURNETT, J. This is an action for damages. It was occasioned by serious personal injuries received by appellant at Encinal Station, Alameda, on the railroad of respondent, and which were due, so it is alleged, to the negligence of respondent in running its train "at an improper and negligent rate of speed and at an improper and negligent point of time without notice or warning of any kind whatever, and so negligently that it ran upon said plaintiff and threw him to the ground." The case is somewhat unique, in this: That no objection by either party was made to any of the testimony; only five simple instructions were requested by appellant and three by respondent; without substantial modification they were all given by the court; and the verdict of the jury was in favor of the corporation.

By the learned counsel for the appellant, only one point is deemed sufficiently vulnerable to merit attention and invite attack. With commendable brevity and simplicity it is urged that prejudicial error was committed by the court in giving the following instruction: "I instruct you that it was the duty of the plaintiff to have a reasonable regard for and pay such reasonable attention as a reasonable man under such circumstances should pay to the preservation of his own life and limb, and if the jury believe from the evidence that he did not on that occasion exercise such reasonable and ordinary care as the average reasonable man would exercise under like conditions, he cannot recover in this action, whatever may have been his injuries, or whatever the negligence of the defendant, unless the negligence of the defendant was gross, willful, and intentional and exhibited an intentional purpose to hurt him." It is suggested that this instruction is open to two objections; that is, in attempting to state the rule of contributory negligence the essential element of "proximate" contribution has been omitted, and, again, that it takes no account of the doctrine of the "last clear opportunity," or, as aptly expressed by appellant's counsel: "It tells the jury, in effect, that, even though the engineer discovered the plaintiff in time to have avoided injuring him by the use of ordinary care, yet he was not guilty of actionable negligence, though he failed to use such care, unless he purposely ran over him, with the intention of hurting him." In support of each objection one authority is cited, and no fault can be found with the doctrine of either. The first is found in Deering's Digest, vol. 2, p. 2058, No. 123, and is as follows: "The rule releasing a defendant from responsibility for damages because of the negligence of the plaintiff is limited to cases where the act or omission of the plaintiff is the proximate cause of the injury." It is hard to conceive of any authority holding differently. In support of the second objection appellant invokes the case of Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85, wherein it is declared that "no purpose or design * * * to injure was essential to defendant's liability."

In the consideration of the first objection is involved the significance of the expression "proximate cause." The term scarcely needs definition, as it is so familiar to the profession. Shearman & Redfield, in their work on Negligence, § 26, however, declare that "the proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new independent cause, produces that event, and without which that event would not have occurred." "Proximate contributory negligence," then, must be that negligence which "in a natural and continuous sequence, unbroken by any new independent cause," contributes to the injuries, and without which the injuries would not have occurred. But, it is apparent from the evidence in the case that the occasion did not demand the definition of "proximate contributory negligence," and it is equally obvious that the omission from the instruction of the word "proximate," or its equivalent, could not have prejudiced the appellant. This is indubitably so because there could be no controversy as to whether appellant's "contributory negligence" was proximate or not. The evidence all shows that appellant's negligence, assuming it to exist, continued up to the very moment of the accident, "unbroken by any new independent cause and without which that event would not have occurred." This is manifest from the testimony of appellant himself. In his account of the accident, he says: "I boarded the first car, the smoking car—next to the tender. I was going to the city. After I got on the platform, I turned around and saw my wife. She made a motion with her hand, as I understood to recall, signaling to come back. * * * My intention was to come down again the way I came up on that platform, but there were people getting on there still, so I stepped off on the other side, the north side of the train. * * * My purpose was to go to the sidewalk and wait until that train had withdrawn from the station and go to my wife and see what she required of me when she recalled me. * * * The train was headed towards the west, and I was turned northeast with my back towards the engine. I was going to the northeast corner of Lafayette street and Encinal avenue. In order to do that I had to cross the northerly track. The northern and southerly tracks are 11.95 feet apart. During the six years I had traveled there I had observed that the trains never met there at the station, according to a rule of the company, of which I had read, that the train should not pass on the double track in Alameda, at stations. After stepping off the car, I was not conscious of anything. I didn't even feel the blow. As I got off to cross that track on the northerly side of the train I was leaving, I did not turn at all in the direction in which the train might be coming from the mole. I stepped down with my back in that direction. I did not stop to look or listen or to see if any train was coming. I may have taken two or three steps. I couldn't say whether I got to the track, whether I was between the rails or at the side of the track. I think I got hit almost immediately after I got off the train."

From the foregoing account, it could be argued plausibly that, at any moment from the time he left the train until he was struck, plaintiff could have avoided the accident by the use of ordinary caution—such caution as "a person of ordinary prudence would use for his own protection under the same circumstances, in view of the danger to be avoided." That plaintiff's negligence was the "proximate" contributing cause of the injury is not open to discussion, if he was guilty of any negligence at all. That he was actively at fault in voluntarily exposing himself to danger, without making any effort to ascertain whether a train was approaching from the opposite direction, seems established by the weight of authority. The doctrine of the cases is embodied in the following quotation from Shearman & Redfield, § 476: "It is a rule of almost invariable application that a traveler who knows or is bound to know that he is about to cross the track of a railroad, upon which trains may lawfully run at greater speed than ordinary vehicles upon highways, must both look and listen for approaching trains before even attempting to cross the track. He must do this every time that he crosses the track, even if he goes to and fro. He should in this manner make sure that the crossing is safe and clear before using it. He ought not to take any chances. A traveler must look in every direction from which engines could possibly come. * * * One who stands or lingers on the track must continually look and listen. * * * It is no excuse for failure to look and listen that the traveler did not think, just then, about the railroad or its dangers, or that his attention was diverted by some trivial matter, or that he believed that all trains stopped short of the crossing, or that no regular train was due, or that a train had recently passed, or that the usual or statutory signals of approaching trains were not given."

The decisions of our supreme court are to the same effect. Holmes v. South. Pac. C. Ry. Co., 97 Cal. 161, 31 Pac. 834; Bailey v. Market St. Ry. Co., 110 Cal. 323, 42 Pac. 914; Everett v. Los Angeles, etc., Ry. Co., 115 Cal. 105, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350; Sego v. S. P. Co., 137 Cal. 406, 70 Pac. 279. Hence with some reason defendant might have contested the propriety of submitting to the jury at all the question of negligence. However, in view of the conflict in the evidence as to whether respondent transgressed its rule in reference to trains passing at the station, and as to whether the usual signals were given, and keeping in mind the testimony of appellant that he relied upon said rule, it may have been proper to allow the jury to determine whether, under all the circumstances, appellant was chargeable with such contributory negligence as to preclude recovery. But assuredly no question could arise as to whether that "contributory negligence" was proximate or otherwise. Again, the instructions must be read together, as the authorities hold, and it is not necessary for one to contain all the elements, when the omission is supplied by other instructions. What the court meant by the negligence of plaintiff is shown by four instructions given at the request of plaintiff. They conclude with this caution: "Unless you further find that the plaintiff was guilty of negligence which proximately contributed to his injuries." There could have been on the subject no misunderstanding in the minds of the jurors.

What has been said will apply in part to the further animadversion of appellant. There was no room for the application of the doctrine of "earlier and later negligence," or, as some of the decisions express it, "of the last clear opportunity." The negligence of plaintiff and the negligence of defendant, assuming them to exist, were, without controversy, contemporaneous and concurrent, and extending up to the very time of the accident; and, if we are to apply the strict doctrine of Everett v. Los Angeles Co., 115 Cal. 128, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350, the rule could not apply because of the continuing neglect of plaintiff and his ability at any moment up to the time of the accident, by the exercise of the slightest care and effort, to put himself out of danger. But, to justify the instruction of which complaint is made, it is not necessary to go to the limit of the Everett Case. It is sufficient to say that there was no evidence of any last clear opportunity, or to show that the negligent acts of the parties were distinct and independent of each other, and that the engineer could have stopped the train after knowing of plaintiff's danger. Indeed, as a complete answer to appellant's contention, it is submitted that all the evidence shows that the engineer, after his discovery of plaintiff's dangerous situation, notwithstanding his right to assume that plaintiff would avoid the accident, did all that he could to prevent it. The only evidence that could arouse a suspicion to the contrary is found in the testimony of one R. S. Wheeler, an apparently honest witness, who thinks that when plaintiff stepped upon the track the train was 20 or 30 or 50 feet away. This, however, is merely a guess on his part. In this connection, it must be remembered that the doctrine of later negligence rests upon the assumption that the engineer must have been actually aware of plaintiff's danger in time to obviate it, and not upon the proposition that by the exercise of more or less diligence he might have discovered plaintiff's peril earlier. Herbert v. S. P. Co., 121 Cal. 227, 53 Pac. 651; Harrington v. Los Angeles Ry. Co., supra. The latter case, cited by appellant, affords him no comfort. In that case there was evidence of a "last clear opportunity," and that deceased, realizing his danger, made an earnest effort to escape. The court there, nevertheless, declares that the duty of exercising ordinary care by the defendant to avoid injuring plaintiff arises only when he discovers plaintiff in a dangerous position, and under such circumstances as preclude the assumption that the injured party will or can get out of the way. Of course, in any event, the defendant would have no right to injure the plaintiff wantonly, willfully, and with "an intentional purpose to hurt him"; but, in view of the fact that in the case at bar there was no evidence and no issue raised as to any wanton and intentional injury, this feature might have been eliminated from the instruction in question; but its presence there could not possibly injure appellant.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

5 Cal. App. 1

## AMES v. BELL. (Civ. 315.)

(Court of Appeal, First District, California. Feb. 7, 1907.)

1. PLEADING—BILL OF PARTICULARS—MOTION TO STRIKE.

Where defendant for five months raised no objection to a bill of particulars filed by plaintiff pursuant to an order of the court made as authorized by Code Civ. Proc. § 454, the court properly denied a motion, made on the day the case was called for trial, to strike the bill of particulars and to order a further bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 992, 1130.]

2. SAME—BILL OF PARTICULARS—SUFFICIENCY—ATTORNEY AND CLIENT—ACTIONS FOR COMPENSATION.

A bill of particulars in an action by an attorney for legal services, showing that between specified dates the attorney examined accounts of creditors of a deceased and petitions of creditors for the sale of real estate and a return of sale thereon, and that on a specified date he prepared answers to the petitions of creditors, and that between specified dates he was obliged to appear in court at hearings and trials of said proceedings in relation to matters connected with the administration of the estate, is sufficient to notify defendant of the nature of the services rendered, and to authorize evidence of the character of the services performed in connection with the administration of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 954–962.]

3. SAME—BILL OF PARTICULARS—AMENDMENT.

An amended bill of particulars supersedes former bills, and may include services rendered for defendant not included in the former bills.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 986.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Fisher Ames against Teresa Bell. From a judgment for plaintiff, defendant appeals. Affirmed.

T. Z. Blakeman, for appellant. Theo. J. Roche, for respondent.

COOPER, P. J. This action was brought to recover $8,500, balance alleged to be due plaintiff for services as an attorney and counselor at law, performed at defendant's instance and request. The case was tried with a jury, and a verdict rendered for plaintiff in the sum of $3,000, upon which judgment was entered. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and the order denying the motion.

It is not claimed that the evidence is insufficient to sustain the verdict, nor is there any suggestion that the instructions to the jury were in any respect erroneous. The main contentions of the defendant relate to a bill of particulars furnished by the plaintiff to the defendant, concerning which error is claimed in the refusal of the court to make an order striking out the bill, in the refusal of the court to compel the plaintiff to furnish such bill as it is claimed the court ordered, and the refusal of the court to grant the defendant's motion for a continuance until such time as the plaintiff should have furnished a bill of particulars to comply with the order of the court. As these alleged errors all relate to the one question as to the bill of particulars, we will consider them under the one head.

On November 17, 1902, upon demand of defendant, plaintiff furnished her a bill of particulars which contained the item of $2,012.50 for 805 consultations between September 21, 1895, and October 27, 1898, and the item of $5,587.50 for legal services rendered at the request of defendant in the matter of the estate of Thomas Bell, deceased, and in the matter of the guardianship of the minors. Upon motion of the defendant, and on the 30th day of January, 1903, the court made an order directing plaintiff to make and deliver to defendant a further bill of particulars, specifying separately the services rendered in the estate of Thomas Bell, deceased, and for defendant as guardian of the minors, and the dates and general subject and nature of the 805 consultations. On February 14, 1903, the plaintiff delivered to the defendant an amended bill of particulars in response to the order that had been made by the court. Defendant claims that the amended bill of particulars did not comply with the order of the court in certain respects, and on the 6th day of March, 1903, the court at the request of the defendant, made an order directing the plaintiff to furnish defendant with "an amended and further bill of particulars." On the 28th day of April, 1903, in response to the second order of the court, the plaintiff served defendant with an amended and further bill of particulars, in which he gave at great length statements of services in the various matters connected with the estate of Thomas Bell, deceased, the guardianship matters, and his various services for defendant as her attorney. This amended and further bill of particulars goes into detail as to dates, times, places, time occupied, and kind of services rendered for the defendant. It takes up 187 folios, or nearly half the transcript, and evidently was an attempt in good faith to comply with the order of the court. It was not objected to, except as hereinafter stated, and the case was set down for trial at the request of the parties. The deposition of the defendant was taken. The case was not reached on the trial calendar of the court until October 6, 1903, and during the time intervening after the last bill of particulars was served and up to October 5, 1903, a period of over five months, no objection was made to the last bill of particulars, and no intimation by defendant that she would not be ready for trial. On the day the case was called for trial, and upon only one day's notice, defendant made a motion to strike from the files the last bill of particulars, and asked for an order to compel the plaintiff to furnish another bill of particulars, and for a continuance of the case until the plaintiff should comply with the orders of the court already made in regard to the bill of particulars. The court denied each of said motions, and directed the parties to proceed with the trial. In this the court did not abuse its discretion. As to whether or not the defendant should have used more diligence, and asked for relief in regard to the bill of particulars before the trial, so as not to interfere with the orderly conduct thereof, and as to whether or not the amended bill of particulars substantially complied with the order of the court, were matters resting largely in the discretion of the trial judge. It is provided in section 454, Code Civ. Proc., that when the items of an account are not set forth in a pleading the pleader "must deliver to the adverse party, within five days after a demand therefor in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge may order a further account when the one delivered is too general, or is defective in any particular." The purpose of the above section is to give the adverse party reasonable notice of the items constituting the claim which he is required to meet, so that he may prepare for trial. It is in the nature of an amplification of the pleading to which it relates, and is to be construed as a part of it for certain purposes. It has the effect of restricting the evidence and limiting the recovery to the matters and things set forth therein, provided proper objections are made, and the court's attention called to any material departure from it. When the court or judge orders a further account or bill of particulars, as the section provides may be done, the further or amended account is to be construed as an amended pleading for certain purposes. We therefore have in this case an application made by defendant, at the time the case is ready for trial, for an order requiring the plaintiff to serve a further account or bill of particulars. The court may well have denied the motion, for the reason that defendant, having made no objection to the last bill of items served upon her for over five months and not till the moment of the trial, the motion came too late. Dennison v. Smith, 1 Cal. 437; Connor v. Hutchinson, 17 Cal. 279; McCarthy v. Mt. T. L. & W. Co., 110 Cal. 687, 43 Pac. 391; Silva v. Bair, 141 Cal. 601, 75 Pac. 162.

Plaintiff was allowed to testify, under defendant's objection, to services in examining the claims of seven creditors of the estate of Thomas Bell, deceased, one being a claim for $16,000, and also to services in the contested claim of one Butler against the estate for $1,600, and other items of like character. The main ground of objection to the evidence was that the amended bill of particulars was not sufficiently specific, did not set forth the dates on which the several items of services were performed, and that the bill of particulars did not comply with the order of court. The matters concerning which plaintiff was testifying were not wholly omitted from the last bill of particulars, and we are of opinion, from what has already been said, that the defendant had waived the right to any further bill of particulars, or to object to any testimony within the general scope of the complaint and the amended bill. The bill of particulars contained the following items:

"Between the 15th and 18th days of said month (October, 1895) he examined the accounts of seven creditors of said deceased, and thereafter the petitions of two of said creditors, one for a sale of real estate, and the other for an order to show cause; also a return of sale thereon."

"On November 26, 1895, he prepared and filed the answers of defendant to said petitions of said creditors; thereafter, and during said month, he received a demurrer to said answers, and examined claims of P. F. Butler and Roos Bros. against said estate."

"During said period of time, between said 21st day of September, 1895, and said 27th day of October, 1898, plaintiff was obliged to and did appear repeatedly in court, upon the hearings and trial of said proceedings hereinabove specified, and in relation to matters connected with the administration of said estate."

This was sufficient to notify the defendant of the nature of the charge in the estate of Thomas Bell, deceased, and the amount of the charge as attorney for the guardian of the minors. This authorized evidence as to the nature and character of the services performed under each heading in connection with the estate or the guardianship respectively.

The defendant complains that while the plaintiff made no charge in his first bill of particulars for his services rendered plaintiff in and about the guardianship of the Bell minors, he did make such charge in the last bill. The amended and last bill of particulars superseded the others, and we know of no reason why it might not include all services rendered to and for defendant at her special instance and request. A further answer to the last contention is that the evidence given by plaintiff relative to the guardianship was given without objection, and no motion was made to strike it out. Counsel for defendant, after the testimony was in, moved to strike out the statement of plaintiff as to consultations with defendant in regard to a petition to revoke her letters of guardianship, but the motion only went to the statement as to consultations.

The objection to the inventory and appraisement being received in evidence as to the value of the estate of Bell is extremely technical, and the ruling not of sufficient importance to justify a reversal of the case. Not only this, but it is not clear from the record that the counsel objected on the ground that the inventory and appraisement were incompetent because hearsay.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

5 Cal. App. 6

## KILILLEA v. WILSON et al. (Civ. 340.)

(Court of Appeal, First District, California. Feb. 8, 1907. Rehearing Denied March 7, 1907; Denied by Supreme Court April 8, 1907.)

JUDGMENT—DEFAULT JUDGMENT—PLEADINGS TO SUPPORT—ALLEGATIONS—CONCLUSION OF LAW.

An allegation that defendants became indebted to plaintiff in a certain sum is a sufficient allegation of the incurring of the indebtedness sued on to sustain a judgment by default, and is not defective as a conclusion of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 168–173.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Nellie Kililleа against Kate Wilson and another. From a default judgment for plaintiff, defendants appeal. Affirmed.

J. B. Gibson, for appellants. Davis & Klein, for respondent.

HALL, J. This is an appeal from a judgment taken by default against the defendants, who neither answered nor demurred to the complaint.

The only point raised upon the appeal is that the complaint does not state facts sufficient to constitute a cause of action, and therefore does not support the judgment. The complaint simply charges "that defendants are husband and wife, and within the two years last past became indebted to the plaintiff in the city and county of San Francisco, state of California, in the sum of nine hundred ($900) dollars," followed by allegations that no part thereof has been paid, save $280; that the sum of $620 is now due; that defendants have refused to pay the same, or any part thereof, although demand has been made therefor. It is insisted that the general allegation of indebtedness is but an allegation of a conclusion of law, and is not an allegation of a fact, and therefore the complaint states no cause of action. Without in detail discussing the various cases cited by appellant in support of his position, it is sufficient to say that, in a case later than any cited by appellant, it has been held that an allegation of a conclusion of law, which cannot be distinguished in principle from the allegation in this case, is sufficient to support a judgment by default. Penrose v. Winter, 135 Cal. 289, 67 Pac. 772. In this latter case, there was no allegation of nonpayment of a debt secured by mortgage, save that a specified sum "is now due and owing." The court, however, upon an appeal from a default judgment, held the allegation sufficient to support a default judgment, expressly overruling Ryan v. Holiday, 110 Cal. 337, 42 Pac. 891, where the contrary was held. The court said: "It is true that the allegation was made in the form of a legal conclusion, in which the material fact was merely implied; but, in the absence of any demurrer, such faults of pleading are cured by the judgment." The allegation that a certain sum "is due and owing" is an allegation of a conclusion of law of the same kind as is the allegation that defendants became indebted to plaintiff in a certain sum. There is no difference in principle between the two forms of pleading. The case of Penrose v. Winter, supra, is decisive of the point now under discussion.

Judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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4 Cal. App. 752

## SIMMONS v. ROWE et al. (Civ. 245.)

(Court of Appeal, Third District, California. Feb. 6, 1907.)

1. APPEAL—REVIEW—ERROR WAIVED IN APPELLATE COURT.

Where appellant attempts to overthrow the judgment by attacking certain findings only, it will be assumed that he has abandoned every other point of attack.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256–4261.]

2. PARTITION — PARTNERSHIP — SETTLEMENT AND ACCOUNTING — SUFFICIENCY OF EVIDENCE.

In an action for partition of real property, evidence examined, and *held* sufficient to support a finding that defendant in a partnership settlement and account had surrendered all interest in the property which was to remain assets of the partnership subject to a mortgage thereon to defendant.

3. JUDGMENT—CONSTRUCTION.

In an action by a retired partner to foreclose a mortgage on partnership real estate, the answer alleged that the note and mortgage was given to secure the payment of the mortgagee's interest in the partnership, and that, if the estimated value of his interest should prove to be excessive or erroneous, the note and mortgage would be held good only for the amount actually due him. *Held*, that a judgment decreeing that the mortgagee recover nothing was an adjudication that he had fraudulently overvalued his interest; that he had agreed to enforce the mortgage only for the amount actually due him; and that, when he brought the action, he had received all he was entitled to for his interest.

4. SAME—ABSENCE OF FINDINGS—EFFECT.

The facts that findings are waived does not derogate from the potency of a judgment.

5. ESTOPPEL—DEALING WITH PERSON ASSERTING TITLE.

Where a retiring partner, without objection, permitted the remaining partners to mortgage to him the entire interest in the partnership property to secure the payment of his interest, he was thereafter estopped to deny that they were vested with a complete title.

6. LIS PENDENS—RIGHTS OF PURCHASERS.

Under Code Civ. Proc. § 1908, providing that a judgment is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action, where a decree in an action to settle and adjust partnership interests adjudged that one of the partners was not entitled to any interest in the real estate, another partner having notice of the pendency of the action was bound by the judgment, and took nothing under a conveyance of the first-named partner's interest.

Appeal from Superior Court, City and County of San Francisco; F. H. Kerrigan, Judge.

Action by Alonzo R. Simmons against William T. Rowe and others. Judgment for plaintiff, and defendant Philip Simmons appeals. Affirmed.

Chas. W. Slack, for appellant. Edw. C. Harrison, for respondent Simmons. R. L. Simpson, for respondent executors. Leonard S. Clark, for S. Young.

BURNETT, J. For a proper understanding of the controverted questions involved in the case it is deemed advisable to make a somewhat extended statement of the pleadings and proceedings presented by the record. In doing so no substantial departure is made from the admirable recital contained in the brief of the learned counsel for appellant. The action was brought for the partition between plaintiff and the Rowe estate of certain real estate in San Francisco, and also to have it decreed that appellant "has no equitable title to any interest or share in or of said real estate or any portion thereof," and to require him "to make, execute, and deliver any conveyance that may be necessary to properly perfect the title thereto of said plaintiff and said estate of Wm. B. Rowe, deceased." The lower court found in favor of plaintiff and the Rowe estate, and made its interlocutory decree accordingly. From this, and from the order denying his motion for new trial, Philip Simmons, who was adjudged to have no interest in the property, has appealed.

The complaint, in appropriate phraseology, alleges that on and prior to February 20, 1868, the plaintiff, Alonzo R. Simmons, and William B. Rowe and Joseph Simmons and the defendant, Philip Simmons, were partners engaged in business in the city and county of San Francisco, under the firm name of Simmons, Rowe & Co., and that on said date they purchased for use in their partnership business, with partnership funds, the property in question. This allegation is not denied. The deed, executed by Albert Jacobs, and dated February 20, 1868, and granting the property to "Joseph S. Simmons, Wm. B. Rowe, Alonzo R. Simmons and Philip Simmons, partners in trade and doing business under the firm name of Simmons, Rowe & Co.," was received in evidence. The complaint further alleges that the partnership continued until May 20, 1872, when the defendant Philip Simmons retired therefrom and sold and transferred to the other members of the firm all his interest and share in and of the partnership property, including the property in controversy, and the partnership was thereafter continued by the other three until January 9, 1892, when it was dissolved by the death of Joseph S. Simmons. Appellant denies in his answer the sale and transfer by him. The court found it as alleged in the complaint. The complaint further alleges the death of Wm. B. Rowe, December 29, 1895, leaving a last will, its admission to probate, the appointment of executors and the disposition of his estate by will to certain of the defendants. There is no denial of these allegations. It also appears from the complaint that on May 18, 1877, Wm. B. Rowe began an action against plaintiff and Joseph S. Simmons for a dissolution of the partnership and settlement of its affairs, and that on October 17, 1899, by judgment rendered, the property in controversy was allotted to plaintiff herein and to the estate of the said Wm. B. Rowe. There is no denial of these allegations. The judgment roll in the action referred to was introduced in evidence. It appears therefrom that appellant, Philip Simmons, was not originally a party, but he was made so by an amended and supplemental complaint filed August 25, 1895, in which it was alleged that he had in his possession and under his control large assets of the firm for which he refused to account. He answered, denying that he had any assets of the firm, setting up the dissolution of the firm by his retirement in May, 1872, and pleading laches and the statute of limitations. The court found that he had retired from the firm, as alleged, and that the cause of action as to him was barred by laches and the statute of limitations. Judgment was entered accordingly May 19, 1894. As to the other parties to that action on October 17, 1899, the court found that Philip Simmons, as a partner, owned a one-fourth interest in the property from about January 1, 1863, until May 20, 1872, which interest he then resold and restored to his three copartners; that Joseph S. Simmons was indebted to the firm in the sum of $49,000, and that the only property of the firm consisted of this indebtedness and the real property here in controversy. The decree followed, awarding the said real property, as hereinbefore set out, in equal undivided shares to Alonzo R. Simmons and the estate of William B. Rowe, who had died during the pendency of the action.

The complaint in the present action proceeds that plaintiff is an owner of an undivided half of the property, and that certain defendants, as residuary devisees under the will of William B. Rowe, are the owners of the other half, subject to the right of possession in the executors for purposes of administration. This is denied by defendant. The court's finding was in favor of plaintiff. It is further alleged that the defendant claims an interest in the property by virtue of a deed to him from Joseph S. Simmons, which deed was executed after the commencement of the said action for dissolution of the partnership, and while Joseph S. Simmons was indebted as aforesaid to the firm in the sum of $49,000, a sum largely in excess of the value of the property, and was taken by said Philip Simmons with full knowledge of the pendency of said action and of said indebtedness. Furthermore, that said Philip Simmons claims some interest in said property by virtue of the fact that on May 20, 1872, no formal conveyance of it was delivered by him to his partners; but that a full settlement was then had in which he received full credit for the value of his interest, and it was then understood and agreed that the said property should continue to form a part of the assets of the partnership, after his retirement therefrom, and that he should have no further interest therein other than the mortgage thereon, which was at the time given him, and that he has no equitable interest in the said property. The answer of Philip Simmons denies these allegations, except as to his claim of ownership, and alleges that he became the owner of an undivided one-fourth interest in the property by virtue of the said deed from Albert Jacobs, February 20, 1868, and of another undivided one-fourth by said deed from Joseph Simmons. The court found in favor of plaintiff's claim. The executors and the trustees under the will of William B. Rowe filed an answer admitting the allegations of the complaint to be true, and they also filed a cross-complaint containing similar allegations to the complaint, which were similarly answered by Philip Simmons. Respondent, in his brief, explains the theory of his complaint based upon certain fundamental and somewhat elementary principles of partnership, and he cites numerous authorities to sustain his theory; but we may pass by this part of the discussion, as appellant does not question the sufficiency of the complaint. Appellant, however, attempts to overthrow the judgment by attacking two of the findings. It must be assumed that he has abandoned every other point of attack.

1. He claims that the evidence is insufficient to support the finding to the effect that it was, on May 20, 1872, understood upon the settlement and accounting then had between the parties and as a part thereof, that the real estate should continue to be a part of the assets of the partnership; that Philip Simmons should have no further interest therein, other than the mortgage thereon which was given him pursuant to said settlement; and that it was then agreed and understood that the settlement was effective to vest in the remaining partners the whole title to said real estate. Whether there is any substantial evidence to support this finding can be answered only in the affirmative. As pointed out by the able counsel for respondent, Philip Simmons himself testified: "I was a member of the firm when the property here in controversy was bought from Mr. Jacobs. It was with partnership money and for a place of business for the partnership. The building was constructed with partnership money. My connection with the partnership was terminated in May, 1872. The other partners agreed to give me $15,000 for my interest, and the papers were drawn up. No accounts were drawn off the books at that time that I know of. I then surrendered my position in the firm and went East. I retired from the firm as a partner, and thereafter did not pay any of the firm bills, nor collect any of the firm accounts, nor take any part in the management of the firm business. I sold my interest in the firm. At the time I retired from the firm and went East, I signed a deed to the property and acknowledged it. I don't know where the deed is now, but it was never delivered. They were to have the deed, but I never delivered it to them." Alonzo R. Simmons testified: "I heard Philip Simmons say that Joseph had agreed to give him $15,000 for his interest, and that the papers were all made out—the deeds and mortgages, or whatever it was, mortgages, and so forth. Joseph said in the presence of Philip that, if I would sign those papers, if there was anything wrong with them they would make it right." Also, the deed of Albert Jacobs, received in evidence, conveyed the property to "Simmons, Rowe & Co.," and the mortgage, also, to Philip Simmons of May 22, 1872, covered the whole of said property. The chattel mortgage, likewise, of the same date, transferred all the goods and chattels of the firm. Besides, in support of this finding, there is found in the record the judgment roll in the action for the foreclosure of said real estate mortgage in the Fifteenth district court. In the answer and cross-complaint in that action it is alleged that, on account of illness, Philip Simmons desired to sell to the other partners his interest in the partnership; that it was distinctly understood and agreed by the parties that, in case the estimated value of $15,000 should prove to be erroneous or excessive for Philip's interest, the note and mortgage therefor would be held good only for the amount actually due him. The answer of Philip to said cross-complaint contained no denial of his desire to sell, and that the note and mortgage were given in payment of his interest, but he avers that his interest was of the full value of $15,000. The judgment was in favor of the other parties and against Philip Simmons, and decreed that he recover nothing in his action of foreclosure. This was an adjudication that he had fraudulently overvalued his interest, that he had agreed to enforce the mortgage only for the amount actually due him, and that at the time of the bringing of the action he had received all that he was entitled to for the sale of his interest in the partnership property. It is true that findings were waived, but this circumstance does not derogate from the potency of the judgment. In Crew v. Pratt, 119 Cal. 149, 51 Pac. 42, the Supreme Court said: "It may be stated, as a general proposition, that a judgment is conclusive, not only as to the subject-matter in controversy upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were really met and decided"—citing Freeman on Judgments,

§ 253; Parnell v. Hahn, 61 Cal. 131; Lillis v. Emigrant, etc., Co., 95 Cal. 553, 30 Pac. 1108; Woolverton v. Baker, 98 Cal. 631, 33 Pac. 731; Howell v. Budd, 91 Cal. 342, 27 Pac. 747; Burris v. Kennedy, 108 Cal. 338, 41 Pac. 458; Estate of Hudson, 63 Cal. 457.

It is significant, also, that in the action to foreclose the mortgage there was no suggestion in the pleadings that the mortgagors were not the owners of the entire property, and it would seem under all the circumstances that appellant is estopped from denying that they were vested with a complete title, since he permitted them without objection to mortgage to him the entire interest. If the finding is not supported by the evidence, it is difficult to conceive how the omission could be supplied. It is not a case of the repudiation of the burden and the appropriation of the benefit of a contract, as appellant suggests. The cases cited by him are not in point. There was no repudiation, but an affirmance of the contract as made by the parties. It was and is insisted that effect be given to the real agreement of the parties, and the balance due to appellant, if any, be correctly determined and settled. In the foreclosure proceedings it was ascertained and adjudged by the court that the defendants in that case had discharged their obligations to the plaintiff therein, that they owed him nothing, and it is too late for appellant to question that judgment now.

2. The contention is made, also, that support is lacking for the finding in reference to the deed from Joseph S. to Philip Simmons; that it was executed while Joseph was in debt to his partners in excess of his interest in the firm, that Philip at the time had knowledge of this fact; and that the deed was ineffective to convey any interest. The only argument in this behalf made by appellant is that "the evidence shows that the deed was taken by Philip Simmons in good faith, on account of what the firm owed him, as well as money owing him by Joseph S. Simmons individually. It is the contention that the deed is valid in the absence of an attack for fraud." This argument is based upon the assumption that Philip was a firm creditor. But adversely to this position the question was settled by said judgment in the foreclosure suit. This judgment was rendered October 19, 1881, while the deed under which appellant claims was executed November 21st of the same year. Again, there was evidence before the court in the testimony of appellant from which the inference arises that the deed was taken by him on account of what "Joseph owed him generally." It is to be observed, also, that the deed itself purports to convey simply all the right, title, and interest of Joseph Simmons individually in and to the particular piece of property, and it was so understood by appellant, as shown by his answer herein, as he claims only one-fourth of the property by virtue of said deed. "It is well settled that a partner cannot transfer an individual interest in any specific article belonging to the firm. A transfer of the partner's interest, either by voluntary act or legal process, merely entitles the transferee to receive such partner's share of what may remain after a settlement of the partnership affairs and the payment of the partnership debts." Noonan v. Nunan, 76 Cal. 47, 18 Pac. 98; 22 Am. & Eng. Ency. of Law, p. 104. And, finally, the decree in the action to settle and adjust the partnership interests adjudged that Joseph was not entitled to any interest in the real estate, and by said judgment the whole of said property was awarded to this plaintiff and the Rowe estate. Hence, at the time he executed said deed, Joseph Simmons had nothing to convey, and Philip, having notice of the pendency of that action, is bound by the judgment. Section 1908, Code Civ. Proc. The case seems to have been fairly tried and justly determined, and there is no error apparent in the record.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

4 Cal. App. 717

## PEOPLE v. PALERMO LAND & WATER CO. (Cr. 280.)

(Court of Appeal, Third District, California. Jan. 31, 1907. Rehearing Denied by Supreme Court March 28, 1907.)

CORPORATIONS — CRIMINAL RESPONSIBILITY — JURISDICTION—JUSTICES OF THE PEACE.

Const. art. 6, § 5, provides that the superior court shall have original jurisdiction in all criminal cases amounting to felony, and in cases of misdemeanor not otherwise provided for. Article 6, § 11, authorizes the Legislature to fix the powers of justices, provided they shall not trench on the jurisdiction of courts of record. Code Civ. Proc. § 115, confers jurisdic-

**tion on justices of all misdemeanors punishable by fine not exceeding $500 or imprisonment not exceeding six months, or by both such fine and imprisonment. Pen. Code, § 7, provides that the word "person" includes a corporation. *Held*, that a corporation accused** of an offense, the punishment for which is by a fine not exceeding $200 or by imprisonment not exceeding 100 days, or by both fine and imprisonment, must be prosecuted before a justice; Pen. Code, §§ 1390–1397, relating to proceedings against corporations, providing simply a mode of procedure against corporations charged with crime which, if not applicable to prosecutions before a justice, would not divest the justice of jurisdiction, but Code Civ. Proc. § 187, permitting the use of any suitable mode of procedure, would apply.

Appeal from Superior Court, Butte County; E. P. McDaniel, Judge.

The Palermo Land & Water Company was convicted of the crime of failing and refusing to sell and deliver water for irrigating purposes, and appeals. Reversed, with directions to dismiss.

Carlton Gray and A. F. Jones, for appellant. U. S. Webb, Atty. Gen., for the People.

BURNETT, J. By an information filed by the district attorney in the superior court of Butte county, appellant was accused of the crime of "failing and refusing to sell and deliver water for the purpose of irrigating the orchard of William Hilemon." A motion was made to set aside the information on the ground "that before the filing thereof the defendant had not been legally committed by a magistrate." The motion was denied. A demurrer to the information was also interposed, setting forth: (1) That the court has no jurisdiction of the offense charged therein; (2) that it does not substantially conform to the requirements of sections 951 and 952 of the Penal Code; (3) that the facts stated do not constitute a public offense." The demurrer was overruled. Appellant was tried by a jury and convicted, and was sentenced by the court to pay a fine of $100. The appeal is from the judgment and an order denying the motion for a new trial.

The charging part of the information is as follows: "The Palermo Land & Water Company, being at all times herein mentioned a corporation, duly organized and existing under the laws of the state of California, for the purpose of selling, distributing and renting water, and having water to sell, rent and distribute, did, on or about the first day of July, 1905, at Butte county, state of California, and before the filing of this information, wrongfully, unlawfully, willfully, and maliciously refuse and fail to sell and deliver six inches of water to said William Hilemon for irrigating his orchard, after being tendered 75 cents payment in advance for one day's supply thereof, the said corporation having then and there water to sell, contrary to and in violation of the provisions or Ordinance No. 211, passed by the board of supervisors of Butte county, state of California, February 27, 1905; the orchard of the said William Hilemon being then and there within the limits of the unincorporated town of Oroville, in Butte county, state of California, and not within the limits of any incorporated town, city or village, contrary to the form, force and effect," etc.

Ordinance 211, upon which the prosecution was based, among other things provides:

"Section 1. The rate or compensation to be collected by any person, company or corporation in the county of Butte for the use of water supplied to any unincorporated city or town, or the inhabitants thereof, is hereby fixed and established as follows: * * * (29) For water used for irrigation or mining ditches, for irrigation of vineyards, orchards and similar uses, the rate shall not exceed 10 cents per inch, miner's measure, for day of twenty-four hours. * * *

"Sec. 3. Any person, company or corporation having water to sell, who shall refuse to deliver water to any person tendering payment therefor, in advance, for one day's supply, shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding $200.00, or by imprisonment in the county jail not exceeding 100 days, or by both such fine and imprisonment."

Among the grounds of demurrer, as already observed, is one involving the determination of the question of the jurisdiction of the superior court to try the offense charged against the appellant. The claim is made that it is within the exclusive jurisdiction of the justice court to try offenses wherein the punishment "does not exceed a fine of $500 or imprisonment not exceeding six months, or by both such fine and imprisonment." In the present instance the maximum punishment provided by the ordinance is a "fine of $200 and imprisonment for 100 days in the county jail."

To the consideration of this vital question of jurisdiction our attention will be directed. In the discussion it will be assumed that the ordinance in question is sufficiently pleaded, so that the court could take judicial notice of its terms. The jurisdiction of the superior court is conferred directly by the Constitution of the state; that of the justice court arises from the act of the Legislature. Section 5, art. 6, of the Constitution provides: "The superior court shall have original jurisdiction * * * in all criminal cases amounting to felony and cases of misdemeanor not otherwise provided for." The authority delegated to the Legislature in respect to the jurisdiction of the justice court is found in section 11 of said article 6. The provision is: "The Legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities and towns, or cities and counties, and shall fix by law the powers, duties and responsibilities of justices of the peace; provided, such powers shall not in any case trench upon the jurisdiction of the several courts of record," etc. In consonance with this grant of power the Legislature has clothed the justice court with jurisdiction over certain misdemeanors. The test and measure of its said jurisdiction are presented in section 115, Code Civ. Proc., as follows: "The justices' courts shall have jurisdiction of the following public offenses committed within the respective counties in which such courts are established: * * * (3) Breaches of the peace, riots, routs, affrays, committing a willful injury to property, and all misdemeanors punishable by fine not exceeding $500, or imprisonment not exceeding six months, or by both such fine and imprisonment." Therefore it would seem that the misdemeanor of which appellant has been convicted is "otherwise provided for" and not cognizable within the scope of the original jurisdiction of the superior court. The subject has received elaborate treatment from the Supreme Court on different occasions. If authority be needed to determine what seems so clear from the said provisions of the Constitution and Code of Civil Procedure, reference may be made to the following cases: Ex parte Wallingford, 60 Cal. 103; Gafford v. Bush, 60 Cal. 149; Green v. Superior Court, 78 Cal. 556, 21 Pac. 307, 541; People v. Joselyn, 80 Cal. 544, 22 Pac. 217; People v. Lawrence, 82 Cal. 182, 22 Pac. 1120; People v. Hamberg, 84 Cal. 468, 24 Pac. 298; People v. Tom Nop, 124 Cal. 150, 56 Pac. 786; and People v. Haagen, 139 Cal. 115, 72 Pac. 836.

The case at bar, however, is sought to be distinguished from the others on the ground that appellant is a corporation. In this behalf it is argued that the Supreme Court had jurisdiction to try defendant by virtue of the provisions of chapter 9, tit. 10, pt. 2, of the Penal Code, entitled "Proceedings Against Corporations." In the first place, independent of said chapter, it is clear that as far as jurisdiction of the offense is concerned, it can make no difference whether the accused be a corporation or an individual. Section 7 of the Penal Code provides that the word "person" includes a corporation as well as a natural person, and it would be judicial legislation to hold that "all misdemeanors" mean "all misdemeanors committed by a natural person." There is no reasonable foundation in the nature of things or such intrinsic difference between corporations and natural persons, of which I am aware, that requires the application of a measure of jurisdiction over an offense committed by a corporation different from that to be invoked where an individual is charged with the same or similar crime. The general rule in criminal cases where corporations are amenable to the criminal law, when limited to the officers through whom the corporation performs its corporate acts, is the same as in civil cases. "Private corporations in respect to their liability for the acts of their agents or servants stand before the law on the same footing as individuals." 10 Cyc. 1204, and cases cited. Nor do the provisions of Penal Code, §§ 1390 to 1397, inclusive, cited by respondent, affect the question at issue. That chapter simply provides a mode of procedure against corporations charged with crime. It is well settled that "the jurisdiction of the offense is not determined by the form of procedure by which it is prosecuted, but by the nature of the offense itself." Ex parte Wallingford, supra. Even if it be conceded that the form of procedure provided is applicable only to cases tried in the superior court, and that it seems to contemplate that all criminal charges against corporations shall be submitted to such tribunal, it still remains true that the test of jurisdiction afforded by the statute indubitably sustains appellant's contention.

In conclusion, it may be suggested that the procedure provided by section 1391 et seq. of the Penal Code may be made available to the justice court in the prosecution of corporations, although it must be remembered that the "means by which the defendant has been brought within the jurisdiction of the court does not affect its right to try him." Ex parte Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; People v. Pratt, 78 Cal. 345, 20 Pac. 731; Mahon v. Justice, 127 U. S. 708, 8 Sup. Ct. 1204, 32 L. Ed. 283. If this procedure be not apt and adequate, then resort must be had to the sections of the Code in reference to the trials of persons, and also to section 187, Code of Civil Procedure, which provides that "in the exercise of its jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

The judgment and order denying the motion for a new trial are reversed, and the court below is directed to dismiss the proceedings.

We concur: CHIPMAN, P. J.; HART, J.

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4 Cal. App. 717

## PEOPLE v. PALERMO LAND & WATER CO.

(Supreme Court of California. March 28, 1907.)

In Bank. Application for rehearing denied.

For opinion in Court of Appeal, see 89 Pac. 723.

PER CURIAM. The application that the above-entitled cause be heard and determined by this court, after decision in the District Court of Appeal for the Third Appellate District, is denied.

In denying the application, it is proper to state that section 1427, Pen. Code, as amended in 1905 (Ann. St. 1905, p. 706), apparently furnishes a rule of procedure in the case of a corporation charged with a misdemeanor triable in a justice's or police court.

150 Cal. 680

## WRIGHT v. FOX et al. (L. A. 1,703.)

(Supreme Court of California. March 20, 1907. Rehearing Denied April 9, 1907.)

1. TAXATION — ASSESSMENT — DESCRIPTION OF PROPERTY—SUFFICIENCY.

An assessment described the property as city or town lots within a designated county and on a designated street, without aiding the description by reference to map, plat, or tract. The property was not within the corporate limits of any city or town. *Held*, that the assessment was void under Pol. Code, § 3650, requiring the assessor to list all property within the county, and describe the same, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 722, 729.]

2. SAME—TAX DEED—VALIDITY.

A tax deed made under a void assessment is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1470.]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by W. M. Wright against Edwin R. Fox and others. From a judgment for plaintiff, defendant Edwin R. Fox appeals. Affirmed.

Cole & Cole, for appellant. O. B. Carter, for respondent.

HENSHAW, J. Plaintiff brought this action to quiet title in himself against the defendant Edwin R. Fox and others to certain pieces of land. All the defendants, save defendant Fox, made default. Fox answered, denied plaintiff's title, and asserted title in himself; his claim of title being based on tax deeds which he offered in evidence. To the introduction of these plaintiff objected, upon the ground they were irrelevant, immaterial, and incompetent. It was stipulated that, if the defendant failed to establish title in himself by virtue of the tax deeds, then title was in plaintiff, and the decree should be given accordingly. The court found the invalidity of the tax deeds and rendered its decree quieting title in plaintiff's favor. Defendant Fox moved for a new trial, and, his motion being denied, appeals from the judgment and from that order.

Section 3650 of the Political Code requires the assessor to prepare an assessment book with appropriate headings, in which must be listed all property within the county under the appropriate head. The assessment in this case is in the following language:

In Los Angeles County. In Jefferson St.
City or Town Lots.

| Lot | Block |
|---|---|
| 5 | 3 |
| 6 | 3 |

It would seem to be an assessment drawn under subdivision 3 of section 3650 of the Political Code; that is to say, an assessment of city and town lots. So regarded, it fails to designate the city or town. It describes property as being in the county of Los Angeles, in some city or town, and upon Jefferson street therein, lot 5 in block 3. Not only is no effort made to aid this description by references to map, plat, or tract, but we are advised by appellant that the land was not within the corporate limits of any city or town. We then have extraurban land assessed as being lot 5, block 3, in Jefferson street, a description which, of course, is fatally and radically defective. Labs v. Cooper, 107 Cal. 656, 40 Pac. 1042; Miller v. Williams, 135 Cal. 183, 67 Pac. 788. This is not at all the case presented in Baird v. Monroe (decided by this court on February 16, 1907) 89 Pac. 352, first, because here there was no attempt to aid the assessment by evidence; and, in the second place, this assessment pretends to fix property, not as in any tract, but as in Jefferson street, so it would seem impossible, even if the effort had been made, to aid so defective a description by evidence of a map.

The assessment being thus void, all subsequent proceedings, and the deed made thereunder, are likewise void. Grotefend v. Ultz, 53 Cal. 666; Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134; Dranga v. Rowe, 127 Cal. 506, 59 Pac. 944. The conclusion thus reached renders unnecessary a consideration of any of the further propositions of respondent against the sufficiency of the tax deed.

For the foregoing reason, the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.

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150 Cal. 682

## In re DE CIGARAN'S ESTATE. (L. A. 1,821.)

(Supreme Court of California. March 21, 1907. Rehearing Denied April 18, 1907.)

1. Bastards—Inheritance From.

Since Civ. Code, § 1388, which declares that where an illegitimate child, not acknowledged by his father, dies intestate, without issue, his estate goes to his mother, or on her decease to her heirs, provides a rule of succession for a special case, notwithstanding sections 1386 and 1387, providing that where the decedent leaves a surviving husband and neither issue nor parents, etc., the whole estate goes to the surviving husband, etc., the separate estate of an illegitimate daughter, not acknowledged by her father, passes on her death intestate and without issue, leaving surviving a husband, to another illegitimate child of her predeceased mother by another father, who had not acknowledged her as his child, and not to the surviving husband.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bastards, §§ 257–262.]

2. Same.

The rule of succession as to the whole estate of an illegitimate child, not acknowledged by her father, and who dies intestate, without issue, provided by Civ. Code, § 1388, has reference solely to the separate property of the deceased illegitimate, for sections 1400–1402 provide for the disposition of the community property owned by her and her husband.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bastards, §§ 257–262.]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

In the matter of the estate of Rosario de Cigaran, deceased, to determine the rights of persons to her estate. From a judgment awarding the whole estate to the surviving husband of the deceased, Refugio Padilla appeals. Reversed and remanded.

H. H. Appel, Henry T. Gage, and W. I. Foley, for appellant. J. Wiseman McDonald, for respondent.

ANGELLOTTI, J. This is an appeal from the judgment given in a proceeding brought under section 1664 of the Code of Civil Procedure to have determined the rights of all persons to the estate of Rosario de Cigaran, deceased. There is no dispute as to the material facts, which are as follows: Deceased died intestate. She was an illegitimate child, and had never been acknowledged or adopted by her father. At the time of her death she was the wife of Vicente de Cigaran, who survives her. She died without issue, legitimate or illegitimate. There also survived her one Mrs. Refugio Padilla, who was also an illegitimate daughter of the mother of deceased by a different father, and who likewise had never been adopted or acknowledged by her father. The mother of these illegitimates died prior to the death of deceased, having never been married, and, so far as appears, leaving no issue other than decedent and Mrs. Padilla. All the property of the deceased was her separate property; she having owned the same prior to her marriage. The only claimants of the estate, or any interest therein, are the surviving husband and Refugio Padilla. The judgment of the lower court awarded the whole estate to the surviving husband, and Refugio Padilla appeals therefrom.

The questions presented by this appeal turn upon the proper construction of various provisions of our statutes relating to succession, as the same existed at the date of death of the deceased; certain of said provisions having been amended since the death of deceased.

Respondent bases his claim on subdivision 5 of section 1386, Civ. Code, the general section relating to the succession to the property of intestates. That subdivision was as follows: "If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife." The theory of respondent in this regard is that appellant, by reason of illegitimacy, was not a sister or half-sister of deceased within the meaning of said section 1386. If this theory be well founded, as we think it is, there could, of course, be no question as to respondent's right under this provision of law to succeed to the entire estate, were it not for the illegitimacy of the deceased. The principal question on this appeal is as to the effect of this illegitimacy. By the express terms of section 1386, Civ. Code, the rules of succession therein laid down are applicable only "unless otherwise expressly provided for in this Code and the Code of Civil Procedure." Under this language in the general section whenever different rules are laid down for special cases, those rules are paramount to the general rules of section 1386, Civ. Code, and this is so whether or not such section can be construed as having any direct reference to the estates of illegitimates in the absence of provision therefor elsewhere. Section 1388, Civ. Code, which is the only provision of our law referring in terms to succession to property of illegitimates, provided as follows: "If an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or in case of her decease, to her heirs at law." This section provides a rule of succession for a special case, and must govern in every such case, notwithstanding anything to the contrary contained in section 1386, Civ. Code. It is upon this section that appellant bases her claim. The mother of deceased being dead, she claims the estate of deceased as her mother's heir at law.

There can be no doubt that the facts of this case bring it within the provisions of this section, if they be taken literally, and construed without reference to any other provision of the law. Deceased was an illegitimate child, she had not been acknowledged or adopted by her father, she died intestate, and she died without issue of any kind, legitimate or illegitimate. Her mother had died before her. Appellant was sole heir at law of the mother of deceased, by reason of section 1387, Civ. Code. That section declares: "Every illegitimate child is an heir of the person who, in writing signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been borne in lawful wedlock." Such mother not having left a husband surviving, her surviving issue, if legitimate, would have taken her (the mother's) whole estate under subdivision 1 of section 1386, Civ. Code, and as section 1387 put appellant in the same position, so far as the right to inherit is concerned, as if "born in lawful wedlock," she, as the only child, was the mother's sole heir at law. The contention that the further provision of section 1386, that such illegitimate child, although in certain cases the heir of his father, and in all cases the heir of his mother, "does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family," precludes appellant from taking the estate of her deceased illegitimate half-sister as the heir of her mother—is answered by the decision of this court in Estate of Magee, 63 Cal. 414, where the same question was directly involved. There the deceased, Suez, who was illegitimate, died after her mother, Susan. There had been another illegitimate daughter of Susan, Elizabeth, who also died before Suez, leaving a legitimate son. It was held that this son, as the lawful issue of the deceased illegitimate Elizabeth (who, by section 1387, was the heir of her mother, as if born in lawful wedlock), took the whole estate as against the legitimate children of Eliza, a deceased sister of the mother, Susan, not "perhaps" as heir of the deceased, Suez, but as heir of Susan, the mother of deceased. Subdivision 1 of section 1386, Civ. Code. Referring to the proviso last quoted from section 1387, Civ. Code, the court said: "This proviso does not apply to the case before us. If Eliza, the other daughter of Sabra, the common ancestor, had died leaving estate, the illegitimate children of Susan (Elizabeth or Suez), or their descendants, could not have represented Susan for the purpose of inheriting from Eliza. Eliza's estate would rather have escheated. We think the word 'kindred,' used in the above quoted clause, relates to the kindred referred to in section 1386, meaning lawful kindred. * * * By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different contention is clearly manifest. [Citing authorities.] In using the word 'kindred' in section 1387, the Legislature intended to preclude from the general words preceding it the construction that an illegitimate might by representation inherit from those whom the common law or section 1386 acknowledges as kindred." This case is conclusive upon the proposition that appellant was entitled to take, as her mother's sole heir at law, whatever of the estate of deceased such mother would have taken under section 1388, had she survived deceased.

It would appear, therefore, that under the express terms of section 1388, Civ. Code, appellant is entitled to the whole estate of deceased, to the exclusion of the surviving husband. Respondent contends that section

1388 was never intended to exclude the surviving husband or wife of an illegitimate, and that, construing it in connection with sections 1386 and 1387, Civ. Code, it is clear that section 1388 was intended to be operative only in the absence of surviving spouse and issue. We can see no sound basis for such contention, even granting, as we are inclined to do, contrary to views expressed in Estate of Magee, supra, which were obiter dicta, that section 1386 does apply to the estates of illegitimates in the absence of contrary provision elsewhere, and that sections 1387 and 1388, Civ. Code, do not make complete provision as to illegitimates so far as the Legislature has seen fit to declare.

The language of section 1388, Civ. Code, is such that, even when considered in connection with sections 1386 and 1387, it would not permit a construction making it anything else than the rule of succession applicable as to the *entire estate* of the illegitimate not acknowledged or adopted by his father, who dies intestate, without lawful issue. The rule prescribed is utterly at variance with that contained in section 1386, subd. 2, where it is declared, "if the decedent leaves no issue, the estate goes one-half to the surviving husband or wife, and the other half to the decedent's father and mother," etc., while here, if he dies without lawful issue, "*his estate goes* to his mother," etc. (The italics are ours.) It is also directly opposed to the rule declared in subdivision 5 of section 1386, Civ. Code, upon which respondent relies, and which has already been quoted. By express provision of section 1386, Civ. Code, that section is applicable only in the absence of express provision otherwise elsewhere. The Legislature saw fit to prescribe in section 1388 the absence of lawful issue of the illegitimate as the sole condition precedent to the succession of the mother, or, in case of her death, the mother's heirs, to the whole estate. It will be observed that, if respondent's theory as to the effect of section 1386 be correct, the lawful issue of such an illegitimate was, equally with the surviving spouse, protected by such section from the application of section 1388, Civ. Code, even if not mentioned therein, and yet provision was expressly made as to it in section 1388, while no mention was made as to a surviving spouse. Having in mind the possibility of marriage on the part of the illegitimate, as is shown by this provision as to lawful issue, the Legislature must also be presumed to have had in mind the possible survival of the other spouse, and its omission to specify his or her failure to survive as a condition precedent to the application of the rule must be deemed to have been intentionally made.

It is urged that, construing section 1388 according to its terms, a conflict is apparent between it and section 1387, in that, by section 1387, an illegitimate "in all cases is an heir of his mother," while by section 1388, in the absence of "lawful issue," the estate of an illegitimate goes to his mother, or, in case of her decease, to her heirs at law. Thus, it is said, where both the mother and the child are illegitimate, section 1387 makes the child the heir of his mother, while section 1388, taken alone, excludes him, and this is urged as a reason for such a construction of section 1388 as would make it subject to the provision of sections 1386 and 1387 so far as the rights of the surviving spouse and children are concerned. But we do not think that sections 1387 and 1388 are in conflict upon the point suggested. If they can be reasonably so construed as to avoid such a conflict, that construction must, of course, be adopted. Either section 1387, which has to do solely with the right of illegitimates to inherit, is to be construed as applicable only to inheritance by an illegitimate from a parent who is legitimate, or, for purposes of inheritance, the illegitimate child by reason of section 1387, Civ. Code, is to be held to be within the terms "lawful issue," as that term is used in section 1388, Civ. Code. See Estate of Wardell, 57 Cal. 484; Cherry v. Mitchell, 55 S. W. 689, 108 Ky. 1; In re Gorkow's Estate, 56 Pac. 385, 20 Wash. 563; Marshall v. Wabash R. Co., 25 S. W. 179, 120 Mo. 275; Bennett v. Toler, 15 Grat. 588, 78 Am. Dec. 638.

The language of section 1388 is plain and unambiguous. But one effect can be given to it if we take it as it is, and this we are compelled to do. The intention of the lawmaking power must be ascertained solely from the language it has used, where that language is so plain that it permits of but one construction, and the result of that construction is not so absurd as to make it manifest that it could not have been intended. Certainly, we cannot say that the exclusion of the surviving spouse from participation in the estate of a deceased husband or wife, even under the circumstances here appearing, is such a result, however unjust or improper it may be. The question as to whether such a surviving spouse should inherit is one solely for the Legislature, and the courts cannot substitute their own views thereon for the views of the lawmaking power. In Estate of Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80, the question was as to the right of the children of the deceased brother or sister to take as against the surviving husband; there being no issue, father, mother, brother, nor sister. Under subdivision 2 of section 1386, such children were entitled to their deceased parent's share where there was also a surviving brother or sister of the deceased, but subdivision 5 of section 1386, which has been before quoted herein, declared that the whole estate goes to the surviving husband or wife "if the decedent leaves a surviving husband or wife and neither issue, father, mother, brother nor sister," making no provision as to a child of the deceased brother or sister. It was held that the husband was entitled to all. The court said: "It is vain to argue against the injustice of the rule, or to contend that in a case like the one at bar the children of a deceased ought to have a share in the estate when there is not any surviving brother or sister, as well as when there is. Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts." See, also, Estate of Carmody, 88 Cal. 616, 620, 26 Pac. 373. This is clearly in point here. We may not be able to see any good reason for the exclusion of the surviving spouse of the illegitimate where she dies without lawful issue, and the giving of the estate to the mother of her heirs in preference to such spouse, but that fact is immaterial where the Legislature has said in unmistakable terms that it shall so be. That it did so say by section 1388, we can have no doubt.

Our conclusion is that section 1388 provides the rule of succession as to the whole estate of an illegitimate, not acknowledged or adopted by his father, who dies intestate, without lawful issue, except in so far as it may be qualified by section 1387, Civ. Code, and that this rule, being contrary to the general rules of succession prescribed by section 1386, must prevail over everything contained in that section. The case here is one where, in the language of section 1386, it has been "otherwise expressly provided," and by the express terms of such section it has no application here.

It should be observed that what we have said has reference solely to the separate property of the deceased husband or wife. Section 1400, Civ. Code, provides that the preceding sections, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents, and sections 1401 and 1402, Civ. Code purport to provide the rules as to community property.

The judgment of the superior court is reversed, and the matter remanded for such further proceedings as are not inconsistent with the views herein expressed.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

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5 Cal. App. 55

## DOYLE v. ESCHEN et al. (Civ. 238.)

(Court of Appeal, Third District, California. Feb. 21, 1907. Rehearing Denied by Supreme Court April 23, 1907.)

1. TRIAL—NONSUIT—ADMISSIONS BY MOTION.

A motion for nonsuit being substantially a demurrer to plaintiff's evidence, and the court having no right to pass on the weight of the evidence, every fact plaintiff's testimony proves or tends to prove must be taken by the court to be proven, and in the strongest light against defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 374.]

2. NEGLIGENCE—ACTION FOR INJURY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injury to plaintiff by falling into a vessel's uncovered hatchway, left open by defendant stevedores, whether plaintiff was guilty of contributory negligence *held*, under the evidence, a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 333-346.]

3. EVIDENCE—CONCLUSION OF WITNESS.

Where plaintiff sued for an injury resulting from falling into a vessel's uncovered hatchway at night, it was improper to overruled defendants' objection to a question whether any candle light around the hatchway would have enabled him to see the hole, if there was no light in the hold of the vessel; the question calling for a conclusion.

4. APPEAL—REVIEW—HARMLESS ERROR—STATEMENT OF WITNESS' CONCLUSION.

The overruling of an objection to a question calling for the witness' conclusion is harmless error, where a witness had been permitted to state substantially the same conclusion without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4166.]

5. SAME—ERROR CURED BY INSTRUCTION.

If, in an action for injury to plaintiff who fell into a vessel's uncovered hatchway at night, the admission of plaintiff's conclusion that, if there had been candle light around the hatchway, he could not have seen the hole unless there was light in the vessel's hold, was erroneous as in effect telling the jury that it was important to know whether candles placed, as defendants' witnesses said they were placed, would enable one approaching the hatch to see the opening itself, whereas the real purpose and only one required was to give warning that the hatch cover was off, the error became harmless when the court instructed to the effect that it made no difference whether the opening was illuminated or not, if the lights were placed there by the defendants, they were absolved from liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4180-4182.]

6. COSTS—STATUTE NOT REPEALED.

The act of 1895 (St. 1895, p. 268, c. 207), to establish the fees of county officers, jurors, witnesses, etc., did not repeal Act Feb. 9, 1866 (St. 1865-66, p. 66, c. 91), entitled "An act to regulate fees in the city and county of San Francisco," providing that the prevailing party shall be allowed 5 per cent., not exceeding $100, on the amount recovered, together with disbursements to be included in a judgment against the adverse party, etc.

Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by Edward Doyle against James C. Eschen and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Van Ness & Redman, for appellants. Sullivan & Sullivan, for respondent.

BURNETT, J. This is an action for damages. It was occasioned by respondent falling into the hold of a vessel through a ballast hatch in the lower deck. This hatchway, it is claimed, without the knowledge of respondent and without notice to him, and when he had reason to believe and did believe it was closed, was left open and unprotected and without any lights about it, through the negligence of appellants, who were stevedores engaged in ballasting said vessel. Defendants in their answer, either positively or on information and belief, denied the material allegations of the complaint, and alleged that "immediately after said hatch was uncovered and before said accident the employés of these defendants put a guard and fender around it and also placed lights near by it, which lights were burning at the time plaintiff fell into said hatch." The case was tried before a jury. A verdict in favor of plaintiff for $7,500 was rendered. Defendants appealed from the judgment and the order denying their motion for a new trial, and also from an order refusing to strike from plaintiff's memorandum of costs the item of $100, "alleged legal percentage on the judgment in favor of plaintiff herein." At the close of plaintiff's evidence, defendants moved for a nonsuit, which was denied.

Among the reasons urged for reversal, appellants seem most confident of their contention that by reason of contributory negligence respondent was not entitled to relief, and that their motion for a nonsuit should have been granted by the learned judge of the trial court. As so often affirmed by the higher courts, it is conceded that, "when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." Texas C. Ry. v. Gentry, 16 Sup. Ct. 1104, 163 U. S. 353, 41 L. Ed. 186. And, furthermore, that usually the consideration of negligence, including "contributory negligence," involves "a mixed question of law and fact, in which it devolves upon the court to say, as a matter of law, what is or amounts to negligence, and upon the jury to say as matter of fact whether or not in the particular case the facts in proof warrant the imputation of negligence. The court furnishes the standard. The jury adjusts the facts and pronounces them as up to or falling short of the requirements of the standard. When, however, the facts are clearly settled, and the course which common prudence dictates can be readily discerned, the court should decide the case as matter of law." Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555; Shearman & Redfield on Negligence, § 26; Davis v. Pacific Power Co., 107 Cal. 575, 40 Pac. 950, 48 Am. St. Rep. 156; Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993.

It is also not controverted that the motion for a nonsuit is substantially a demurrer to the plaintiff's evidence, and this being so, and the court having no right to pass upon the weight of evidence, every fact that plaintiff's evidence proves or tends to prove must be taken by the court to be proved. It must be taken in the strongest light as against the defendant (Purnell v. Raleigh & G. R. Co., 29 S. E. 953, 122 N. C. 832), and "at the hearing of such motion the evidence should be interpreted most strongly against the defendant." Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737; Hanley v. Bridge Co., 127 Cal. 236, 59 Pac. 577, 47 L. R. A. 597.

It is only in comparatively rare cases when the court is justified in saying as a matter of law that a given state of facts constitutes contributory negligence and precludes the plaintiff from recovery. It is easy to formulate a rule of contributory negligence, but it is much more difficult by that rule to measure the facts and determine incontestably the only conclusion warranted by the standard of ordinary prudence, caution, and discretion. In the accidents, occasioned by persons passing over the tracks of steam railroads, in order to obviate the imputation of contributory negligence, the concensus of the opinion of men of ordinary care and prudence has become crystalized into the demand, recognized by all the courts, that the injured party must stop and look and listen before placing himself in a position of such manifest peril. But in the multifarious positions of hazard involved in the varied pursuits and environments of modern civilization it is apparent that seldom can the law prescribe with precision what specific acts of omission or commission shall prevent the recovery of damages for injuries received. In most cases, under proper instructions, the determination of the question should be left to the decision of a jury.

In the present instance, considering the evidence most favorably to respondent, is it true that only one conclusion could be drawn by men of average caution and intelligence? And is that irrestible conclusion to the effect that respondent was guilty of such contributory negligence as to preclude recovery, notwithstanding the negligence of defendants? It is so insisted by appellants. The plaintiff testified that for two weeks he had been engaged at work as foreman ship carpenter in constructing and placing waterways in said vessel, as alleged in the complaint; that, when he began his work, the hatchways were all covered by spiked plank; "that there were three decks on the vessel and four ballast hatches on each of the two lower decks and none on the upper deck, and these hatches were only used for ballast; that during his work there the men and himself were accustomed daily to traverse the lower deck, walking over these hatches, which were nailed down, and carrying timbers on their shoulders; that when he left at 12 o'clock, March 18th, the trimming or ballast hatches were all covered up; that they worked upon the ship with candle light and it was too dark to do without it; that when he came back from lunch, about 1 o'clock, he went down the forward hatch and then walked aft on the lower deck; that he could not see much there, although there were a few lights scattered around with the men working; he walked on the starboard side in the same direction in which he had been accustomed to walk for two weeks and he fell into the ballast hole, and there was neither light, fender, guard, no rails there, and he could not see the hole in the darkness prevailing at the time; there was no person there to warn him, he had not been warned, and he did not know the ballast hatchway had been opened; and that was the first time it was open in two weeks. The hatch is only about three feet square. There was very little ballast in the hold at the time, but some came down upon him after he fell in. He knew the usual way of guarding hatchways. Some have ropes and stanchions; some have boxes put down into these holes, so that the ballast can go through them when they are working, and when they are idle they have covers. They are supposed to be covered all the time. The ballast was thrown through the side port into the between decks and wheeled aft to the trimming hatch in the middle deck and dump into that and so went through the corresponding hatch of the lower deck into the hold of the vessel. There was no cargo in the vessel and the work kept the coal dust moving all the time, especially on the lower deck."

In the cross-examination the additional circumstances brought out which may be of some moment are as follows: The ship was partially ballasted before it was brought to Spear Street Wharf where the accident occurred. Respondent did not know the ballasting was not completed at the time of the accident. That earlier in the day he had seen on the ship Mr. McDonald, the foreman of defendants, but he had no conversation with him, and he could not say what Mr. McDonald was doing there. That he did not know of any other men on board except those in his employ. He supposed McDonald was there to do ballasting, but he did not ask him and he did not take the trouble to go and see if the trimming hatch was open or shut, because he had no business to do so and because he knew the hatch was shut when he went to lunch. It is usual to put a light at the hatch when it is opened up. If he had seen one, it would have been notice to him to look out that the hatch might be open; that, when he came back from lunch, he saw them putting ballast from the outside onto the between decks. It is piled up there, and then wheeled and thrown down the trimming hatch. He did not know how much they had put in at that time. At the time he went down onto the lower deck he knew they were ballasting the ship, but took no pains to ascertain whether they were putting it through the center or the forward or the trimming hatch, and he did not hear any ballast dropping into the hold of the vessel. They would move the ballast with wheelbarrows from the middle deck to the place on the lower deck where they wished to deposit it in the hold. He did not see any wheelbarrows, nor any one near the ballast holes. He did not have any candle with him. During the two weeks before the accident, the only holes on the lower deck were the main hatch. The bulk of the ballast is put in through the main hatch, only a small portion through the trimming hatch. In walking about on the lower deck you could see probably nine or ten feet in front of you, but where this trimming hatch was you could not see more than two feet. There were lights on the lower deck on the starboard side of the vessel put there by his men but not near the trimming hatch.

In my judgment, the one circumstance lending some support to appellants' contention and adding some plausibility to their argument is the admission of respondent that, when he returned from lunch, he noticed the men engaged in the work of putting ballast into the ship. But the point at which they were loading was on the deck above and 40 or 50 feet away from the trimming hatch into which he fell. Besides, construing the testimony most favorably to respondent, it must be held that he had no knowledge or notice that they were using at that time any of the trimming hatches, or that the hatch in question had been opened; and it must be conceded that neither guard, nor fender, nor light was placed about or near the opening to warn him of danger. Under the circumstances, keeping in view the fact that he had traversed this deck daily for two weeks, that his work called him there, that when he left for lunch the hatch was closed as it had been all the time for two weeks while he was at work, that he was without warning that it had been changed, and recalling his observation that, "when the triming hatch is opened, it is customary to place a fender and lights about it to prevent accidents," can it be said that the law inexorably demands the conclusion that an ordinarily prudent and cautious man would not have followed the course pursued by respondent in this particular instance? It involves a question, in my opinion, open to candid disputation. Concerning it, a difference of opinion among intelligent men is justified and to be expected. It was proper to submit it to the jury.

While each case, owing to its peculiar facts, is somewhat of a "law unto itself," the higher courts with jealous care have guarded from unwarranted invasion the province of the jury to pass upon the question of contributory negligence where it is open to reasonable controversy. In Mosheuvel v. District of Columbia, 24 Sup. Ct. 57, 191 U. S. 247, 48 L. Ed. 170, the facts were these: "A water box was in the sidewalk at the bottom of three steps leading from plaintiff's house and there was no other place of egress from the house to the street. The box was so situated about midway of the steps that, in order to go from the lowest step to the sidewalk, it was necessary to go either to the right or the left, which it would have been safe to do, or to take a step longer than usual in order to step over the box and clear it. It was about four inches square, projecting irregularly above the level of the street, and was without covering of any kind. * * * It was in the same dangerous condition at the time of the beginning of plaintiff's occupancy of the house, about nine months before the accident, and so remained without change, and it was visible from plaintiff's house. The plaintiff stumbled over it once before, and she usually went on one side or the other, and not over the box, as she knew an unusually long stride was necessary. * * * She testified that from the time she left her door she had the box in view a part of the time, and had it in mind all the time and remembered its dangerous character, but on this occasion she attempted to step over it, did not take a sufficiently long step, and put her foot into the hole and was thrown, with the result that she suffered serious injury." The United States Supreme Court said that the question of contributory negligence was one for the jury and not for the court.

Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555, is another persuasive case. In the opinion the following facts are detailed, as shown by plaintiff's evidence: "For 10 years prior to March 1, 1893, the plaintiff had kept a cigar store on the west side of Polk street, between Sutter and Bush streets. Defendant for eight years had owned a building consisting of two stores north of and adjoining plaintiff's cigar store. The store of defendant next to plaintiff was a candy store, and in front of it and close to the building defendant had trapdoors placed in the sidewalk 4 feet wide by 4 feet 4½ inches in length, which opened on hinges from the center, and when opened were turned back flat upon the sidewalk. A stairway led from the opening to the basement which was used by the tenants of defendant's building. The iceman usually came in the morning at 7 o'clock, the ashman about 9 a. m., and the gasman at intervals, and these doors were opened to give them access to the basement. The sidewalk was 15 feet wide, of which 11 feet were clear of the trapdoor. Plaintiff was entirely familiar with the opening and had often been up and down the stairs, had seen it daily for years, and had spoken to defendant about it being dangerous. The opening had no railing nor protection around it. On the morning of March 1, 1893, about 9 o'clock, plaintiff being on the sidewalk in front of his store, was called by Mr. Weinshenk, who kept a jewelry store next north of the candy store, and went to the jewelry store either over or past the trapdoors, which were closed, talked with the jeweler a few minutes, during which interval the ashman came and one of the trapdoors was opened to admit him to the basement, and the plaintiff while returning south towards his store, thinking of what the jeweler had said to him and perhaps looking at a paper with some figures upon it, fell into the opening and was seriously injured. Plaintiff had seen the ashman drive up, but had not seen the trapdoor opened." Our Supreme Court held it was a proper case to submit to the jury.

If the law was properly declared in those two cases, then it cannot be held in the case at bar that the only reasonable conclusion that can be drawn from the evidence is that respondent was guilty of contributory negligence. It is claimed by appellants that the Van Praag Case is an extreme one, but it has been quoted with approval by the Supreme Court in subsequent cases, and it is in line with many other decisions of different courts, among which may be cited the following: Muller v. Hale, 138 Cal. 163, 71 Pac. 81; Sellers v. Market St. Ry. Co., 139 Cal. 268, 72 Pac. 1006; Woods v. City of Boston, 121 Mass. 337; McGuire v. Spencer, 91 N. Y. 305, 43 Am. Rep. 668; Lyman v. Co. of Hampshire, 140 Mass. 311, 3 N. E. 211; Engle v. Smith, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549.

It may be admitted that plaintiff's testimony was somewhat inconsistent, and portions of it seem absurd, but that was a consideration to be submitted to the jury, and it does not present a question of law to be determined by this court.

2. Complaint is made of the court's action in overruling the objection of appellants to the following question: "Q. State whether or not any candle light, even around the trimming hatch, around this hole, would enable you to see the hole itself, if there was no light at all in the hold of the vessel. A. No. Q. Why? A. The hold was black, and the deck was black, and there was coal dust moving around all the time. It was impossible to see the hole, unless there was a light below, or a hanging light, hanging lantern about there. Candles are no good." In my opinion the objection should have been sustained, as the question called for a conclusion, but it is apparent that the error was without prejudice.

The argument is made by appellants that the testimony in effect told the jury that it was important to know whether candles placed as defendants' witnesses say they were placed would enable one approaching the hatch to see the opening itself, whereas the real purpose and the only one required was to give warning that the hatch cover was off. But the answer to that is this: Respondent without objection had already testified substantially to the same effect when he said in cross-examination that "candles were no good," and that "they would not enable you to see on account of the coal dust." But, granting to the testimony the full effect claimed by appellants, it was completely nullified and the question rendered harmless by this instruction of the court: "If from the evidence you find that prior to the time that the plaintiff Doyle fell into the lower deck starboard ballast hatch lights had been placed around said hatch by the employés of the defendants, and that said lights were at said hatch before and at the time the plaintiff fell into the hatch, then and in that case your verdict should be against the plaintiff and in favor of the defendants." This instruction in effect told the jury that it made no difference whether the opening was illuminated or not. If the lights were placed there by defendants, they were absolved from liability.

3. Contention is made that $100 should have been stricken from the cost bill. This allowance was made by virtue of section 6 of "An act to regulate fees in the city and county of San Francisco, approved Feby. 9, 1866" (St. 1865–66, p. 68, c. 91), which is as follows: "The prevailing party shall be allowed five per cent. on the amount recovered, together with any sum by him so paid in a cause, as costs and disbursements, to be included in the judgment against the adverse party; provided said five per cent. shall be allowed only in litigated cases and said percentage shall not be allowed to exceed one hundred dollars in any one judgment." The validity of the statute has been upheld in Corwin v. Ward, 35 Cal. 198, 95 Am. Dec. 93; Whitaker v. Haynes, 49 Cal. 597; Fanning v. Leviston, 93 Cal. 188, 28 Pac. 943; Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 38 Pac. 635. But it is claimed that it has been repealed by the statute passed in 1895, entitled "An act to establish the fees of county, township and other officers and of jurors and witnesses in this state." St. 1895, p. 268, c. 207. The statute of 1895 does not, however, in express terms nor by implication repeal section 6 of the act of 1866. The title of the act of 1895 does not not purport to affect the question of costs in litigated or other cases. The reasoning of the Supreme Court in the case of Hilton v. Curry, 124 Cal. 84, 56 Pac. 784, seems decisive of this question in favor of respondent.

There is no other point requiring attention. The judgment and order denying the motion for a new trial and the order denying the motion to strike out the $100 percentage from the cost bill are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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## WATKINS et al. v. GLAS et al. (Civ. 281.)

(Court of Appeal, Third District, California. Feb. 23, 1907. Rehearing Denied by Supreme Court April 23, 1907.)

1. PARTY WALLS—RIGHT OF CONTRIBUTION.

Under an agreement that on the erection of a party wall by either of two adjoining owners the other owner would pay half the cost of the wall, an action lay by the assignees of the owner building the wall against the other to recover one-half the cost, even though the party building the wall had not paid for the construction thereof.

2. TRIAL—ORDER OF PROCEEDING.

Under Code Civ. Proc. § 607, providing that the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs: "the plaintiff after stating the issue and his case must produce the evidence on his part" —the court properly denied defendants' motion to open the cause by introduction of evidence in support of their plea in abatement and plea in bar.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 47, 57.]

3. PARTY WALLS—ACTION FOR CONTRIBUTION —EVIDENCE.

In an action for contribution under a party wall agreement, the contract between the owner building the wall and the contractors, specifying the extent of the work to be done and showing that under its terms the contractors were to erect the wall in question, was admissible in evidence.

4. CORPORATIONS — CONTRACTS — EXECUTION —SUFFICIENCY OF EVIDENCE.

An assignment by a corporation of a claim for contribution under a party wall agreement, signed by the president and secretary of the corporation and attested by its corporate seal, prima facie showed the due execution of the instrument, and was sufficient in the absence of evidence overcoming it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1797.]

5. PARTY WALLS—ACTION FOR CONTRIBUTION —APPRAISEMENT—BURDEN OF PROOF.

In an action for contribution under a party wall agreement providing that the cost of the wall should be fixed by an architect, the burden was on defendants to show any error or mistake in the appraisement made by the architect prejudicial to them.

Appeal from Superior Court, Madera County; M. L. Short, Judge.

Action by J. W. Watkins and another against Frank Glas, Jr., and another. From a judgment for plaintiffs and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

W. H. Larew, for appellants. Francis A. Fee, for respondents.

HART, J. Appeal from the judgment and an order denying a new trial.

The plaintiffs brought this action to recover from the defendants the sum of $475 alleged to be due under an agreement for the erection of a party wall. The plaintiffs, it is alleged, became the owners of the claim against the defendants under an assignment of the same to them by Wehrman & Meilikie, a corporation, incorporated and organized under the laws of California. Wehrman & Meilikie, in their corporate capacity, and the defendants were the owners, respectively, of adjoining lots in block No. 40 of the town of Madera, in the county of Madera. Having in view the erection of brick structures, with a party wall on the line of their respective properties, upon said lots, the said corporation and the defendants, on the 9th day of October, 1903, entered into an agreement in writing, by the terms of which said parties were to bear in equal proportion the actual cost of the erection of such party wall. This agreement is made a part of the complaint, and is inserted in hæc verba in the findings. On the 31st day of October, 1903, the said Wehrman & Meilikie, corporation, entered into a written contract with plaintiffs, by the terms of which the latter agreed for and in consideration of the sum of $1,903 to erect and complete, within a certain designated period of time, on the land of said corporation mentioned in the said party wall agreement, a one-story brick building, 25 by 80 feet in dimensions, with "a party wall on the easterly side thereof, and being the party wall referred to in the agreement of October 9th, 1903, aforesaid, and to furnish all of the labor and materials necessary for the erection, construction and completion of said building, including said party wall." The complaint alleges that the said sum of $1,903, for which plaintiffs agreed to erect said building, did not include the defendants' one-half of the cost of the construction of the party wall. The building, the erection of which was thus contracted for, was completed by the 1st day of February, 1904. Prior to the commencement of this action, the said corporation, Wehrman & Meilikie, in the language of the complaint, "by an instrument in writing, and under its corporate name and seal, and in pursuance of a resolution of its board of directors duly adopted and entered upon its minutes, authorizing the same, assigned and transferred to the plaintiffs its said account, claim and demand against the defendants, arising by reason of the construction of said party wall as provided in said agreement of October 9th, 1903, together with all its rights to receive from said Frank Glas Jr. and W. H. Glas, the one-half cost of said party wall." The facts of the transaction are fully set out in the complaint. A general and special demurrer to the complaint was overruled. The point urged under the special demurrer, involving the question of the running of the statute of limitations against the action, seems not to have been well taken, and, in fact, is not urged here. The complaint is verified.

The answer specifically denies the averments of the complaint, except that it admits that "the easterly wall of the building, erected by Wehrman & Meilikie, and referred to in the complaint as 'the party wall,' was erected partly upon the lands of defendants and partly upon the lands of Wehrman & Meilikie," and then sets up a special defense, alleging that the party wall was not so "constructed as to be useful and beneficial to the defendants equally with Wehrman & Meilikie, but, on the contrary, defendants allege that said party wall, so called, was not so constructed that the defendants could properly connect their buildings therewith," and then charges that "defendants' building afterwards joined thereto [the party wall] was badly cracked and damaged to the loss and damage of defendants in the sum of $500," etc. The defendants also set up, by way of a special plea in bar, a judgment alleged to have been made and entered on the 7th day of November, 1905, in their favor and against the plaintiffs, in an action in which these plaintiffs were plaintiffs and the defendants, Frank and W. H. Glas, and Wehrman & Meilikie, corporation, were defendants, "upon and on account of the same action set forth in plaintiffs' complaint herein; that said judgment was rendered and entered after the trial of the action upon its merits." The same judgment is pleaded in abatement of this action, and in this connection the answer alleges that said judgment is not final, and the action, therefore, still pending, because the "six months within which an appeal may be taken therefrom" have not expired.

The party wall agreement, which is the basis of this action, or so much thereof as is material to the controversy, reads: "* * * Now, therefore, in consideration of the premises it is agreed, that either the party of the first part [Wehrman & Meilikie] or the parties of the second part [defendants] may construct and complete the said party wall, and it is agreed that if the party of the first part constructs and completes said party wall, that the parties of the second part will, upon completion thereof, pay to the said party of the first part, the one-half (½) of the actual cost of the erection and completion of said party wall, vice versa, it is agreed that if the parties of the second part erect and complete the said party wall, the said party of the first part will, upon completion thereof, pay to the parties of the second part, the one-half (½) of the actual cost of the erection and completion of said party wall, and it is further agreed, that the westerly one-half of said party wall shall be the property of the party of the first part, and that the easterly half of said party wall shall be the property of the parties of the second part, and it is agreed that the value or actual cost of the erection and completion of said party wall shall be fixed and determined by Julian Mourot, Architect of Modesto, California, and we agree to conform to and abide his decision and valuation of the same. * * *" It is stated in the complaint that "after the completion of said building and said party wall, and on or about the 1st day of February, 1904, said Julian Mourot did, in pursuance of said agreement of October 9, 1903, ascertain and determine that the one-half of the cost of the erection and construction of said party wall, was the sum of $475," and that defendants on or about the same date were notified that the sum had been by Mowrot ascertained to be one-half of the actual cost of the party wall. The answer does not traverse this allegation, but merely denies that the sum mentioned or any other sum is due or owing the plaintiffs on account of the construction of the party wall. Plaintiffs were given judgment, from which and from the order denying a motion for a new trial this appeal is taken.

Appellants contend that the complaint does not show that the corporation, or assignor of plaintiffs, had acquired any right from the defendants which they could assign. The right arising under the party wall agreement is, it is claimed, the same as that accruing to a surety who, having satisfied the obligation of the principal debtor, may sue to require his co-sureties to contribute their shares of the burden, and that, therefore, the failure of the complaint to show that the assignor of the plaintiffs had actually paid the contractors for the entire cost of the party wall, and thus had paid out money for and on behalf of defendants on account of the cost of the erection of such wall, renders it amenable to the objections of the demurrer. In other words, it is urged that this is nothing less than an action by a surety against his co-surety for contribution, and that the complaint falls short of stating a cause of action because it does not appear therefrom that the assignor of plaintiffs has expended any money for which he is entitled to contribution or reimbursement by the defendants. In their opening brief, appellants state their position, and it may best be presented in their own language: "This is an action against the defendants to compel the payment of contribution by the defendants on account of a party wall erected by the plaintiffs at the instance of Wehrman & Meilikie. It is settled law that an action for contribution will not lie until actual payment has been made by the party entitled to receive the contribution—in this case, Wehrman & Meilikie, a corporation. Having actually paid nothing on account of the defendants, Wehrman & Meilikie could not themselves have maintained an action for contribution against the defendants. It follows they had no right of action to assign."

The first question is whether the court erred in its order overruling the demurrer. The complaint is not a carefully drafted pleading, for it is not altogether free from the criticism of uncertainty. A special demurrer to this point was not interposed, however, and we think its averments and the manner thereof sufficient to withstand the attack of a general demurrer.

It is, of course, clear that the duty of contribution to which a coterminous owner of a party wall may become liable, and that of the contribution to which a surety is entitled at the hands of his co-sureties upon his extinguishment of the obligation of the principal debtor, both originate in the equitable consideration that those who have assumed a common burden ought to bear it equally. In the very nature of the case, as between co-sureties, one is not entitled to contribution until he is damnified by actual payment, and it is settled that he has paid more than his share. It is, in other words, only where one surety has discharged the entire burden that he is authorized to maintain an action against his co-sureties to compel contribution of their just proportion of the obligation. In the case before us the same event, in principle, has occurred, which would authorize a surety to institute suit. As we have seen, in the principles from which the duty of contribution in both cases arises, there is no distinction. The only difference perceivable between the two is in the manner of the discharge of the "principal obligation." As, in the case of a surety suing for contribution, he must necessarily plead and prove that he has discharged the principal obligation or paid more than his share of the debt, so in the case of the party erecting the wall he must plead and prove that he has erected the wall or caused it to be erected, and that the defendant has made use of it without contributing his part of the cost of its erection. In an action by a surety against his co-sureties it would not for a moment be conceived to be necessary for him to allege that he had not borrowed the money with which to extinguish the common obligation. It would make no difference, so far as his cause of action was concerned, whether he had or not; and, of course, it could be no defense against his claim to say that he had. So, in an action for contribution for a party wall, we do not understand it to be required that the plaintiff shall allege that he has actually paid the cost of the erection of the wall, and we do not apprehend that it would be a defense against such contribution to say that the party erecting the wall has not settled with or paid the builder for the labor and materials bestowed upon its construction. In other words, in a suit for contribution by a surety against his co-sureties, the gist of the action is essentially the payment by the plaintiff of the money due under the principal obligation. There is, of course, in such case no other cause for damnification than the fact of having been compelled to discharge a burden which it was not incumbent upon him to bear alone. On the other hand, in an action for contribution for a party wall the gravamen of the complaint is the building of the wall by one and its subsequent use by the other coterminous owner. In such case, the injury or damnification suffered by the plaintiff is in the fact of having built the wall and its subsequent equal use without compensation by the defendant.

The complaint in the case before us alleges the agreement between the parties to bear an equal proportion of the expense of the erection of the wall. It alleges that the wall was erected by one of said parties—the assignor of the plaintiffs—and avers that the cost thereof was appraised by the architect upon whom the parties had agreed should perform that office and the notification of defendants of such appraisement, and alleges that the defendants have made use and are making use of the wall, and have not paid their share of the burden of its erection. We think that this was sufficient to fortify the complaint against the attack of the demurrer. The allegations of the complaint show that by reason of the obligation flowing from the party wall agreement the relation of debtor and creditor was established between the defendants and the corporation, and that the latter thereby became vested with a right of or chose in action against the former. It is not questioned that a thing in action is assignable, and it cannot be doubted that the corporation in this case had a right to assign its claim as a chose in action against the defendants to plaintiffs (section 954, Civ. Code; Burlock v. Peck, 2 Duer [N. Y.] 98), or that such a claim may be assigned either for a valuable consideration or for the purposes of collection, subject, of course, to any defense, set-off or counterclaim which might have been interposed in a suit upon the claim by the original owner. Sections 368, 440, Code Civ. Proc.

There are other specifications of error, some of which involve the point we have been discussing, and of which we have disposed against the contention of appellants. There was no proof offered upon the special defense that the wall was so defectively constructed as to have caused damage to the building of defendants by adjoining the building to the wall, and there is therefore no attack upon the finding of the court that the allegations of such special defense are untrue. It is urged that the court erred in refusing to permit appellants to introduce in evidence a certain judgment in support of their special pleas in abatement and in bar of the present action. The transcript shows the following proceeding upon this point: "The defendants moved the court that they be permitted to open the cause by introduction of evidence in support of their plea in abatement and plea in bar. The motion was denied by the court, and defendants excepted." The ruling was proper. Section 607, Code Civ. Proc. Trial courts, in the exercise of their discretion, may depart from the orderly procedure prescribed by that section for the conduct of a trial; but error cannot ordinarily be predicated upon their refusal to do so. The onus was, of course, upon the plaintiffs to prove the issue tendered by the pleadings, and the court was proceeding only in the orderly way when it refused to grant the motion of counsel, and required plaintiffs to first present their case. No effort was subsequently made during the progress of the trial to introduce the alleged judgment in evidence. The proper time for its offer was after the plaintiffs had closed their case. We cannot speculate as to what the ruling of the court might have been had the judgment been offered in evidence at the proper time. If it had been pertinent to the issue raised by the special pleas set up by the answer, no doubt it would have been admitted.

The contract between the corporation and the plaintiffs for the construction of the building of the former was admitted in evidence, under an objection that "the evidence was irrelevant, incompetent, immaterial and contained nothing tending to establish a right of recovery in the plaintiffs." The contract contains, of course, a provision specifying the extent of the work to be done, and shows that under its terms the contractors were to erect the party wall in question. As a circumstance tending to show the fact of the construction of the wall by the contractors under their contract with the assignor of plaintiffs, the instrument was properly admitted in evidence. Nor is there any force in the objection to the admission in evidence of the assignment to plaintiffs by Wehrman & Meilikie of the claim against the defendants. The specific objection to this evidence is that "no assignment was proven in the manner required by section 1940 of the Code of Civil Procedure." The assignment was signed by the president and secretary of the corporation and attested by its corporate seal. This was a prima facie showing of the due execution of the instrument, and, in the absence of other evidence overcoming it, it was sufficient. There was no proof offered by the defendants that the assignment was not what it purported to be.

The attack upon the appraisement of the cost of one-half of the erection of the party wall by the architect agreed upon by the parties cannot be sustained. Defendants were notified of the appraisement made by the architect at or near the time the same was made. There is no challenge of this appraisement in the answer, nor was there any evidence offered in support of the objection here made to it. The facts as disclosed by the pleadings and the evidence do not sustain appellants in the declaration that the appraisement is void upon its face. It appears to have been conducted substantially in accordance with the terms of the party wall agreement. If there was any error or mistake prejudicial to the defendants by such appraisement, the burden was upon them to show it. This they have not done.

The fourth finding of the court is assailed upon the ground that there is no evidence in the record to sustain it. The part of the finding to which objection is made is that the one-half of the cost of erecting and completing said party wall to be borne and paid for by the defendants "was not a part of said consideration sum of $1,903, but was in addition thereto." The "consideration sum of $1,903" referred to is the amount for which the contractors agreed to erect the building of the corporation. The contention of appellants is that there is no evidence to warrant the finding. There is considerable discussion in the briefs upon this point, the basis of which is the affirmation of the fact by the plaintiffs and its denial by the defendants in the pleadings. And it might be suggested that the position of counsel for defendants upon this question, considered in connection with his contention as to the prerequisites necessary to establish a right of action in the assignor of plaintiffs, is disingenuous. If, as he contends, the item of the half of the cost of the construction of the party wall, to be borne by defendants, was included in the consideration price of $1,903 paid by the corporation for the construction of its building, what becomes of his position attempted to be maintained both upon the demurrer and upon a review of the evidence that the assignor of plaintiffs had acquired no right of action, and consequently nothing that it could assign, because it had paid nothing for defendants on account of their half of the cost of the party wall? But in our view of the case, and of the legal relations existing between the parties, as heretofore expressed, the proposition is immaterial. We have held that the erection of the party wall by the assignor of plaintiffs and the subsequent use thereof by the defendants created a liability in favor of the former against the latter. This, as we have endeavored to explain, was upon the theory that the contractors, having under their contract with their assignor constructed the building of the corporation, including the party wall, could legally look to no one for compensation for the entire wall but the corporation. Its building having been erected previous to the construction of the building of the defendants, it was necessary for it to build the entire wall. It is therefore, in our conception of the case, unimportant whether or not the half of the cost of the wall to be paid for by the defendants was included in the "consideration price of $1,903" for the erection of the building of the corporation, for, as we have said, the fact remains that, in any event, so far as this record shows, the corporation was legally bound to pay for the erection of the entire wall. The contract for the construction of the corporation's building contained a proviso to the effect that the cost of one-half of the party wall was to be paid for by defendants. The record does not disclose the specific reason why that proviso was inserted in the contract between the plaintiffs and the corporation. The testimony of J. W. Watkins, one of the plaintiffs, shows that the contracts for the erection of both buildings were awarded at about the same time. Plaintiffs did not secure the contract for the erection of the building of the defendants. If it were important to find the reason, the insertion of that proviso in the contract might be accounted for upon either one of two theories. The one that the parties to that contract were under the belief that the plaintiffs would also secure the contract for the erection of the building of the defendants; the other that the proviso was designed as an assignment to plaintiffs of the claim of the corporation against the defendants for the latter's half of the cost of the wall. But whatever may have been its purpose, or the reason for its insertion in the contract, we repeat that we are of the opinion that the fact which the proviso, as is claimed by appellants, tends to prove, is of no importance or materiality; that is, the fact of whether or not the item of the half of the cost of the wall to be borne by the defendants was included in the sum of $1,903 paid by the corporation to plaintiffs for the construction of its building. If, however, the finding is of any importance, we think the testimony of Mr. Watkins sufficiently supports it.

There are no other assignments of error, except that it is declared in a general way that the evidence does not sustain the judgment. All of the evidence, with the exception of that of Mr. Watkins, was of a documentary nature. There was no evidence offered by the defendants. We think the judgment is well supported by the evidence. We have reached a conclusion in this case upon a somewhat different theory from that presented by the attorneys in their briefs. We have preferred to confine ourselves in the determination of the principal point in issue to a consideration alone of the history of the entire transaction as disclosed by the record evidence. It is clear that the wall was erected by the plaintiffs under a contract with their assignor. It is, of course, equally clear that the plaintiffs are entitled to their pay for the work, and that the defendants should, from every consideration of equity and fair dealing, under the circumstances presented by the record, be required to pay their just proportion of the expense incurred in the erection of the wall, cannot be disputed.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

5 Cal. App. 83

## BISHOP v. OWENS et al. (Civ. 243.)

(Court of Appeal, Third District, California. Feb. 25, 1907. Rehearing Denied by Supreme Court April 23, 1907.)

1. Appeal—Notice—Conformity to Record.

Where the appeal record discloses that a preliminary injunction had been granted, a notice of appeal from "the order denying plaintiff's motion for a preliminary injunction" was ineffective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2145.]

2. Same—Effect of Notice.

A notice of appeal from an alleged order denying plaintiff's motion for a preliminary injunction, entered July 1, 1903, was ineffective as an appeal from an order dissolving a preliminary injunction previously granted, entered July 8, 1903.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2145, 2146.]

3. Injunction—Irreparable Injury.

A complaint alleged that the defendants were repeatedly entering on the roof of plaintiff's building, and hanging ladders and falls with ropes attached thereto from an adjoining building on the west of plaintiff's building, preparatory to further entering upon such premises, and are threatening to continue the commission of such acts, and to suspend other arti-

**cles, materials, and things therein.** It also alleged that defendants threatened to, and would, unless restrained, continue to enter on plaintiff's above-described property, and that an action at law would not afford an adequate remedy because such trespasses would be so frequent that a multiplicity of suits would be necessary, and that defendants' acts, if permitted to continue, would ripen into an easement, etc. *Held*, that the general averment that the injury to plaintiff would be irreparable was not sustained by the facts, and did not justify an injunction on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 14.]

4. SAME—GROUNDS OF EQUITABLE RELIEF—STATEMENT.

In a suit to restrain certain alleged trespasses, a mere declaration in the complaint that complainant's property will suffer irreparable injury, unless an injunction be granted, and that a multiplicity of legal actions can be avoided thereby, is insufficient to sustain the issuance of an injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 223–232.]

5. PLEADING—CONCLUSIONS.

Allegations that defendant's continued trespass on plaintiff's property "will ripen into a right and easement on plaintiff's property," and will "constitute and create an obstruction to the free and peaceable use" of such property, were mere conclusions of the pleader, and insufficient to sustain an injunction restraining such acts.

6. APPEAL—THEORY OF TRIAL COURT.

Where an order sustaining a demurrer was correct, the reasons on which the ruling was founded in the trial court were immaterial on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3408, 3412.]

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Suit by Lewis H. Bishop against Len D. Owens and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Chas. E. Naylor, for appellants. Henry C. McPike, for respondent.

HART, J. Suit brought for an injunction to restrain certain acts complained of by plaintiff. A preliminary injunction was granted upon the verified complaint and an order to show cause why the same should not be made permanent. Defendants interposed a general demurrer to the complaint. On August 23, 1903, the court entered an order sustaining the demurrer, with leave to plaintiff to amend within 10 days. The plaintiff failed to amend within the time allowed, and thereupon judgment was entered in favor of defendants herein. From this judgment plaintiff takes this appeal.

On the 8th of July, 1903, the court, upon motion and application of defendants, made an order upon the complaint alone dissolving the preliminary injunction and discharging the order to show cause. There is in the transcript a "notice of appeal from the order denying plaintiff's motion for a preliminary injunction, made and entered herein on the 1st day of July, 1903"; but, as the record shows that a preliminary injunction had been granted by the court, there is no ground upon which such an appeal may be presented. Presumably, it was designed to take an appeal from the order dissolving the temporary injunction. If so, the attempt was abortive; but, as we think the court below committed no error in its order sustaining the demurrer, it becomes immaterial whether or not an appeal has been properly taken from the order dissolving the temporary injunction, because, if the facts are insufficient under a general demurrer to state reasons for the final relief prayed for, certainly they were not sufficient to warrant the continuance of the temporary restraining order. The stating part of the complaint alleges: "That all of said defendants repeatedly and continually are entering upon the roof of the building hereinafter named, and are engaged at the present time in hanging and suspending ladders and falls with ropes attached thereto from an adjoining building on the west of the aforesaid building, over and above the roof of the aforesaid No. 506 Market street and No. 7 Sutter street, and in the space above said roof, preparatory to continue and further enter upon said premises, and have and are threatening to continue daily, hourly, repeatedly, and continuously to continue in the commission of said acts, and have threatened and are threatening to suspend other articles, materials, and things therein. That all of said defendants, and each of them, threaten to and will, unless restrained by order of this court, continue to enter upon plaintiff's said described premises, and the whole thereof, repeatedly and continuously, daily and hourly, and that actions at law would afford plaintiff no plain, speedy, and adequate remedy, for the reason that such trespasses will be so frequent and of interminable and numerous duration that such a multiplicity of suits will be necessitated thereby, and the injury resulting from each act of trespass would be so trifling in amount as compared with the expense and inconvenience of prosecuting actions at law to recover damages therefor, as to leave plaintiff without adequate remedy, and, furthermore, such acts of the defendants, if permitted to continue, will in all probability result in a breach of the peace of this community, because, unless defendants be restrained by the court, plaintiff must resort to necessary force in preventing the violations of his rights of property consequent upon such trespasses; and, furthermore, such acts, if permitted to continue, will ripen into a right and an easement on plaintiff's property aforesaid, and such imminent, threatened, and actual pending acts of defendants as aforesaid do and will so constitute and create an obstruction to the free and peaceable use of the aforesaid property of plaintiff as to interfere with the comfortable enjoyment of said property, and will injuriously affect the said plaintiff in the reasonable possession thereof."

It is impossible to ascertain from the complaint exactly what the nature of the acts is which plaintiff charges interfere, and will continue to interfere, with the full and peaceable enjoyment of his property, and which, he alleges, will, if not restrained, crystallize into a "right and easement" on his property. We are not advised by his pleading whether a structure is to be constructed above the roof of his building, or whether the acts of defendants will result in the establishment of some mechanical or other contrivance that will cause a nuisance and consequently an interference with the comfortable enjoyment of his property, or will result in suspending some article over or near his roof that is likely to fall upon his building and thus damage it; nor, in fact, does he allege any fact or facts in such manner as to clearly inform us what acts the defendants have committed, or are committing or threatening to commit, which will result in permanent or irreparable injury to his property. The averment that the defendants are "repeatedly and continually entering upon the building hereinafter named," and "are engaged at the present time in hanging and suspending ladders and falls with ropes attached thereto from an adjoining building on the west of the aforesaid building, over and above the roof of the aforesaid No. 506 Market street and No. 7 Sutter street, and in the space above said roof," certainly furnishes no light by which we can determine how the plaintiff's property will be permanently injured.

The allegation that the plaintiff will be driven to a multiplicity of suits involving trivial amounts, and will thus be put to vexatious, troublesome, and expensive litigation, is a mere conclusion, having no support in the other pleaded facts. In Gilbert v. Arnold, 30 Md. 29, it is said: "A court will not grant an injunction to restrain a trespasser merely because he is a trespasser, yet it will interfere where the injury is irreparable, or where full and adequate relief cannot be obtained at law, or where the trespass goes to the destruction of the property in the character in which it has been held and enjoyed, or where it is necessary to prevent a multiplicity of suits." But "these grounds of the jurisdiction," says the editor of the American Decisions (footnote, p. 500, vol. 11), "when closely examined, resolve themselves into one—that of irreparable injury." The test for the determination of the question of whether or not a particular injury will be irreparable seems to be this: Will a verdict of damages at law afford complete compensation for it? If so, then the fundamental ground for invoking the power of equity is lacking, to wit, a want of adequate remedy at law. "But an injury resulting from trespass may be incapable of compensation in damages from a variety of reasons: (1) It may be destructive of the very substance of the estate; (2) it may not be capable of estimation in terms of money; (3) it may be so continuous and permanent that there is no instant of time when it can be said to be complete so that its extent may be computed; (4) it may be vexatiously persisted in, in spite of repeated verdicts at law; (5) it may be committed by one who is wholly irresponsible, so that a verdict against him for damages would be entirely valueless." Jerome v. Ross, 11 Am. Dec. 501, footnote. The question of whether irreparable injury will result from the trespass must, of course, depend and be determined upon the facts of the particular case. The court must be fully advised by the pleaded facts of what the acts of the alleged trespasser are so that it can readily be determined whether the injury complained of meets the criterion of "irreparable injury." "Before a court of equity will interfere to restrain a trespass, it must appear that the injury to result from the trespass will be irreparable in its nature. And it is not sufficient simply to allege that fact, but it must be shown to the court how and why it will be so." Mechanics' Foundry v. Ryall, 75 Cal. 602, 17 Pac. 703; Branch Turnpike Company v. Board of Supervisors, etc., 13 Cal. 190; Waldron v. Marsh, 5 Cal. 120. "The facts must be stated, that the court may see that the apprehensions of irreparable mischief are well founded." Carlisle v. Stevenson, 3 Md. Ch. 499; Pomeroy's Code Remedies, 680, and cases there cited. "* * * It will be observed that it [the complaint] contains only a general averment as to the injury caused or to be caused by the acts of the defendant. No facts are set out showing how or why the supposed injury would be irreparable; but to obtain an injunction, when irreparable injury is relied upon, such a showing is necessary." California, etc., Co. v. Union, etc., Co., 122 Cal. 643, 55 Pac. 591. Tested by the foregoing principles, we think the complaint falls short of stating a cause calling for the equitable relief demanded. The mere declaration that plaintiff's property "will suffer irreparable injury," and that a "multiplicity of legal actions" can be avoided by equitable interference, is not, as we have said, enough.

In this case, while it is charged in paragraph 6 of the complaint that the defendants have threatened to continue committing the acts charged in paragraph 2, we are unable to determine from the complaint, as we have before suggested, how and in what manner and why the alleged threatened continuation of such acts would result in permanent and irreparable injury to the plaintiff. The mere allegations that the continued trespass "will ripen into a right and easement on plaintiff's property," and will "constitute and create an obstruction to the free and peaceable use of the aforesaid property," are only the conclusions of the pleader. The facts alleged do not, as they should, speak for themselves as to the nature and extent of the injury threatened. There is an allegation in the complaint, as we have seen, that the defendants are "engaged at the present time in hanging and suspending ladders and falls with ropes attached thereto from an adjoining building on the west of the aforesaid building, over and above the roof." The purpose of these "ladders and falls with ropes attached thereto," and the threatened suspension of "other articles, materials, and things therein," is not disclosed by the complaint. In any event, as we have said, there is nothing in the averments from which we can determine how or why, if at all, these acts would cause irreparable injury to plaintiff's property. If we understand the complaint, the ladders, falls, etc., are not attached to and suspended from plaintiff's building, but to and from an adjoining building. Of course, if by clear and appropriate allegations it appeared from the complaint that the attachment of the ladders and falls to and their suspension from the building of an adjoining owner would interfere with and obstruct plaintiff's free, full, and peaceable use of his property, and in consequence would inflict upon him a permanent and an irreparable injury, to redress which there was no adequate remedy at law, then and in such case plaintiff would be warranted in invoking the equitable remedy of injunction; but, to secure this remedy, as we have shown by the authorities, there must be a clear case disclosed by the pleaded facts of threatened irreparable injury which could not adequately be repaired by any of the existing legal remedies. If a full statement of all the facts and circumstances of the alleged trespass by the defendant upon plaintiff's property were clearly shown by the complaint (and surely they have not been), it might appear that the defendants "might be crowded out of the way by a molliter manus imposuit" (Mechanics' Foundry v. Ryall, supra), or it might appear that the plaintiff is afforded a complete remedy at law.

In his reply brief, appellant complains that counsel for respondents, in his presentation of his side of the cause on this appeal, has abandoned the position taken by him in the court below. In the lower court, he says, the defendants argued that the facts stated in the complaint show that the acts of the defendants were protected under the doctrine of damnum absque injuria, and that it was upon that view and theory that the learned judge of the court below sustained the demurrer. The sufficiency of the facts to state a cause of action was necessarily challenged by the demurrer, whatever may have been the specific moving cause of the ruling. We cannot perceive, however, how, from the face of the complaint, it could be determined that the facts bring the acts charged within the rule of damnum absque injuria. As we have before observed, the purpose for which the alleged acts have been committed and are threatened to be continued is not disclosed by the facts stated in the complaint. Indeed, the pleaded facts do not even furnish ground from which a conjecture as to the purpose of the acts complained of might be ventured. We do not, therefore, see how it can be determined from the complaint whether the alleged acts of defendants were and are excusable under that rule or not; but we are not concerned with the particular reasons upon which the ruling in the court below was founded.

It is enough for us to be convinced that the ruling was correct, and, being so convinced, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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5 Cal. App. 19

## LEONHART v. CALIFORNIA WINE ASS'N.

(Civ. 294.)

(Court of Appeal, First District, California. Feb. 16, 1907.)

1. APPEAL — HARMLESS ERROR — RULINGS ON DEMURRER TO PLEADINGS.

A complaint, for the breach of a buyer to carry out his contract to buy specified quantities of four different kinds of grapes for $16 a ton for three kinds and for $15 a ton for the fourth kind, alleged that, by reason of a delay of the buyer in accepting the grapes as they matured, a large portion of them which were delivered had shrunk to an amount exceeding 40 tons. The complaint did not specify the kinds of grapes thus damaged, but showed that but little over three tons of the $15 a ton variety were delivered, and the evidence disclosed that the shrinkage was in one of the kinds sold at $16 per ton. *Held*, that the error in overruling a demurrer to the complaint, on the ground that it could not be determined what portion of the shrinkage occurred in the different kinds, was harmless.

2. EVIDENCE — PAROL EVIDENCE—CUSTOM TO CONTRADICT WRITTEN CONTRACT.

A written contract for the sale of specified quantities of specified kinds of grapes for specified prices, to be delivered at the winery of the buyer, without limitation as to the amount of the daily deliveries, cannot be contradicted by proof of a custom relating to the daily deliveries at the winery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1945–1952.]

3. APPEAL — RECORD—SPECIFICATION OF ERRORS.

Where the record fails to specify what instructions were requested by the party complaining, or on what issues he desired a special verdict, no error is pointed out.

4. EVIDENCE — ADMISSIBILITY — BREACH OF CONTRACT.

In an action by a seller of grapes for breach of contract of sale by the buyer caused by his delay in accepting grapes at his winery as they matured, evidence that other sellers were delayed in the delivery of their grapes was admissible to show the congested condition and lack of facilities at the winery for accepting grapes.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by P. R. Leonhart against the California Wine Association. From a judgment for plaintiff, defendant appeals. Affirmed.

Pillsbury, Madison & Sutro and Johnston & Jones, for appellant. L. L. Cory, for respondent.

KERRIGAN, J. This is an action brought by the respondent against the appellant to recover damages, claimed to have been sustained by respondent through the failure of appellant to carry out the terms of a contract for the purchase of grapes. The amended complaint alleges that respondent delivered to appellant a certain quantity of different kinds of grapes specified in the contract, and, by reason of the delay of appellant in accepting the grapes as they matured, a large portion of the grapes which were delivered had shrunk in weight to an amount exceeding 45 tons; that a portion of the grapes, the Malagas, was rejected altogether; that the Malaga grapes were then sold for the highest market price, and the appellant charged the difference between the amount actually realized and the contract price. The action was tried before a jury, which rendered a verdict in favor of the plaintiff. The appeal is from the judgment, and from the order denying defendant's motion for a new trial.

Appellant demurred specially to the amended complaint, on the ground that it could not be determined therefrom what portion of the shrinkage in an amount exceeding 45 tons occurred in the Zinfandel grapes delivered, what portion occurred in the Burger grapes delivered, what portion occurred in the Faher Zagos grapes delivered, and what portion occurred in the Sultana grapes delivered. The contract fixes the price for each of the first three kinds named at $16 a ton, and that of the last kind named at $15 a ton. Had the price to be paid for each variety of grapes been the same, it would have been immaterial how the shrinkage was distributed. The complaint is uncertain in the respect pointed out in the demurrer, and it should have been sustained. The error, however, is highly technical, and concerns a mere trifle in amount. Only a very small proportion of the loss could have been in the $15 a ton variety, for the complaint shows that but a little over three tons of that variety were delivered, and then again the evidence discloses that the shrinkage was in the Zinfandels alone. The error is harmless, and does not affect the case. The court will not reverse a judgment for such an error. In the case of Alexander v. Central L. & M. Co., 104 Cal. 536, 38 Pac. 411, it is said: "It is not in all cases where error has been committed by trial courts in overruling demurrers to complaints upon the grounds of ambiguity or uncertainty that this court will order a reversal of a judgment based upon a trial of the issues made by the complaint and answer. The same rule applies to errors of this character as is invoked as to all other errors of the court. It must not be a mere abstract error, but it must be prejudicial and injurious error in order to avail appellant; otherwise he has no cause of complaint." See, also, Holland v. McDade, 125 Cal. 353, 58 Pac. 9; Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258.

The appellant in its answer set up as a special defense that the crushing capacity of the winery at which these grapes were to be delivered did not exceed 100 tons per day; that the amount of grapes which might be delivered at the winery under ordinary conditions was in excess of 9,000 tons during a season lasting usually about 90 days; that, because of the impossibility of handling at the winery at one time all the grapes of one season, it was known and understood by all persons delivering grapes, including respondent, to be customary for each person to deliver each day at the winery only such proportion of the daily capacity of the winery as all the grapes to be delivered by each individual for each season bore to the whole amount of grapes to be delivered to the appellant during such season; that this custom was well known to respondent at the time of entering into the contract, and constituted one of the conditions thereof; and that it was in accordance with this custom that appellant notified respondent not to deliver his grapes at the winery during the season of 1904 at a greater rate than one or two loads per day. The contract provides that respondent will sell and deliver his grapes at certain prices, etc., "and payment will be made as the grapes are delivered." The trial court took the view that these allegations did not constitute a defense to the written contract sued on by respondent. Under the terms of the contract, respondent could make as many deliveries within a given time, say a day, as he pleased, and upon delivery he was entitled to payment. The written contract makes no limitation as to deliveries. The alleged custom would have limited the deliveries to one or two loads a day, and in that respect would have been inconsistent with the written contract. A custom inconsistent with the terms of a written contract is not the proper subject-matter of a defense. In the case of Withers v. Moore, 140 Cal. 591, 74 Pac. 159, the defendant contended that the contract sued upon was subject to a certain custom. In that case, at pages 596, 597 of 140 Cal., pages 160, 161 of 74 Pac., it is said: "The contract as made by the cablegrams and explained in the letter is not uncertain with respect to the point in question. It is a positive agreement by the defendant to buy the coal in question of the plaintiff at the price of 24s. 3d. per ton, to be delivered to him free of any expense of freight, insurance, exchange, or duty, all of which were to be paid by the plaintiff. To attach to this contract the custom of San Francisco, the effect of which would be that if the cargo was not received until after July 1, 1894, the defendant would pay 35 cents less per ton than the price agreed upon, would be to vary the terms of a written contract by parol evidence. The Code provides that evidence may be given of 'usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation.' Code Civ. Proc. § 1870, subd. 12. And in accordance with this principle it has been held that it is not competent to vary a written contract by parol proof of a custom where the contract is certain in its terms. Holloway v. McNear, 81 Cal. 156, 22 Pac. 514; Milwaukee Co. v. Palatine Co., 128 Cal. 74, 60 Pac. 518; Ah Tong v. Earl Fruit Co., 112 Cal. 681, 45 Pac. 7; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916.

The appellant urges that the trial court should have submitted to the jury certain special issues requested by it. Upon this point the bill of exceptions shows only this: "The defendant California Wine Association requested the court in writing to direct the jury to find a special verdict in writing upon certain issues in the case specified in such written request, but the court declined to direct the jury to find a special verdict in writing upon all or any of the issues as requested by this defendant, and this defendant duly and regularly excepted to the failure of the court to so instruct the jury." The record fails to specify what the request was, or upon what issues the appellant desired a special verdict. It fails to point out any error. Error will not be presumed; all intendments being in favor of the regularity of the action of the trial court. Sheehy v. Shinn, 103 Cal. 325, 37 Pac. 393; In re Yoakam, 103 Cal. 503, 37 Pac. 485; Rudel v. Los Angeles Co., 118 Cal. 281, 50 Pac. 400; McLennon v. Wilcox, 126 Cal. 51, 58 Pac. 305; People v. Clark, 121 Cal. 633, 54 Pac. 147.

The plaintiff was permitted, over the objection and exception of the defendant, to show that persons other than the plaintiff were delayed in the delivery of their grapes. To take the testimony of one witness by way of example, speaking of deliveries, T. R. Chipman said: "My experience was I got from one to two loads; very seldom two loads. * * * I saw 36 teams delivering there. I didn't stay there night and day. I left my wagon and would go there next day with my team, and get in; if I couldn't, I would wait all day and go back home at night again, and go again. That is the way I got my grapes delivered. That was the condition as long as I was there. I had to get a number from the office. Each man went in in rotation in accordance with the number he got from the office. They would not accept them in any other way." The testimony was not admitted to show that, because others were delayed in the delivery of their grapes, plaintiff was also delayed. It was admitted to show the congested condition and lack of facilities at the winery for accepting grapes.

It is claimed the court erred in other of its rulings on the admission of evidence, and that it erred in the rejection of certain evidence, and in a motion to strike out certain testimony. We have examined the rulings, and are of the opinion that no error was committed regarding them.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

5 Cal. App. 25

## RILEY v. LOMA VISTA RANCH CO. et al.

(Civ. 340.)

(Court of Appeal, Second District, California. Feb. 18, 1907.)

1. Appeal—Order of Reversal—Effect.

Where the order of reversal was not qualified by any specific direction, but was general, on the ground that the findings were not justified by the evidence, the effect of the reversal was to award the parties a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4626.]

2. Same—Proceedings After Remand.

A judgment for one of the defendants, a corporation, was reversed on appeal on the ground that the findings were not justified by the evidence, without any specific directions as to the further proceedings in the case. After remand plaintiff, having recovered against the other defendants, moved for judgment against the corporation defendant, which the court granted, the order reciting that the cause came on to be heard on plaintiff's motion for judgment against defendant corporation on remittitur from the Court of Appeals, and it appearing to the court that all questions of fact were finally adjudicated by the judgment against the other defendants, and, good cause being shown therefor without objection, it was ordered that judgment be rendered against the corporation. *Held*, that such proceedings did not constitute a new trial, to which the corporation defendant was entitled, as defined by Code Civ. Proc. § 656, and that the judgment was therefore erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4684-4690.]

3. Same—Right of Appeal—Waiver.

Defendant corporation did not waive its right to appeal from the judgment so entered by its failure to object to the proceedings in the trial court.

4. Same—Vacation of Findings.

Where on a former appeal, a judgment in favor of defendant was reversed, because the findings were not justified by the evidence, such findings thereby became of no further effect, and were unavailable to sustain a subsequent judgment for such defendant in the trial court, under Code Civ. Proc. § 657, subd. 6, providing that a former verdict or decision may be vacated and a new trial granted on the application of the party aggrieved for insufficiency of evidence to justify the verdict or other decision.

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by William Riley against the Loma Vista Ranch Company and others. From a judgment in favor of plaintiff against defendant ranch company, it appeals. Reversed and remanded.

Barstow & Variel, for appellant. Will D Gould and James H. Blanchard, for respondent.

SHAW, J. The appellant issued to one Howard its warehouse receipt for a quantity of hay. A part of the hay had been delivered when, by assignment, the respondent acquired title to this receipt, demanded the balance of the hay, and upon failure to deliver the same instituted suit against the Loma Vista Ranch Company for the value thereof, making as parties defendant in said suit Howard and one W. L. Riley, who was respondent's immediate assignor. Upon the trial he obtained judgment against Howard and W. L. Riley; but as against the Loma Vista Ranch Company it was adjudged that plaintiff's (respondent's here) complaint be dismissed and that said company have judgment for its costs. The respondent moved for a new trial, which motion was, by order of court, denied, and on his appeal therefrom this order was reversed without any qualification. William Riley v. Loma Vista Ranch Co., 1 Cal. App. 488, 82 Pac. 686.

On November 24, 1905, and after the remittitur had been filed in the superior court, judgment was rendered on motion in favor of respondent William Riley, and against the Loma Vista Ranch Company, and from this judgment the latter appeals on the judgment roll.

The order of reversal was general and not qualified by any specific direction, the ground assigned therefor being that the findings were not justified by the evidence. The effect of this reversal was to award to the parties a new trial of the case. Falkner v. Hendy, 107 Cal. 49–54, 40 Pac. 21, 386; Myers v. McDonald, 68 Cal. 163, 8 Pac. 809; Irwin v. Towne, 43 Cal. 23; Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74.

The position occupied by the parties was identically the same under this reversal as though no trial had ever been had. "A new trial is a re-examination of any issue of fact in the same court after a trial and decision by a jury or court, or by referees." Code Civ. Proc. § 656. They were left free to make such proper amendments to the pleadings as the trial court might allow, and upon the trial to introduce any and all competent evidence. The case was before the court for trial de novo. Heidt v. Minor, 113 Cal. 385, 45 Pac. 700.

It appears that no trial within the meaning of said section 656, Code of Civil Procedure, was ever had. The judgment from which the appeal is taken recites that the cause came on to be heard "on plaintiff's motion for judgment against defendant Loma Vista Ranch Company, a corporation, upon remittitur from the District Court of Appeals"; that the parties were present in court by counsel, the rendition of the former judgment, motion for new trial and order denying same, and that on appeal the same was reversed and, "it appearing to the court that all questions of fact in said cause were determined and finally adjudicated by judgment heretofore entered against W. W. Howard and W. L. Riley, and good cause being shown therefor, and no objection being made thereto, it is ordered," etc. It thus appears that there was an entire absence of the procedure necessary in a re-examination of the issues of fact joined by the pleadings. No findings were made, and, in view of the recitals in the judgment, we cannot, in aid thereof, indulge in the presumption that they were waived. People v. Forbes, 51 Cal. 628. The findings made upon the former trial were brought up in the transcript, but the facts then found by the court supported, not this judgment, but the former judgment, and embodied the decision, which this court then held was not justified by the evidence.

The fact that counsel for appellant did not object to the procedure cannot be construed as consent thereto. Failure to object was not a waiver of its right to appeal from any erroneous order or judgment.

Respondent insists that the transcript does not contain the notice of motion made for judgment. This is no part of the judgment roll, and, further, appellant not only concedes that the notice was served, but makes no point on account of its absence. It is apparent that the judgment was rendered through misapprehension and inadvertence of both the respondent and the court, and that counsel for appellant did not conceive that the interest of their client demanded that they enter any objection to the procedure. Want of criticism should not be construed as commendation of the position assumed by appellant in this behalf.

It is urged that the trial court should now be directed to enter judgment for appellant on the findings made on the former trial. Section 657, Code Civ. Proc. provides that "the former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: * * * (6) Insufficiency of the evidence to justify the verdict or other decision." This court in its opinion on the former appeal held that the findings upon which appellant now bases its claim for a judgment were not justified by the evidence and reversed the order of the trial court denying a motion for a vacation of the decision, and, in effect, ordering that a new trial be granted. These findings having been set aside, and the record excluding the presumption that any were waived, and none other having been made in any subsequent trial, it follows that there are no findings to support any judgment.

The judgment is reversed and the cause remanded for a new trial, as heretofore ordered.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 26

## SPENCER v. SAN FRANCISCO BRICK CO. (Civ. 137.)

(Court of Appeal, First District, California. Feb. 28, 1907. Rehearing Denied by Supreme Court April 29, 1907.)

1. DAMAGES — PUNITIVE DAMAGES — NEGLIGENCE.

Under Civ. Code, § 3294, authorizing an award of punitive damages in an action not arising from contract, where defendant has been guilty of oppression, fraud, or malice, express or implied, an award of punitive damages cannot be based on simple negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 200.]

2. TRESPASS—PUNITIVE DAMAGES—"OPPRESSION."

Defendant constructed a bulkhead adjoining plaintiff's property for the purpose of retaining dirt, gravel, sand, etc. The bulkhead was negligently constructed, so that after it had remained standing for two years it gave way, following a period of wet weather, and precipitated gravel, dirt, etc., onto plaintiff's premises, destroying a portion of his fence and chicken house. *Held*, that such facts were insufficient to show gross negligence, wantonness, or oppression, required by Civ. Code, § 3294, in order to justify an award of punitive damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 144.]

3. SAME—EXCESSIVENESS.

A bulkhead negligently erected on defendant's property gave way during wet weather, and allowed earth to escape onto plaintiff's premises, and destroyed a portion of plaintiff's fence and chicken house. Plaintiff testified that the fencing was worth $125 and the chicken house $30, while a carpenter testified that the fencing and chicken house could both have been restored to their original condition at a cost of $25. *Held*, that a verdict allowing plaintiff $600 damages was excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 145.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Carl Spencer against the San Francisco Brick Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

Fisher Ames, for appellant. Robert P. Troy and Andrew Thorne, for respondent.

HALL, J. Plaintiff sued defendant for damages caused to his premises by the giving way of a bulkhead upon the premises of defendant, and recovered a judgment for the sum of $600. Defendant moved for a new trial upon the grounds of excessive damages, and errors of law occurring at the trial. The motion was denied, and defendant appealed from the judgment and order denying the motion for a new trial.

The action was for damages to the premises of plaintiff resulting from the giving way of a bulkhead on the premises of defendant, whereby dirt, gravel, sand, etc., fell against the fence and chicken house of plaintiff, and injured the same, and gravel, dirt, etc., fell upon the plaintiff's premises, and timbers of the bulkhead were projected onto and over plaintiff's premises.

Plaintiff is the owner of a lot in the city and county of San Francisco 25 feet in width, the rear of which abuts against a lot owned by defendant, and used by it for the purpose of dumping dirt. To retain this dirt, defendant, some two years previous to the accident causing the injury complained of, built a bulkhead which, on January 15, 1901, following a spell of rainy weather, gave way. Plaintiff's lot was occupied by a dwelling house, and the rear portion of the lot was inclosed with a board fence, and in the corner was a chicken house nine feet square and eight feet high, built of boards, and two sides of which were formed by the rear and side fences of plaintiff. The giving way of the bulkhead, and the consequent falling of the heaped-up earth, pushed the fence and chicken house out of position, broke some of the boards from the fence, as well as caused some of the beams and timbers of the bulkhead to project into and over the rear portion of plaintiff's lot. Plaintiff testified that the fencing affected was worth $125, and the chicken house $30, while a carpenter called by the defendant testified that the fencing and chicken house could have been restored to their original condition at a cost of $25. There is no evidence that the dwelling house was in any way injured. Indeed, a photograph of that portion of the premises claimed to have been injured, attached to the transcript, shows that the injury was confined to the rear portion of the lot, which was used for a chicken yard. It is perfectly apparent from the evidence in the record that the actual damage could not have exceeded $155, even if the chicken house and fences had been destroyed, which they were not, but only pushed out of position and considerably damaged.

It is only upon the theory that the case was one where punitive damages may be given that the verdict and judgment can be sustained. "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, malice, express or implied, the plaintiff, in addition to the actual damages may recover damages for the sake of example, and by way of punishing the defendant." Civ. Code, § 3294. Simple negligence will not justify an award of punitive damages. Moody v. McDonald, 4 Cal. 297; Sloane v. Southern Cal. Ry. Co., 111 Cal. 687, 44 Pac. 320, 32 L. R. A. 193. There is no evidence in this case that the injury was willfully or wantonly done, or that defendant was guilty of gross negligence in the construction of the bulkhead, or in the use of its lot, and there is no pretense of any fraud in the case. It was simply shown that after standing for two years the bulkhead gave way, following a spell of wet weather. From this it may be presumed that it was negligently constructed, or that too much earth was negligently heaped against it.

In the case of Chicago Ry. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373, cited with approval in Mabb v. Stewart, 133 Cal. 556, 65 Pac. 1085, it is said: "We are prepared to go a step further, and say that in any and all actions for damages, where the proof fails to show anything that will warrant an implication of willfulness, recklessness, or rudeness, it is the duty of the court to inform the jury, where requested so to do, that they cannot inflict punitive damages. Not to do so in a case free from doubt would be an abdication of judicial authority, and a permission to the jury to violate the settled principles of law." In the case at bar there was no evidence of recklessness, willfulness, or rudeness in the original trespass, but it is claimed on the part of the plaintiff that there is evidence of oppression, in this: that after the accident had happened plaintiff requested defendant to repair the damage, and it neglected to do so. It is in evidence that immediately after the accident plaintiff notified a bookkeeper of defendant to fix up plaintiff's property, and again in May following the accident he made the same request of the secretary of the defendant, which he repeated to the president of the defendant in the following July, but nothing was done by the defendant until after the action was brought, although defendant promised to do so. Oppression is defined by the Standard Dictionary as "the act of subjecting to cruel and unjust hardships." The mere omission to repair a damage unintentionally, though negligently, done, cannot be said to be subjection to cruel and unjust hardship. Plaintiff had an immediate legal remedy for his damage in an action therefor. So far as the projecting timbers, etc., constituted a nuisance on his property, he could have abated the same by his own act. They did not interfere with the use of the dwelling house, but only interfered with the use of the rear portion of the lot to a trifling extent.

Substantially this case presents the aspect of a defendant neglecting to make reparation to a plaintiff for damage which he has negligently but unintentionally caused the plaintiff, and for which plaintiff had a legal remedy. If upon such a showing exemplary damages may be awarded, it is difficult to see why such damages may not be awarded in all cases of injuries resulting from negligence when the party in fault refuses to make good the damages on demand. The evidence does not disclose a case of fraud, malice, or oppression. For this reason the damages allowed are excessive, and a new trial should have been granted.

There being no evidence to justify an award of punitive damages, the court also erred in refusing the instruction requested by defendant, "That this is not a case for punitive or exemplary damages, and that the plaintiff can in no event recover more than such damages as were actually suffered by him." Mabb v. Stewart, 133 Cal. 556, 65 Pac. 1085.

Judgment and order are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

5 Cal. App. 64

## SNYDER v. REGAN. (Civ. 303.)

(Court of Appeal, Second District, California. Feb. 23, 1907.)

1. PLEADING — ALLEGATIONS — ARGUMENTATIVENESS—OWNERSHIP.

In an action by a lessee against a person refusing to deliver possession of the leased premises for damages to his goods and business, an allegation by plaintiff that he was a merchant conducting a store business, and, being desirous of increasing his business, he entered into the lease and was injured because he could not remove his goods thereto, is a sufficient allegation of ownership of the business intended to be carried on in the leased premises as against a general demurrer.

2. SAME.

An allegation of damage that "the goods depreciated in value to plaintiff's business" was sufficient to allege a loss to the business conducted by plaintiff in relation to such goods as he would have been enabled to sell but for the tortious acts of defendant.

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by D. D. Snyder against A. J. Regan. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Shipsey, for appellant. S. V. Wright, for respondent.

ALLEN, P. J. Action to recover damages for wrongfully withholding possession of certain premises. Verdict and judgment for plaintiff, from which judgment, and an order denying a new trial, defendant appeals.

The action was brought by plaintiff, the lessee of a certain storeroom in the city of San Luis Obispo, whose lease thereof commenced September 1, 1903. The defendant as a prior lessee, whose lease expired at the date last named, was in possession, and, notwithstanding the expiration of his lease, refused to surrender the same, but continued in possession until September 23d of that year. Plaintiff, relying upon his lease, made purchases of goods most marketable at that point in the month of September, and which were duly received about September 1st, but by reason of defendant's acts it became necessary to store the same at an expense to plaintiff, and other goods were delayed in consignment because of plaintiff's inability to furnish storeroom therefor, and a loss ensued to plaintiff by not being able to display and sell the said goods during September. In consequence of the expected removal plaintiff disarranged his store then occupied by him so as to seriously interfere with his business during the time that defendant wrongfully held possession of the other store, and suffered other losses specifically set out in the complaint. Afterwards, in November, 1903, plaintiff commenced an action against the lessor to recover damages for breach of contract by reason of his failure to deliver possession of the premises. In that complaint most of the items of damage were identical with those set out in this action. That action against the lessor was dismissed under an agreement by which the lessor paid the costs of court and the attorney's fees for the preparation and filing of the complaint, estimated at $45.25. Defendant in this action pleaded such settlement and dismissal as a bar to this action, claiming that all questions of actual damage accruing to plaintiff had once been satisfied and paid. The trial judge instructed the jury that, if they should find that such actual damage had entered into the settlement of the action against the lessor and plaintiff had received a valuable consideration on account of such settlement and dismissal, plaintiff could not again recover the amount of such actual damages from defendant, and, further, that the adequacy of such payment was not material; that the question was: Did plaintiff receive any sum in settlement of the actual damages suffered by him? The verdict, which was a general one in favor of the plaintiff, by implication, amounts to a finding that such actual damages had not been the subject of such settlement. There was evidence to support such finding, and it will not be disturbed upon appeal. It was competent to show what matters entered into the settlement and dismissal, even though the receipt in general terms released the lessor from all claims of damages against him. Jersey Island Dredging Co. v. Whitney (Cal. Sup.) 86 Pac. 691.

There was a conflict of evidence with reference to the ownership of the business, and as to whether the damages could have been avoided by the use of ordinary diligence, as well as to the amount of damages suffered on account of the various matters specified in the complaint. But as to all of such matters there is some testimony warranting the jury in its finding, and under the well-established rule, the verdict of the jury is determinative of all such questions. Appellant, however, insists that the complaint itself does not aver ownership in the goods or business alleged to have been injured. We find an allegation that plaintiff was a merchant in the city of San Luis Obispo, and conducted a store business at that place and was desirous of increasing his business, in view of which he entered into a lease for the premises by which plaintiff rented said storeroom, and was injured in his business because he could not remove his goods thereto. As against a general demurrer, this is a sufficient averment of ownership of the business intended to be carried on in said leased premises. A statement of facts which indicates with reasonable certainty actual ownership is the equivalent of an allegation of the ultimate fact.

It is next contended as to one of the allegations of damage, namely, as to the depreciation in value of certain goods, that the allegations of the complaint are insufficient to entitle plaintiff to the recovery of such item. The allegation is that "the goods depreciated in value to plaintiff's business." It is argued that this is not a sufficient allegation of depreciation to authorize a recovery; that a recovery can be had only for the actual market depreciation, which, it is claimed, is not shown in the record. We accept this allegation of injury on account of the depreciation in value to the business as sufficient to allege a loss to the business conducted by plaintiff in relation to such goods as he would have been enabled to sell but for the tortious acts of defendant. It was for the jury to say whether such goods actually depreciated in value to the injury of plaintiff and his business, which it has determined adversely to the appellant. When there is some testimony in the record sufficient to sustain a verdict, it is not incumbent upon us to enter upon a calculation as to the elements of damage and what may or may not have been considered, or the weight or effect which was given to any particular testimony in connection with such items of damage. Nor will we enter into an examination of the items entering into the verdict to determine whether the jury considered some small item where the testimony was very slight, when the general proof is such as to warrant a jury in determining generally the damage to the extent found by them in their verdict.

There is nothing in the record indicating passion or prejudice, nor was there anything in the conduct of respondent's counsel which could have had the effect of prejudicing an intelligent jury. Taking the whole record, we are satisfied that the verdict was a fair one, that the charges of the court were proper, and that there is no prejudicial error in such record.

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

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5 Cal. App. 45

## PEOPLE v. MITCHELL. (Cr. 73.)

(Court of Appeal, First District, California. Feb. 20, 1907.)

WITNESSES—CROSS-EXAMINATION OF PROSECUTRIX—SCOPE.

Where, in a prosecution for rape, prosecutrix, a child under 16 years of age, testified that she was taken to defendant's office and there submitted to sexual intercourse in consideration of the sum of $2.50 paid to her, it was error to refuse to permit defendant to ask her, on cross-examination, whether there was any inducement or threat held out or made to her to sign the complaint against defendant for the purpose of showing that she had been threatened with incarceration on a charge of vagrancy, unless she swore to the complaint against defendant; such evidence being admissible to show prosecutrix's motive, as provided by Code Civ. Proc. § 1847.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

David Mitchell was convicted of rape, and he appeals. Reversed.

H. S. Aldrich, J. E. McElrath, and W. J. Donovan, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of rape, for having sexual intercourse with a female child under the age of 16 years not his wife, and has appealed from the final judgment of conviction, from the order denying a new trial, and from the order denying the motion in arrest of judgment.

For the purpose of showing the character of the testimony, and that because of its character a liberal cross-examination of the prosecutrix should have been permitted, a short recital of the evidence for the people is necessary. The prosecutrix testified that she, with her girl friend, Bernice B. (the name of this witness being immaterial to the discussion), went to the offices of the defendant on the 17th day of November, 1905, at about 5 o'clock in the afternoon. There the prosecutrix had sexual intercourse with defendant, and pursuant to her expectations received the sum of $2.50, with which (according to her testimony) she intended to buy a costume to wear at a skating rink carnival. The arrangement for the intercourse had been made by her friend, Bernice, who accompanied her to defendant's office and waited in the reception room while defendant and prosecutrix retired to a bedroom adjoining. The latter testified: "From the bedroom the defendant and I, after putting on our clothes, went into the office, where he gave me $2.50. He also gave Bernice $1 in the reception room. When he gave me the $2.50, I think he told me not to speak of being in his office, because it might get him into trouble." She further testified that at another and subsequent time she had had sexual intercourse with the defendant. The only other evidence in chief for the people was the testimony of Bernice, who really acted as procuress. She had recently introduced the parties, and had told the defendant, among other things, that she thought E. (the prosecutrix) "would do business." She, too, testified that she accompanied E. to the offices of defendant, and that defendant paid her $1.

There are several instances in which it is claimed that the trial court erred in its rulings on the cross-examination by the defendant of the prosecutrix and the witness Bernice. While it is true that the extent of a cross-examination is largely within the discretion of the trial court, yet we think the trial court in this case unduly and needlessly restricted the cross-examination in the following instance: "Question by defendant (to prosecutrix): Was there any inducement or threat held out or made to you to get you to sign the complaint against Mitchell? (To which question the district attorney objected, on the ground that it was irrelevant, immaterial, incompetent, and not proper cross-examination.) The Court: I don't see the materiality of it. Will you point out in what way it is material? Mr. Aldrich: Only as going to the credibility of the witness in this. This, of course, is simply a preliminary question. While I want to be perfectly fair, I do not think I ought to state my reasons before the jury, unless your honor is going to say, that this being a preliminary question, that we have a right to ask the question. The Court: I do not conceive that you have a right to pursue this kind of examination at this time. Mr. Aldrich: Then our object in asking that question, our reason for it, is this: We expect to show by this witness that, at the time of the making of this complaint, this witness was under arrest by the police of this city on a charge of vagrancy. That at this time a man by the name of B., whose daughter is the girl Bernice, was present at the courthouse, in the office of the police, and at that time threatened that in case this girl did not make complaint as against Mitchell that he would cause her to be sent to an institution, say Whittier, upon a charge of vagrancy. That acting upon that and in fear, believing that he would do as he said he would do, this young woman was induced to swear to this complaint as against Mitchell. The Court: If every fact that you have stated be so, you should well know that it is not competent evidence in this case." The same question substantially was again repeated during the trial, to which the same objection was made, followed by the same ruling. The question was admissible, under section 1847, Code Civ. Proc., to show motive. "Section 1847. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies * * * by evidence affecting his motives. * * *"

In the case of People v. Howard, 143 Cal. 316, 76 Pac. 1116, Chief Justice Beatty, in a concurring opinion in a rape case, said: "There was evidence to the effect that the prosecutrix was induced by threats of imprisonment to make the accusation, and if the jury believe this evidence they should have taken it into consideration in determining her credibility." In the case of People v. Christy, 65 Hun (N. Y.) 352, 20 N. Y. Supp. 278, a witness was asked: "Did you understand by making the statement which you did make you would relieve yourself from prosecution?" This was objected to and excluded, and the defendant excepted. It was held that this should have been admitted; the court saying: "It related to the position of the witness with reference to the complainant and the prosecuting officer, and was competent and material as affecting his credibility"—citing Whart. Crim. Ev. § 477. In the case of People v. Benson, 6 Cal. 223, 65 Am. Dec. 506, while the court was not discussing the point under consideration here, yet what it there said has an important bearing on this case generally, and especially in view of the fact that the prosecutrix herein was, as is generally the case, the sole witness to the act itself. We quote from that case: "There is no class of prosecutions attended with so much danger, or which affords so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenseless, and courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding." In a late and similar case in this state, it is said: "It will be sufficient to say, in a general way, that in a case of this character the very widest latitude, compatible with our somewhat technical and restricted rules of evidence, should be allowed the defendant in his cross-examination of the witnesses of the people. More especially is this true with reference to the prosecuting witness. In this class of prosecutions the defendant, owing to natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence that he should be given the full measure of every legal right in an endeavor to maintain his innocence." People v. Baldwin, 117 Cal. 249, 49 Pac. 186.

The defendant would clearly have had the right, on cross-examination of the prosecutrix, to show, if it were true, that for charging the defendant with rape and proceeding against him on that charge she had received a consideration in money. The motive which might prompt her to make a colored or false statement in that case would be money, while in the case under discussion it would be to escape punishment and enjoy her liberty. In each case the evidence would be admissible as affecting her credibility. Rape is a detestable crime, for the commission of which one could hardly be punished too severely; but from some of the decisions above referred to, and others that might be cited, the view of the courts seems to be that, as it is a crime easily charged and hard to defend against, even though the defendant be innocent, and as it is one which, out of consideration for the protection of the family and the infant, and for other most commendable reasons, is likely to unduly excite the sympathies of the jury for the prosecution, courts should be very liberal in the extent to which witnesses for the people—and especially the prosecutrix—may be cross-examined. If the prosecutrix was under arrest for vagrancy, and, while in custody, charged the defendant with rape to escape being sent to a reform school, it was eminently a proper matter for the consideration of the jury in determining her credibility, and in sustaining the objection to that question the court contravened the defendant's right and committed prejudicial error, for which the judgment must be reversed.

The prosecutrix was permitted, over the objection and exception of the defendant, to testify as to her age. Authority for the ruling of the court is found in People v. Ratz, 115 Cal. 132, 46 Pac. 915. Defendant claims this was error, and he cites the later case of People v. Baldwin, 117 Cal. 249, 49 Pac. 186, which he claims in effect overrules the former case. The contention of the defendant is that the testimony of the prosecutrix as to her age is hearsay, and inadmissible under sections 1845, 1852 and 1870, subdivision 4, Code Civ. Proc., unless the proper foundation shall be laid by proof that the members of the family and blood relatives, from whom she received the information, are dead or out of the jurisdiction of the court. As the case will have to be retried for the reason already assigned, it is unnecessary to pass on this point. Doubtless the district attorney, having had his attention called to the matter, in order to avoid possible error on a new trial, will pursue what would seem to be the safer course—the one laid down in the later case.

Since the appeal is, in part, from the final judgment, there is no merit in what seems to be contention of the respondent, that the appellant, having taken no exception to the order denying the motion for a new trial, is deemed to have waived his right of appeal. People v. Thompson, 115 Cal. 161, 46 Pac. 912.

For the reasons stated, the judgment is reversed, and a new trial ordered.

We concur: COOPER, P. J.; HALL, J.

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5 Cal. App. 50

## GIFFEN v. SELMA FRUIT CO. (Civ. 288.)

(Court of Appeal, First District, California. Feb. 21, 1907.)

1. SALES — DELIVERY AND ACCEPTANCE — INSPECTION AND APPROVAL.

Plaintiff agreed to sell a certain quantity of raisins in accordance with a sample which had been submitted to the purchaser, and a car load of raisins was shipped to the purchaser to fill the order, the raisins being billed to the purchaser's order, subject to inspection. When the shipment was made, plaintiff drew on the purchaser for the price, the draft being attached to the bill of lading and forwarded to a bank for collection, and the bill bore on its face, "Allow inspection." An invoice was sent to the purchaser and the draft paid by him on presentation, though at that time the raisins had not arrived, and upon arrival they were rejected on inspection and plaintiff notified thereof, and he stored the raisins. *Held*, that the facts did not constitute a sale of the raisins.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 529–541.]

2. SAME—EVIDENCE—ADMISSIBILITY.

The testimony of plaintiff's bookkeeper that plaintiff had made various shipments of raisins to the purchaser, and sometimes would bill a car load for the actual amount and draw for it, and at other times would draw and hold the goods in plaintiff's own warehouse, and that the purchaser always paid the drafts so drawn, was properly admitted, as tending to show the intention of the parties as to the transfer of the title.

3. TRIAL—RECEPTION OF EVIDENCE—MOTION TO STRIKE—NECESSITY FOR PREVIOUS OBJECTION.

On an issue as to the course of business between a seller and purchaser, a witness testified thereto, and subsequently a motion was made to strike the testimony, on the ground that it had been reduced to writing by correspondence, and could not be shown by parol. *Held*, that there was no abuse of discretion in denying the motion; the objection not having been made when the evidence was offered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 242–244.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by L. F. Giffen against the Selma Fruit Company. From a judgment in favor of plaintiff and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Strother & Strother and Harris & Perkins, for appellant. M. B. Harris, E. M. Harris, and Frank Kanke, for respondent.

COOPER, P. J. This action was brought to recover damages for breach of contract, and was tried before a jury. A verdict was returned for plaintiff, upon which judgment was duly entered. This appeal is from the judgment and order denying defendant's motion for a new trial.

The facts are in substance as follows: In September, 1904, the defendant entered into a contract in writing with L. F. Giffen & Co. (plaintiff's assignor) by the terms of which it agreed to seed and pack in a first-class manner the raisins of Giffen & Co. for the season of 1904–05 at the rate of $1.35 per 100 pounds. In December, 1904, the defendant, under the contract, seeded and packed the car load of raisins, out of which this controversy arose for Giffen & Co., and received compensation therefor according to the terms of the contract. It is alleged that, instead of seeding and packing the raisins in accordance with the contract, the defendant negligently seeded and packed them so that they spoiled and became absolutely worthless. The verdict of the jury finds by implication that the allegation as to defendant's negligence is true. The statement on motion for a new trial shows that the plaintiff introduced evidence tending to show that the raisins were not in good condition, and that their condition "was due to the fault and negligence of the defendant in seeding, processing and packing said raisins." Appellant's counsel, in their opening brief, very frankly and properly admit that "the evidence as to such wrongful acts of defendant was conflicting, and the jury found for the plaintiff." It seems, therefore, evident that the defendant violated its contract, and thus became liable for the damages it caused thereby.

It is contended, however, by the defendant that Giffen & Co., prior to the commencement of this action, had sold the raisins to McCord-Brady Co., of Omaha, and hence they argue that the right of action was in McCord-Brady Co., and not in the plaintiff. The decision of the case upon its merits is thus dependent upon the question as to whether or not Giffen & Co. had parted with the title to the raisins. The evidence shows that prior to the commencement of the action Giffen & Co. had agreed to sell to McCord-Brady Co. at Omaha a given quantity of raisins in accordance with a sample which had been sent. The car load of raisins involved in this suit was shipped to fill this order. The raisins were billed to the order of Giffen & Co. at Omaha subject to inspection. When the shipment was made, Giffen & Co. drew on McCord-Brady Co. for the agreed price of the raisins; the draft being attached to the bill of lading, and forwarded to the National Bank of Omaha for collection. The bill of lading bore across the face of it the direction to "Allow inspection." An invoice and bill of the raisins were sent to the McCord-Brady Co., and the draft was paid by them upon presentation, but at the time it was paid the company had not inspected nor received the raisins, because they had not arrived at their destination. Upon the arrival of the raisins, they were rejected upon inspection, and Giffen & Co. were notified of such rejection, and, upon being so notified, they stored the raisins in a warehouse in Omaha, and were unable to dispose of them. In the course of dealing between Giffen & Co. and the McCord-Brady Co., the drafts drawn on the company at Omaha were paid, charged to the account of Giffen & Co., and the goods, when received, credited to Giffen & Co. The draft in this case was charged to the account of Giffen & Co., and has since been paid in full by them.

We are of opinion that the above facts do not constitute a sale of the raisins to the McCord-Brady Co. A sale is a contract by which one transfers to another an interest in property. In order to constitute a sale, the contract must give and pass rights of property. The property must be identified. The evidence shows that the raisins were bought by sample, and that they were rejected because not up to sample. Upon proof that the sale was made by sample the law implies a warranty that the quality of the property sold is up to the sample exhibited (Civ. Code, § 1766), and the title will not pass until there has been an acceptance. Meachem on Sales, §§ 522, 746, 1212; Pope v. Allis, 115 U. S. 372, 6 Sup. Ct. 69, 29 L. Ed. 393; Taylor v. Saxe, 134 N. Y. 67, 31 N. E. 258; Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964.

It is claimed that the delivery of the bill of lading with the draft to McCord-Brady Co. had the effect to transfer the title of the car load of raisins to McCord-Brady Co. A bill of lading does not in all cases transfer the title of the property described thereon to the party to whom it is delivered. It depends upon the circumstances of the particular case and the intention of the parties. In this case the intention was that the bill of lading should be delivered to McCord-Brady Co. with the draft, and when the draft was paid and the raisins inspected, and accepted as being up to the sample, the title should vest in McCord-Brady Co. The bill of lading was delivered, the draft paid, but the goods were not what McCord-Brady Co. had purchased, and they never accepted them, nor did they take possession of them. It was not intended that the title should pass by the delivery of the bill of lading. A bill of lading does not have the effect of passing the title, where the evidence clearly shows a contrary intention. Emery's Sons v. Irving Nat. Bank, 25 Ohio St. 364, 18 Am. Rep. 299; Hilmer v. Hills, 138 Cal. 135, 70 Pac. 1080; Dodge v. Meyer, 61 Cal. 405.

One Broadwell, the bookkeeper of Giffen & Co., was called as a witness for plaintiff, and, after giving evidence of various matters to which no objection was made, testified that Giffen & Co. had made various shipments of raisins to McCord-Brady Co., covering a period of more than a year. He was then asked the question: "Q. Now, then, state the course of business that has been followed all the time, if any, as to the drawing on them in these matters and the payment of the draft." To this question the defendant objected upon the ground that it was incompetent, irrelevant, and immaterial, "and the only thing that would be competent, material, or relevant would be what was actually done in this case." The objection to the question was overruled. The witness then testified that sometimes Giffen & Co. would bill a car for the actual amount, and draw for it as in the case at bar, and at other times they would draw on McCord-Brady Co., and hold the goods in their own warehouse. That McCord-Brady Co. always paid the drafts so drawn as they did in this case. The evidence was properly admitted. It tended to show the intention of the parties as to the transfer of the title to the raisins. It tended to show that by the course of dealing the drafts of Giffen & Co. were paid without reference to the transfer of the goods shipped by a bill of lading. It was shown by the cross-examination of the witness that various letters had passed between Giffen & Co. and McCord-Brady Co., and that the negotiations were by letters. The witness also testified that the understanding arrived at was from the letters and "the understanding between us and Cartan & Jeffrey and through them with McCord-Brady." Defendant's counsel then moved the court to strike out the testimony of the witness as to the course of business, on the ground that it was not the best evidence. The court denied the motion, and we deem it sufficient to say that in so doing it did not abuse its discretion. The objection on the ground that the course of business could not be shown by oral testimony because reduced to writing was not made when the evidence was offered. Nor does it clearly appear by cross-examination that all the course of business was contained in the letters. Defendant made no attempt to get the letters or to have the plaintiff produce them in court.

It was not error to give plaintiff's instruction No. 6, as it is in accordance with what we have said as to the passing of title by the bill of lading.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

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5 Cal. App. 103

## Ex parte NARVAEZ. (Cr. 40.)

(Court of Appeal, Third District, California. Feb. 26, 1907.)

HABEAS CORPUS — PRESUMPTIONS — JUDICIAL PROCEEDINGS.

Accused, having been sentenced to imprisonment by a justice of the peace for the maximum period permitted by Pen. Code, § 490, was committed to the sheriff, and confined by virtue of two judgments or commitments which described the same offense and were identical, except that one of them contained the additional paragraph: "To take effect upon the expiration of the judgment previously rendered upon the above-mentioned date in an action entitled as above." *Held*, in habeas corpus proceedings, that, accused having served the full period of imprisonment which might be imposed for a single conviction of petit larceny, he was entitled to be released, since it could not be presumed that there were two complaints identical in their averments, but embracing two distinct crimes, in order to have support for a second judgment or commitment.

In the matter of the application of Charles Narvaez for a writ of habeas corpus. Prisoner discharged.

Paul C. Harlan, for petitioner. Jas. M. Raines, Dist. Atty., for respondent.

CHIPMAN, P. J. It appears from the uncontroverted facts set forth in the petition that petitioner was, on September 19, 1906, arraigned in the justice's court of Montezuma township, Solano county, on the charge of petit larceny, for the theft of two sacks of barley. He pleaded guilty thereto, and was sentenced to imprisonment in the county jail for the period of 180 days. That he was delivered to the sheriff of said county on said day and has been ever since said day continuously, and is now, confined in said county jail, by virtue of two judgments or commitments, and not otherwise, copies of which are attached to the petition and made part thereof. That the board of supervisors of said county duly and regularly allowed petitioner 30 days' credit upon his aforesaid term of imprisonment. It appears that the two judgments or commitments are identical and describe the same offense; the only difference being that the closing paragraph of one reads as follows: "To take effect upon the expiration of the judgment previously rendered upon the above-mentioned date in an action entitled as above." The petition was filed on February 20, 1907, and the hearing was on February 23, 1907.

It will thus appear that petitioner has already served the full period of imprisonment for which the justice of the peace had jurisdiction to commit the prisoner for a single charge of petit larceny, which is six months. Penal Code, §§ 490, 1205. The two commitments show that they related to but one charge, namely, the stealing of two sacks of barley. No other construction can fairly be put upon them. If there was another charge or another complaint to which the second commitment could, or was intended to, apply, it has not been made to so appear. It is not material which one of the commitments is taken as justification for the imprisonment. Whichever one it may be, the petitioner has served the full period for which he can be held upon the conviction of a single charge of petit larceny. During the maximum time for which he was legally committed, he would not be entitled to his discharge; but he cannot be held to suffer a punishment for a period in excess of that within the power of the justice to impose. Ex parte Bulger, 60 Cal. 438. There must not only be jurisdiction of the person and the subject-matter, but there must be jurisdiction to impose the sentence which is adjudged. Without such jurisdiction the sentence is not merely voidable, but is void. It cannot be presumed that there were two complaints identical in their averments, but embracing two separate and distinct crimes, in order to discover support for a second commitment. No presumptions will be indulged as to the regularity of the proceedings in a justice's court. Ex parte Kearny, 55 Cal. 212. Apparently the petitioner is being imprisoned without lawful authority.

The prisoner is discharged from custody.

We concur: BURNETT, J.; HART, J.

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5 Cal. App. 122

## PEOPLE v. HINES. (Cr. 52.)

(Court of Appeal, Second District, California. Feb. 27, 1907.)

1. FALSE PRETENSES — INFORMATION — SUFFICIENCY.

Pen. Code, § 956, provides that when an offense involves the commission of, or attempt to commit, a private injury, and is described with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material. *Held*, that an information charging that accused intended to cheat and defraud R. and C., and that he obtained money by false pretenses of C., was good under Pen. Code, § 956, though it did not appear that he accomplished his purpose as to R., who did not own the property acquired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 33.]

2. SAME.

An information for obtaining money by false pretenses is good, though it does not allege the purpose for which the party defrauded paid the money to accused.

3. SAME—VERDICT.

Pen. Code, § 960, provides that no information is insufficient, and that no trial or other proceeding thereon shall be affected by any defect in form which does not prejudice a substantial right of the defendant. *Held*, that error, if any, in a verdict, in a prosecution for obtaining money by false pretenses, that the jury found defendant guilty as charged, and that the property obtained was of the amount of $200, was without prejudice to accused; the latter portion being surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 65.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Joseph Hines was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Hugh J. Crawford, for appellant. U. S. Webb, Atty. Gen., and E. E. Selph, Deputy Atty. Gen., for the People.

SHAW, J. The defendant was tried and convicted on an information which charged him with the crime of obtaining money by false pretenses. Defendant interposed a demurrer to the information, which was overruled and exception duly taken to such ruling.

The objection that the name of Fred Rickert was included in the information as one of the persons whom defendant intended to cheat and defraud is fully answered by section 956 of the Penal Code. He is not charged with defrauding Rickert, but merely that originally he intended to cheat and defraud him; and, while it does not appear that he accomplished his purpose as to Rickert, his failure so to do does not affect the charge so far as Carter was concerned.

The information does not allege the purpose for which Carter paid the money to defendant, but this was unnecessary. It does sufficiently appear that he obtained the $200 then and there belonging to Carter, and whether it was by a lóan upon credit established by the false pretenses, or by a purported sale, is immaterial. As to how the false pretense was calculated to defraud Carter was a matter to be shown in evidence. Brown v. State (Tex. Cr. App.) 22 S. W. 22; Thomas v. People, 34 N. Y. 351.

The information shows that Carter was the owner of the money alleged to have been obtained by defendant, and since defendant did not own the restaurant and personal property represented to be owned by him, it is therefore immaterial who owned it.

Counsel for defendant calls our attention to the cases of People v. Mahoney, 145 Cal.

104, 78 Pac. 354, and People v. McKenna, 81 Cal. 158, 22 Pac. 488, in support of his objection to the sufficiency of the information; but, measured by the rules therein laid down, it is amply sufficient. It contains every essential allegation necessary to charge defendant with the commission of the offense, and is calculated to fully acquaint him with the nature of the charge. People v. Millan, 106 Cal. 320, 39 Pac. 605; People v. Cadot, 138 Cal. 527, 71 Pac. 649.

Defendant offered certain instructions, all except one of which, after modification, were given. The changes made therein were proper. Indeed, counsel points out no error therein, merely contenting himself with the bare statement that the refusal to give them as requested constituted error.

It was sought to prove the value of the property in the restaurant at the time the defendant took charge of it, some eight or ten months prior to the commission of this offense, and upon objection the evidence directed to that point was by the court ruled out, and it is claimed that this ruling constituted error. The value of the property in the restaurant was not in issue, and it was immaterial what its value was at that time. The only important question as to value was the value of that which defendant obtained by means of the acts alleged in the information.

It is urged that the evidence shows that defendant was the owner of the property, and, if not, that it shows that he was authorized by the owner thereof to sell it. The testimony upon these questions is conflicting, and, under the well-settled rule, this court will not disturb the verdict of the jury or the ruling of the court in denying the motion for a new trial. People v. Gonzales, 143 Cal. 605, 77 Pac. 448; People v. Maroney, 109 Cal. 279, 41 Pac. 1097.

The verdict rendered by the jury was in the following form: "We, the jury in the above-entitled action, find the defendant guilty as charged, and that the property obtained was of the amount of $200." A general verdict finding him guilty as charged would have been sufficient. People v. Millan, 106 Cal. 320, 39 Pac. 605; People v. Tilley, 135 Cal. 65, 67 Pac. 42. The words, "and the property obtained was of the amount of $200," might be eliminated as surplusage. He was found guilty as charged, and he was charged in the information with obtaining $200 lawful money of the United States. We think, too, that, where the word "amount" is used with reference to money, it is synonymous with the word "value." Indeed, the value of any property is its equivalent amount in lawful money; it is the measure of all value. Bartley v. State, 73 N. W. 744, 53 Neb. 310. At all events, it does not constitute any substantial error prejudicial to the rights of the defendant. Section 960, Pen. Code.

The record discloses no prejudicial error, and the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 130

## UNION COLLECTION CO. v. SNELL et al.

(Civ. 337.)

(Court of Appeal, First District, California. Feb. 28, 1907. Rehearing Denied March 28, 1907.)

EXECUTION—SUPPLEMENTARY PROCEEDINGS—ORDER FOR PAYMENT OR DELIVERY OF PROPERTY.

The issue of the ownership of money paid by a judgment debtor to a third person cannot be litigated in proceedings supplementary to execution, where such third person in good faith claims the money as her own, but the court can only authorize the judgment creditor to institute an action against her to recover the money, and forbid its transfer until the action can be prosecuted to a judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 1157.]

Appeal from Superior Court, City and County of San Francisco; John M. Eshleman, Referee.

Action by the Union Collection Company against Richard B. Snell and others. Judgment for plaintiff. The execution issued thereon having been returned unsatisfied, proceedings supplementary to execution were instituted by plaintiff, in which a referee was appointed. From a judgment, pursuant to the report of the referee, that plaintiff take nothing against Edna Snell Poulson, plaintiff appeals. Affirmed.

J. S. Reid, for appellant. W. G. Witter, for respondent.

KERRIGAN, J. This is an appeal from a judgment entered on the report of a referee in proceedings supplementary to execution.

Many elements are absent from the record. A mere statement of the case will have to be made largely from inferences.

The appellant some time prior to these proceedings obtained a judgment against Mary E. Snell, Sarah N. Snell, and Richard B. Snell, execution was issued thereon, and the same was duly returned by the sheriff unsatisfied. Thereafter proceedings supplementary to execution were instituted by the judgment creditor, in which a referee was appointed. The referee examined witnesses, considered the questions presented, and reported that the order prayed for by the judgment creditor should be denied, upon which report a judgment was entered, pursuant to the report of the referee, that the judgment creditor take nothing against Mrs. Edna Snell Poulson. The report of the referee shows that during the year 1900 Mrs. Poulson paid certain debts owing by her brother and sisters, Richard B. Snell, Sarah N. Snell, and Mary E. Snell, amounting to $3,500. These payments were made without authority and without the knowledge or request of the brother and sisters of Mrs. Poulson, nor was there any subsequent promise on their part to repay Mrs. Poulson. On March 12, 1904, Mary E. Snell received from a certain estate $1,900 as a legacy, $1,600 of which, March 21, 1904, she gave to Mrs. Poulson to apply on account of payments made by Mrs. Poulson as hereinabove stated. It is contended by appellant that Mrs. Poulson was a mere volunteer (Curtis v. Park, 55 Cal. 106; Moulton v. Loux, 52 Cal. 81; Gray v. Brunold, 140 Cal. 620, 74 Pac. 303); that as such there was, as between her and her brother and sisters, no valid subsisting indebtedness capable of being enforced; and that the attempted payment to her by Mary E. Snell of $1,600 was void as to creditors.

The only order or judgment that the judgment creditor requested was that Mrs. Poulson pay the $1,600 to the sheriff, to be applied by him toward the satisfaction of the judgment against the Snells. From the record it is plain that Mrs. Poulson in good faith claims the $1,600 as her own. She claiming the money, her title to it cannot be litigated in this proceeding. She must have her day in court. The only power of the court in this proceeding was to authorize the judgment creditor to institute an action against her for the recovery of the money, and forbidding a transfer of it until such action could be commenced and prosecuted to judgment. McDowell v. Bell, 41 Pac. 413, 86 Cal. 615, 25 Pac. 128. In the case of Lewis v. Chamberlain, 108 Cal. 527, 41 Pac. 413, a judgment creditor claimed that certain transfers of property were made by the judgment debtors to avoid payment of his judgment. Each of the two transferees, among other things, claimed the property transferred to her as her own. In that case it is said: "This proceeding was brought under the provisions of the Code of Civil Procedure, entitled 'Proceedings supplementary to execution.' I think it is entirely clear from the face of the statute that no order could be legally made requiring Mrs. Morse or Mrs. Conklin to surrender the property mentioned in the affidavit of the plaintiff, and its application in satisfaction of his judgment, otherwse than upon their admission that it was the property of the judgment debtor. To make such order in relation to property which they claimed to own in their own right, if it could have any effect or operation, would be to deprive them of their property upon a summary process and without due process of law. If the plaintiff believes or claims their title under the conveyances mentioned in his affidavit to be invalid, an issue as to such ownership and title should be properly made and tried in an appropriate action, in which the verdict of a jury or the findings of a court may be regularly had determining those questions, and upon which a judgment could be regularly entered by which the parties would be conclusively bound."

We do not mean to intimate that the only way in which the judgment creditor could have questioned the title of Mrs. Poulson to the $1,600 was by proceedings supplementary to execution. Such proceedings have not superseded or abolished the right of one to bring a suit in the nature of a creditors' bill. In the case of Rapp v. Whittier, 113 Cal. 431, 45 Pac. 703, it is said: "The complaint being in the nature of a creditors' bill to subject property of Robbers, claimed by Whittier, to the satisfaction of plaintiff's judgment against the former, appellant contends that the action does not lie; that with us the provisions of the statute for proceedings supplementary to execution (Code Civ. Proc. §§ 717, 720) totally supplant any action of this kind. Since appellant asserted title under the transfer from Robbers, and adversely to him, it would have profited plaintiffs nothing to pursue the course provided by the statute. In the face of that claim they could not, by supplemental proceedings, reach the fund held by appellant. In such a case those proceedings do not supersede the remedy by action, for the reason that they are not adequate to accomplish the purpose of the action."

The judgment of the trial court is affirmed.

We concur: COOPER, P. J.; HALL, J.

5 Cal. App. 111

## NEVES v. COSTA. (Civ. 295.)

(Court of Appeal, Second District, California. Feb. 27, 1907.)

1. FALSE IMPRISONMENT — SUFFICIENCY OF COMPLAINT.

A complaint, in an action for false imprisonment, set up a copy of the affidavit made by defendant on which an order for arrest of plaintiff was obtained in an action on an implied contract. The affidavit on its face was insufficient to confer jurisdiction on the court granting the order. The complaint also alleged the arrest and imprisonment for seven days of plaintiff on the order; that defendant acted unlawfully, without right or authority, and against the will of plaintiff, in so doing; that, by means of said false imprisonment, plaintiff was injured in his credit, prevented from attending to business, suffered mental anguish, and was compelled to expend a certain sum for expenses in securing his discharge on habeas corpus—all to his damage in a certain sum. *Held*, that the complaint was good as against a general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, §§ 86–88.]

2. ARREST — CIVIL ACTION — SUFFICIENCY OF AFFIDAVIT.

Where an affidavit under Code Civ. Proc. § 479, subd. 1, and section 481, does not contain positive allegations of fraudulent intent, nor positive evidence of facts from which fraud can be inferred, it is not sufficient to confer jurisdiction on a court to issue an order of arrest in a civil action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arrest, § 60.]

3. PLEADING—DEMURRER—MOTION TO STRIKE.

In a complaint in an action for false imprisonment, ambiguity or uncertainty in setting up fragmentary statements material to, but not sufficiently stating, a cause for malicious prosecution, cannot be considered on a general demurrer, but should be taken advantage of by special demurrer or motion to strike out or make certain.

4. False Imprisonment — Action — Sufficiency of Evidence.

An allegation of false imprisonment, under an arrest in a civil action, is sustained by proof of confinement on surrender by surety, on the bail bond previously given to prevent confinement under the arrest, since the imprisonment was the final result of that arrest.

5. Same—Admissibility of Evidence.

In an action for false imprisonment under an allegation that plaintiff had incurred expense to secure his release on habeas corpus, the fact that he was so released is admissible.

6. Appeal—Matters Not Apparent of Record.

Where the record on appeal does not show that there was anything on the face of a record in a habeas corpus proceeding justifying its admission in an action for false imprisonment, its exclusion on the ground of irrelevancy will be presumed to be proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3735–3747.]

7. Same—Review—Formal Error.

In an action for false imprisonment, there was error in sustaining objections to cross-examination on the matter of plaintiff's expense in a habeas corpus proceeding, but the judgment was otherwise properly rendered. The entire record showed that the expense was incurred, and defendant did not attempt to disprove it. *Held*, that the error would not justify a reversal of the judgment.

8. False Imprisonment—Sufficiency of Evidence—Damages.

In an action for false imprisonment, where plaintiff proved unlawful restraint and the special damages alleged, general damages would follow from the proof of unlawful imprisonment, and a motion for nonsuit was properly denied.

9. Same — Special Damages — Elements of Compensation.

Expenses of litigation to secure release on habeas corpus is a proper item of special damages in an action for false imprisonment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, §§ 109–111.]

10. Same—General and Compensatory Damages.

In an action for false imprisonment, physical inconvenience, mental suffering, and humiliation of mind are all elements of general and compensatory damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, §§ 109–111.]

11. Pleading—Time for Objection—Failure to Demur.

An objection to the giving of instructions relating to special, general, and compensatory damages, on the ground of ambiguity of the statement thereof in a complaint for false imprisonment, comes too late where the right to object by demurrer to the complaint has been waived.

12. False Imprisonment—Complaint—Sufficiency of Allegation.

An allegation, in a complaint in an action for false imprisonment, that "by means of said false and unlawful imprisonment" plaintiff was compelled to pay a certain sum for costs and counsel fees in obtaining his discharge, is sufficient to justify the court in submitting the evidence in relation thereto to the jury, and instructing them as to the law concerning such special damages.

13. Same—Materiality of Allegations.

The truthfulness or falsity of an affidavit on which an order for arrest in a civil action was secured, and the affiant's knowledge of the truth or falsity of such statements, are not material in an action for false imprisonment, when it appears that the court granting the order was without jurisdiction on account of the insufficiency of the affidavit.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action for false imprisonment by M. V. Neves against M. P. Costa. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

Chas. G. Lamberson and J. L. C. Irwin, for appellant. H. B. McClure, for respondent.

TAGGART, J. This is an action to recover damages for false imprisonment. Defendant appeals from a judgment in favor of plaintiff, and from an order denying a new trial.

On April 5, 1905, defendant commenced an action against plaintiff in the superior court of Kings county upon an implied contract, and at the same time procured an order for the arrest of plaintiff based upon subdivision 1 of section 479 of the Code of Civil Procedure. Plaintiff was arrested the next day, on this order, and about two hours after his arrest gave bail. In the meantime he had been permitted by the officer arresting him to go on his own recognizance. About 19 days thereafter plaintiff was surrendered to the sheriff of Kings county by one of the sureties on his bail bond, J. V. Garcia, a relative of his wife. The same day the plaintiff signed the necessary papers for an application to be made to this court for a writ of habeas corpus. The application was granted, the writ was made returnable before Hon. W. B. Wallace, judge of the superior court for Tulare county, and on May 31, 1905, by order of the latter, plaintiff was discharged on the ground (as stated in the order) that the affidavit on which the order of arrest was based was insufficient. Plaintiff was imprisoned in the county jail of Kings county from the time of his surrender by his bail, as aforesaid, until the day of hearing and his discharge on said writ of habeas corpus, a period of six days. The complaint herein, filed June 8, 1905, alleges the commencement of the above-mentioned action in the superior court of Kings county, and the making by defendant of the affidavit upon which said order of arrest was based (setting out the affidavit in full). That said affidavit was made "falsely, unlawfully, and without probable cause." That the order of arrest aforesaid was obtained upon said affidavit by defendant, and plaintiff was arrested thereon, and imprisoned thereunder in the county jail of Kings county at Hanford for seven days. And that plaintiff was thereby restrained of his liberty against his will. "That in so doing the said defendant herein acted falsely, unlawfully, and without probable cause, and without any right or authority so to do, and against the will of this plaintiff." "That said affidavit * * * was and is wholly false and untrue, which the defendant then and at all times since well knew." "That by means of said false and unlawful imprisonment, and being confined and restrained of his liberty as aforesaid, * * * plaintiff was injured in his credit, and was prevented from attending to his business during that time, and suffered mental anguish thereby, and was compelled to pay $250 for costs and counsel fees in obtaining his discharge on writ of habeas corpus, to his damage in the sum of $1,000."

The complaint is sufficient against the attacks made upon it by defendant under a general demurrer. The affidavit upon which the order of arrest was based is insufficient on its face to give the superior court of Kings county jurisdiction to issue the order. An order of arrest is only authorized by section 481 of the Code of Civil Procedure, where "it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 479. The affidavit must be either positive or upon information and belief, and when upon information and belief, it must state the facts upon which the information and belief are founded." In order that it may appear to the judge it is necessary that the facts shall be stated by competent evidence, such as would justify the court in making a finding upon a trial. The ex parte form in which it is presented by affidavit is made competent by section 481. In order that a party who has not sufficient knowledge of his own to make the required showing may avail himself of this provisional remedy in a proper case, the Code permits him to supplement his own affidavit with that of some one else who knows some fact or facts; or he may rely entirely upon the affidavit of "some other person," if the latter is prepared to state facts sufficient to comply with the statute. "Where, in a civil action, the plaintiff desires, so to speak, to enforce his claim at the outset by arrest and imprisonment of the defendant—in other words, to have execution before obtaining judgment—it is not too much to ask him to present such evidence as alone would be receivable upon the trial of the action to justify an ordinary judgment for money." Markey v. Diamond, 20 N. Y. Supp. 847, 1 Misc. Rep. 97; Ex parte Fkumoto, 120 Cal. 316, 319, 52 Pac. 726. "While the affidavit may state generally the grounds of the application upon belief only, we understand the rule to be well settled that, to show the grounds of his belief, he must set forth such facts and circumstances within his own knowledge as will authorize the officer who is to issue the warrant to find such a state of facts as required by the statute to authorize the proceeding, and, if the plaintiff is not himself personally cognizant of the facts and circumstances relied upon, he must procure the affidavit of some one who is thus personally cognizant of them. The warrant cannot be issued upon hearsay, nor upon any statement, however positive, founded upon hearsay." Proctor v. Prout, 17 Mich. 475.

That portion of the affidavit which should be considered in this connection is as follows: "That said defendant, as plaintiff is informed and believes, is about to depart from this state with intent to defraud his creditors. That affiant further avers and shows the following facts and circumstances in support of the above allegation: That the defendant has converted all of his property into cash (and at this time, as plaintiff is informed and believes, has the same in his immediate possession). That the defendant told one M. Macedo that he intended to depart from this state. That the defendant on the 5th day of April, 1905, procured his trunk and all his wearing apparel to be brought to the city of Hanford, Kings county, and that the same is at this time, to wit, at the hour of 9 o'clock p. m., April 5, 1905, situated in the Azores Stables, a livery stable situated at the corner of Sixth and Redington streets, in the city of Hanford, and that the same was brought to said place at or about the hour of 7 o'clock p. m. of said 5th day of April, 1905. That affiant asked the defendant to settle with him as to the amount due to the affiant, the plaintiff herein, on said 5th day of April, 1905, and defendant refused, ever since has refused, and does now refuse, to pay to affiant the amount due him; that said defendant is now in the city of Hanford; and that plaintiff is informed and believes that said defendant intends to leave the city of Hanford on the early morning train on the morning of the 6th of April, 1905, and that said defendant intends to depart from the state as soon as possible."

The affidavit contains no positive allegation of fraudulent intent, and the only statement of the debtor's intention to leave the state is that he told M. Macedo so. The latter statement is positive in form only. It is hearsay pure and simple. Standing by itself, it may relate to an intention of 10 years ago long since carried out. If the affiant had heard the plaintiff tell Macedo, it would have been competent evidence. Not having so stated in his affidavit, it is to be presumed that he did not. If heard in any other way it was hearsay when presented in the affidavit of defendant. That the debtor had "converted all his property into cash" may be an act freighted with import, or destitute of meaning, according to circumstances. Affiant's belief that he still had the money in his possession is not a fact. That plaintiff had removed his trunk and wearing apparel to a livery stable in a particular city at a particular time, disassociated from any other fact except the one that he had refused to pay affiant a debt which the latter claimed he owed, might signify that he had obtained employment at the livery stable and had taken the most convenient time to move his personal belongings to that place. The affidavit seems wanting in the elements necessary to confer jurisdiction. There is neither positive averment of fraud nor positive evidence of facts from which fraud can be inferred. Fkumoto v. Marsh, 130 Cal. 68, 62 Pac. 303, 509, 80 Am. St. Rep. 73.

Defendant's second objection to the complaint is equally ill founded, and it is one which cannot be considered on a general demurrer. However, as the same matter becomes material in the consideration of other questions of law involved in this appeal, we will consider it here. The two actions of false imprisonment and malicious prosecution are quite distinct and different. "False imprisonment is the unlawful violation of the personal liberty of another" (Pen. Code, § 236), the interference with the personal liberty of the plaintiff in a way which is absolutely unlawful and without authority. "Malicious prosecution" is procuring the arrest or prosecution of another under lawful process, but from malicious motives and without probable cause. The provocation, motive, and good faith of the defendant in an action for false imprisonment constitute no material element in the case, and can be considered only where punitive or exemplary damages are asked, and then only as affecting the measure of such damages. On the other hand, malice and want of probable cause are the gist of the action for malicious prosecution. Without allegation and proof of both, the action will fail. 12 Am. & Eng. Enc. of Law (2d Ed.) p. 730. No one can recover damages for a legal arrest and conviction. Therefore, in cases of malicious prosecution, it becomes necessary to await the final determination of the action. But the same principle does not apply to an action for false imprisonment, as the form of action is based upon an illegal arrest, and no matter ex post facto can legalize an act which was illegal at the time it was done. From this it will be seen that one of the essential elements of a complaint for malicious prosecution is that the proceeding upon which it is based has finally terminated in favor of the plaintiff, while it is equally apparent that this is not a necessary or proper allegation in an action for false imprisonment. Hopner v. McGowan, 116 N. Y. 405, 22 N. E. 558; Josselyn v. McAllister, 22 Mich. 300, at page 306. While the complaint at bar alleges that the defendant acted without probable cause, it nowhere alleges malice; and the words "unlawfully" and "without probable cause," if unnecessary, may be treated as "surplusage and meaningless." St. Clair v. S. F., etc., Ry. Co., 142 Cal. 650, 76 Pac. 485. As above stated, ambiguity or uncertainty in a pleading cannot be considered on a general demurrer. It must be corrected by special demurrer, or motion to strike out or make certain. The latter method is peculiarly applicable to fragmentary statements material to, but not stating sufficiently, one cause of action, found in a pleading stating another cause of action.

The other objection to the complaint, that, the imprisonment alleged in the complaint being different from that proven at the trial, the latter is presumed to have been found by the verdict, and therefore there are no allegations in the complaint to sustain the verdict, appears to be more properly considered as a question of variance of proof than as one of pleading. That plaintiff's imprisonment was not immediately following his arrest on April 6th makes it none the less the result of the arrest by defendant's procurement. The purpose of the proceeding inaugurated by defendant was to secure execution against the plaintiff upon a judgment which defendant expected to obtain against him in the superior court of Kings county in the action begun at the time the order of arrest was issued. He was arrested for the purpose of being detained until that judgment was procured. That he was able to give bail a portion of the time only operated to lessen the amount of damages he might have recovered from the defendant. The evidence does not show that plaintiff procured his bail to surrender him for the purpose of laying the foundation of an action to recover damages for false imprisonment. The Code provides for the surrender of an arrested debtor by his bail, and the written notice of Garcia, one of the sureties on the bail bond, to the sheriff of Kings county, that he desired to surrender the plaintiff into custody, together with the bail bond showing that he was such surety, were properly admitted to show that plaintiff was surrendered to the sheriff by authority of law and as one of the steps in the proceeding begun by the defendant.

As above stated, it is not necessary, in an action for abusing the process of law by an illegal act either to allege or prove the termination of the action. Greenleaf on Evidence, vol. 2, § 452. The fact, however, that a person unlawfully imprisoned has been released and is no longer restrained of his liberty is material in ascertaining the time he has lost from his business by his detention. The manner of his release is not a fact necessary to be shown, and the reason of the court for his release in most cases would be immaterial, and in some cases perhaps prejudicial. The decisions upholding the practice of admitting in evidence the proceedings on habeas corpus releasing the plaintiff from imprisonment for the purpose of showing this fact are in actions for malicious prosecutions or those in which the action is joined (or confused) with an action for false imprisonment. American Express Co. v. Patterson, 73 Ind. 430. See Com. v. Cheney, 6 N. E. 724, 141 Mass. 102, 55 Am. Rep. 448; 12 Am. & Eng. Ency. of Law, p. 723.

In the case at bar plaintiff was not prejudiced by the introduction of the order, as the only matter stated therein which could have been prejudicial in any event was that which was embodied in numerous rulings of the court in admitting testimony and expressly declared by the court in its instructions to the jury, to wit, "that the affidavit on which the order of arrest was based was insufficient." The fact that plaintiff was discharged on habeas corpus was material to his allegation that he had been compelled to pay $250 costs and attorney's fees to secure such release, and it has been held that the proceedings on habeas corpus are admissible for this purpose. Forbes v. Hicks, 27 Neb. 111, 42 N. W. 898. The record in the habeas corpus proceeding against J. V. Neves was not relevant, and it was properly excluded. If there was anything on the face of the document which defendant asked to introduce that justified its admission in evidence, it should have been identified and brought up in the record. This not being done, we must presume it was properly rejected.

The other exceptions taken to the rulings of the trial court on the admission of evidence relate to the objections of plaintiff to defendant's questions on cross-examination of plaintiff, sustained by the court. While some of the questions relating to plaintiff's being compelled to pay the $250 attorney's fee and costs in the habeas corpus proceeding should have been allowed as proper cross-examination, their disallowance was not such error as to justify this court in overturning a judgment otherwise properly rendered. The question, "What kind of money was this that you paid to Mr. McClure?" was proper cross-examination in response to plaintiff's direct testimony that he was compelled to pay $250 attorney's fees and costs to secure his release on habeas corpus. From the entire record, it appears that plaintiff did make payment of this sum, and there was no effort to disprove it, so that this error could not have been prejudicial. The objections to the questions directed to what Garcia told the plaintiff were properly sustained, while the question, "Was it a paper that your lawyer wanted to take to Los Angeles?" is answered, in effect, later in the cross-examination of the plaintiff, if it were material.

The motion for a nonsuit was properly denied. Plaintiff established by his evidence that he was restrained of his liberty by the act of defendant, without lawful authority. He proved the special damages alleged, and the general damages would follow from the proof of the unlawful imprisonment.

Appellant's exceptions to instructions numbered 1 and 10, given by the court, are based upon objections already considered and determined adversely to his contention, to wit, the insufficiency of the affidavit here in question, and the effect of the surrender of plaintiff by his bail. These instructions correctly declare the law on these subjects.

The seventh and eighth instructions relate to the damages that may be recovered in the action; the seventh to the general, and the eighth to expenses incurred by plaintiff in habeas corpus proceedings to secure his release from imprisonment. Damages for physical inconvenience, mental suffering, and humiliation of mind incident to a false arrest are all held to be elements of general and compensatory damages. 12 Am. & Eng. Ency. of Law (2d Ed.) —. Expenses of litigation in habeas corpus proceedings may be recovered as damages; in some jurisdictions as a natural and direct result of the wrongful act, and in others as special damages. 12 Am. & Eng. Ency. of Law (2d Ed.) p. 784. The objection of defendant to the ambiguity of statement of these damages in the complaint comes too late as an objection to an instruction of the court, where the right to object by demurrer to the complaint has been waived. The allegation in the complaint that plaintiff was compelled, "by means of said false and unlawful imprisonment," to pay $250 for costs and counsel fees in obtaining his discharge, is sufficient to justify the court in submitting the evidence in relation thereto to the jury, and in instructing the jury as to the law concerning such special damages.

The fourth and ninth instructions correctly define "imprisonment" and the presumptions as to its lawfulness, and were proper instructions to the jury in this case. People v. McGrew, 77 Cal. 570, 20 Pac. 92; Ah Fong v. Sternes, 79 Cal. 30, 21 Pac. 381.

Instructions designated 1 and 6 by defendant, and which the court refused to give at his request, are based upon the assumption that there is some evidence to show that the surrender of plaintiff by his bail was with plaintiff's connivance, and not against his will. No evidence to this effect appears in the record. The case of In re Gow, 139 Cal. 242, 73 Pac. 145, has no application. That was an effort to secure an opinion of the Supreme Court upon a legal proposition by "making a case." The court very properly declined to be so used when it had business requiring its attention.

The instruction designated in appellant's brief as "Instruction 2," requested by the defendant, does not appear in the transcript in the case. Its refusal, if tendered, was not error. "Instruction marked 3" is misleading in form, and is also without the evidence in the case. There is no evidence in the record upon which either of these instructions could be predicated.

The specifications of the insufficiency of the evidence to sustain the verdict have all been considered, in effect, heretofore, except two. These relate to one matter. An issue was raised by the pleadings as to the falsity of the affidavit upon which the order of arrest was made and defendant's knowledge of its falseness when he made the affidavit. It appearing that the superior court was without jurisdiction to make the order on account of the insufficiency of the affidavit, when it was assumed to be true, want of authority was shown, and the issue of the truthfulness of the affidavit became immaterial, if, indeed, it ever was a material issue in the case.

The evidence sustains the verdict.

There being no prejudicial error shown,

the judgment and order denying defendant's motion for a new trial are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

## NEVES v. COSTA. (Civ. 296.)

(Court of Appeal, Second District, California. Feb. 27, 1907.)

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action for false imprisonment by J. V. Neves against M. P. Costa. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

Chas. G. Lamberson and J. L. C. Irwin, for appellant. H. B. McClure, for respondent.

TAGGART, J. This is an action for false imprisonment almost identical in all its facts with the case of M. V. Neves v. M. P. Costa (Civil No. 295) 89 Pac. 860, the decision in which is this day filed. An examination of the record in this case discloses no questions of law not contained in, and not considered by, the opinion in that case.

Therefore, for the reasons assigned in the opinion in case No. 295, the judgment and order of the superior court denying defendant's motion for a new trial in the case are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 90

## HUBBARD v. JUSTICES' COURT OF SAN JOSE TP. OF SANTA CLARA COUNTY. (Civ. 335.)

(Court of Appeal, First District, California. Feb. 26, 1907.)

1. PROHIBITION — WHEN WRIT WILL LIE — JUSTICE COURTS.

Prohibition will not lie to restrain an action in justice court where the aggrieved party has a plain, speedy, and adequate remedy by appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 4, 5, 7.]

2. APPEAL—REVIEW—MATTERS NOT ARISING UPON THE RECORD—STIPULATION.

On appeal counsel may not by stipulation submit questions of law for determination not arising upon the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2356.]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Application by Henry Hubbard for a writ of prohibition against the justices' court of San Jose township of Santa Clara county. From a judgment denying the writ, plaintiff appeals. Affirmed.

C. D. Wright and Robert M. Wright, for appellant. Will M. Beggs, for respondent.

HALL, J. Appeal from a judgment denying application for writ of prohibition.

Appellant brought this action in the superior court of Santa Clara county to obtain a writ prohibiting defendant from proceeding to try an action against appellant pending in the said justice court, and wherein, as appears by the record, summons was neither served on defendant in that action (plaintiff herein) nor returned within three years from the commencement of the action.

Appellant contends that as the summons in the action in the justice court was not served until after the expiration of three years from the commencement of the action, and was not returned at all, and as defendant in said action (plaintiff herein) never appeared in said action, save to move for the dismissal thereof, the said justice court is without jurisdiction to proceed further in said action, save to dismiss the same under subdivision 7 of section 581, Code of Civil Procedure. Respondent contends that section 581, Code of Civil Procedure, has no application to actions in justice courts, and also that, whether the justice court has or has not jurisdiction to try the action, the defendant in that action (plaintiff herein) has a plain, speedy, and adequate remedy by appeal from any judgment that may be rendered against him, and therefore prohibition will not lie. Prohibition is the proper remedy only in cases where the party aggrieved has no plain, speedy, and adequate remedy in the ordinary course of law. Section 1103, Code Civ. Proc.

The general rule is that the remedy by appeal is a defense to an application for a writ of prohibition, although the inferior court may have committed error in determining that it had jurisdiction. High on Extraordinary Legal Remedies lays down the rule in these words: "Thus, where the defendant in an action instituted in an inferior court pleads to the jurisdiction of such court, and his plea is overruled, no sufficient cause is presented for granting a prohibition, since ample remedy may be had by an appeal in the final judgment in the cause." Section 771. The same doctrine is upheld in the following cases: Murphy v. Superior Court, 84 Cal. 592, 24 Pac. 310; Strouse v. Police Court, etc., 85 Cal. 49, 24 Pac. 747; Agassiz v. Superior Court, 90 Cal. 101, 27 Pac. 49; Mines d'Or, etc., v. Superior Court, 91 Cal. 101, 27 Pac. 532; Jacobs v. Superior Court, 133 Cal. 364, 65 Pac. 826, 85 Am. St. Rep. 204; Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765; Cross v. Superior Court (Cal. App.) 83 Pac. 815. In Strouse v. Police Court, supra, the petitioner was being prosecuted on a criminal charge in the police court. In denying his petition for a writ, in which the point was urged that the police court had no jurisdiction, the court said: "If the petitioner should be convicted in the police court, he will have a plain, speedy, and adequate remedy at law by an appeal to the superior court." In Agassiz v. Superior Court, supra, the court said: "Petitioners had the right to appeal from the order refusing to dissolve the attachment, and would have an appeal from any final judgment in the case, and such appeal being a 'plain, speedy, and adequate remedy in the ordinary course of law,' within the meaning of section 1103, Code of Civil Procedure, prohibition does not lie. A remedy does not fail to be speedy and adequate, because, by pursuing it through the 'ordinary course of law,' more time would be probably consumed than in the proceeding here sought to be used. And it makes no difference that in this instance a question of jurisdiction incidentally depends upon the validity of an attachment." This case also quotes with approval the language above given from Strouse v. Superior Court. In Lindley v. Superior Court, supra, the petition was for a writ prohibiting the superior court from proceeding to the trial of an action in which the petitioner was defendant. The court said: "If, as contended, the superior court is without jurisdiction, there is, of course, a remedy by appeal for any adverse judgment affecting petitioner, and it is not sufficient ground for interfering by prohibition that the trial will be expensive and troublesome." The writ was denied solely by reason of the remedy by appeal.

If the remedy by appeal from a final judgment of the superior court is plain, speedy and adequate, the appeal from a similar judgment in a justice court is equally so. The method of appealing from the judgment of a justice court is simple and expeditious, and, if desired, may be taken upon both questions of law and fact.

For the foregoing reasons, and upon the authorities above cited, we are constrained to hold that the appellant has a plain, speedy, and adequate remedy by appeal from any judgment that may be finally taken against him, and for that reason prohibition will not lie.

In so holding we have not overlooked White v. Superior Court, 126 Cal. 245, 58 Pac. 450, nor Keystone Driller Co. v. Superior Court, 138 Cal. 738, 72 Pac. 398, in each of which the writ was granted to prohibit the trying of a case where summons had not been served and returned within the term of three years from the commencement of the action. In the Modoc Land Case no question was raised or discussed as to the remedy, and in the White Case the action in the superior court was to foreclose a mortgage, and the court seems to have laid stress upon the right of the petitioner to a present dismissal of the action and the removal of the lien by which his land was incumbered. But, however that may be, both cases were cited to the court in the later case of Lindley v. Superior Court, supra, where the rule is laid down as we have above indicated.

Neither have we overlooked the stipulation printed in the transcript, to the effect that the only question to be submitted to this court is: "Does section 581 of the Code of Civil Procedure of the state of California apply to justice courts?" Counsel may not by stipulation submit questions of law for determination by this court which do not arise upon the record in the case. If, notwithstanding the justice court may not have jurisdiction to try the action against plaintiff, appellant has no right to the writ of prohibition because of his remedy by appeal, the question of jurisdiction becomes a moot question, and should not in this proceeding be determined by this court.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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5 Cal. App. 94

## HOBSON v. PACIFIC STATES MERCANTILE CO. (Civ. 265.)

(Court of Appeal, Third District, California. Feb. 26, 1907.)

1. CORPORATIONS — INSOLVENCY — APPOINTMENT OF RECEIVERS—GROUNDS.

A court of equity cannot appoint a receiver for a corporation on an action brought by a private person merely because it is insolvent, where the only other prayer for relief is for a money judgment for a certain sum alleged to have been received upon contracts, to the benefit of plaintiff, with no sufficient allegations to sustain an action therefor for money had and received, notwithstanding Code Civ. Proc. § 564, subd. 5, providing that "a receiver may be appointed * * * in the cases when a corporation * * * is insolvent," since such appointment is only made ancillary to another action, so that the relief awarded by the judgment may be effective.

2. RECEIVERS—APPOINTMENT—NOTICE TO DEFENDANT.

An order appointing a receiver without a trial should not be made without previous notice to the defendant, where it does not appear that irreparable injury would be done during the few days necessary for a hearing on notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 54-60.]

Appeal from Superior Court, City and County of San Francisco; F. H. Kerrigan, Judge.

Action by H. F. Hobson against the Pacific States Mercantile Company. From an order appointing a receiver, defendant appeals. Reversed.

Riordan & Lande, for appellant. L. G. Carpenter, F. W. Sawyer, and H. F. Hobson, for respondent.

CHIPMAN, P. J. The prayer of the complaint is that plaintiff have judgment for $4,525, and that a receiver be appointed upon the filing of the complaint to take possession of all the assets and property, books, papers, and records of defendant, and that defendant be restrained from transferring any of its property, assets, books, and records and from doing any further business. Before the court made any order and, as required by the court, plaintiff on said day filed a bond in the sum of $1,000, signed by plaintiff and one surety, though reciting the names of two sureties. It does not appear that this bond was approved. Thereupon and on the same day, and without notice to defendant, the court made the following order: "From the verified complaint herein, good reasons appearing, and it appearing necessary and proper therefor it is hereby ordered that: Thomas J. Quinn be and he is hereby appointed Receiver herein to take into possession and safely keep until the further order of this court, all of the assets, property, money of whatever kind or nature, books, records, files and papers of the defendant herein, and until the further order of this court the defendant, its officers, managers and agents are restrained from disposing, transferring or removing any of its assets, property, books, files, records and accounts, and they and each of them and all other parties having property in their possession or under their control belonging to the defendant are hereby directed to deliver the same to said receiver. For the purpose of fully carrying out this order and the authority of the said receiver, the said receiver is hereby authorized to commence and institute any necessary action in any court for that purpose. The receiver is hereby required to furnish on qualifying an undertaking in the sum of $3000.00 and to take the oath required by law. Dated July 23rd, 1904. Frank H. Kerrigan, Judge." Indorsed: "Filed Jul. 23, 1904." On the same day the receiver so appointed filed the required bond, which was on that day approved by the said judge. The complaint was verified and was filed on July 23, 1904. It alleged that defendant is a corporation organized under the laws of this state; that its object was the sale and issuance of contracts known as "Merchandise Contracts," a sample of which is appended to the complaint as Exhibit A and made part thereof; that plaintiff is the owner and holder of 374 of said contracts, all of which are in good standing. This contract purports to be an agreement on the part of the corporation to deliver to the holder or his assigns, upon his complying with the conditions stated therein, "merchandise of whatever description desired to the retail value of one hundred dollars." The company guaranties upon redemption of the contract to find a purchaser for the merchandise, should the holder wish to sell the merchandise, "for the amount of $85.00 cash then and there." The holder is required and agrees to pay to the company the sum of $50, as follows: $5 on delivery of the contract, $1.50 weekly for 30 successive weeks, failing in which the contract becomes void and all payments made are to be forfeited to the company. If the weekly payments are fully paid the contract is deemed fully paid and nonforfeitable, "and when thereafter there shall be the full sum of one hundred dollars to the credit of this contract, in the redemption fund of the company, the company will immediately, on the surrender to it of this contract, deliver to the holder thereof, the merchandise hereinbefore mentioned." The contract provides further that the company shall retain "for its own use and all expenses" the initial payment of $5; also 25 per cent. of the 30 weekly installments: also "place ten per cent. in the reserve fund, and set aside the remainder of the installments paid on this and other similar contracts to the credit of the redemption fund. The money in said redemption fund shall be used in the purchase of merchandise for delivery, as required in the fulfillment of this and similar contracts of the company." It is also provided that the contract "is written pursuant to a written application thereof signed by the holder which is hereby referred to and made part hereof," but this application is not set out nor are its provisions stated in the complaint.

The complaint next alleges that "said business of said defendant is against public policy and as plaintiff is informed and believes, and therefore alleges a fraud against the plaintiff and all contract holders"; upon information and belief it is alleged that the postoffice department has instituted proceedings against defendant to deprive it of the use of the mails, and that defendant has been "sued and attached on matured contracts and has been unable to meet its demands"; that defendant has caused two other corporations to be organized for the purpose of taking over its property "and placing itself insolvent," and, unless restrained, will transfer its property to prevent the holders of said contracts from realizing anything thereon; that many of said contracts are outstanding and the holders thereof "are becoming alarmed and are making great demands on defendant which are being refused." Plaintiff also alleges on information and belief that complaint has been made to the Attorney General of the state requesting proceedings to be taken to revoke the license of defendant to do further business, and that before such action is taken defendant will dispose of all its assets and property in a manner to be of great loss to plaintiff and other contract holders. On information and belief, also, it is alleged that defendant is insolvent and cannot meet its obligations, and that "plaintiff believes" that defendant intends to sell as many contracts as it can and cause its insolvency to be circulated and thus discredit its ability to meet the demands upon it and cause holders to forfeit their contracts, and, unless restrained and a receiver appointed to take charge of the business there will be a great many contracts declared void for nonpayment and the money paid thereon forfeited; that plaintiff has no information of the full indebtedness and liability of defendant, and that such information is contained in defendant's books and records which, unless preserved by order of the court, will be destroyed or disposed of so as not to be available as evidence; that there has been paid on plaintiff's said contracts the sum of $4,525, which defendant "has had and received for the use and benefit of plaintiff and said contracts"; that, "unless a receiver is appointed to take possession of the assets and property of defendant and its books, papers, vouchers, records as herein alleged, they will be lost to the plaintiff and all contract holders." The bond for $1,000 was objected to as being defectively executed (by whom and when objected to does not appear), and on July 28, 1904, by order of the court, a bond similar in all respects to the first one, duly executed by plaintiff and two sureties, was filed and approved by the judge in lieu of said first bond. It appears that on the day of his appointment, namely, July 23d, the receiver "entered into possession of the premises and offices occupied by the corporation defendant, and seized and took possession and control of all the assets and property of every kind and nature, books, papers, records, vouchers and all other property of every character pertaining to the business of said corporation and the officers duly authorized to take charge of the affairs thereof, the property, and business of said corporation, and changed the locks on the offices and premises occupied by said company in the building known as 137 Montgomery street, in the city and county of San Francisco, and permanently locked and closed said offices occupied and used by said corporation defendant and which constituted the principal and only place of business of said corporation defendant in said city and county." On July 25, 1904, defendant duly served notice of motion to set aside the order appointing the receiver on the ground that the complaint does not state sufficient facts to constitute a cause of action, or entitle plaintiff to the relief prayed for or for the appointment of a receiver, and upon the further ground that there is no authority of law for the appointment of a receiver of defendant corporation upon the grounds stated in the complaint herein, and the court was without jurisdiction to appoint said receiver. The court shortened the time within which to serve notice of said motion to two hours, and defendant duly served the same upon plaintiff on July 25th, and simultaneously therewith also served on plaintiff a copy of the answer to the complaint.

In its answer defendant denies specifically each and every of the allegations of the complaint, and avers that plaintiff has caused assignments of said contracts to be made to him for the purpose of this action, but none of said assignments has or have been registered with defendant as required by said contracts and all like contracts; that not less than 97 per cent. of the contract holders who have assigned their contracts to plaintiff as by him alleged have not paid the full amount required by them to be paid under the terms of said contract, and "said contracts are not fully paid and have not matured, with the exception of probably six"; that said contracts are payable only "when there shall be the full amount of one hundred dollars to the credit of said contract in the redemption fund of the company, and not before, as said contracts in express terms stipulate and provide"; that prior to the delivery or execution of said contracts, or any of them, each holder signed a written application of the form set out in the answer. This application purports to be an application in which the proposed purchaser agrees to make the payments as set forth in the contract under penalty of forfeiture and declares that the application is made with full knowledge of all the provisions of said contract and published literature of the company, all of which terms and conditions the purchaser agrees to. The motion came on to be heard on the 25th, and at the hearing thereof "there was used, heard, and considered the said complaint herein, the said notice of motion to set aside said order, and the said answer of defendant." The matter was taken under advisement, and "on July 27th the plaintiff served and filed in said cause the following papers and pleadings, to wit, notice, affidavits, order, motion to amend, and amended complaint." These papers were filed by leave of court and over the defendant's objection, and thereupon the court "upon the consideration of all the papers on file herein, including said amended complaint, denied said motion to vacate said order appointing said receiver herein, and by the order of said court duly entered in the minutes thereof, continued said receiver in the use, occupation, possession, and control of the property and premises of said corporation defendant, by the order of said court to such effect." The papers filed by plaintiff on the 27th of July, and which were heard upon defendant's motion, do not appear in the transcript. On July 28th defendant duly served notice of appeal from said order appointing said receiver, and upon the same day and upon application, the amount being fixed by the court, defendant filed its stay bond on appeal in the sum of $5,000, which was duly approved by the court, whereupon the court ordered "that all proceedings under said order appointing said receiver are hereby stayed," and further that said receiver surrender possession to defendant of all the property held by him under said order and to "desist from doing any further act as such receiver."

The order from which defendant appeals was made without notice to defendant upon the verified complaint alone. The first notice defendant had of the order was when the receiver took possession of its books and other property and its place of business, locked up the premises, and carried away the key. The bond given by plaintiff at the time was subsequently declared by the court to be so defective as to require another bond to be given in lieu thereof, which was not done until five days later. When the receiver took possession of defendant's place of business and its books, records, and other property, his only authority was the ex parte order of the court concededly issued upon the original complaint, supported by a defective bond which had it been in all respects good and sufficient may have been wholly inadequate to damnify defendant for the damage in executing the order. But, aside from any imperfection in the bond, we know of no authority, statutory or otherwise, that warrants the court in making the order complained of. We regard the proceedings taken subsequent to the making of the order, when the motion to vacate it was noticed and heard, as wholly immaterial, and in no wise affecting the question now before us. The validity of the order must be determined by the proceedings upon which it was based. We have set out these subsequent proceedings because they are part of the record and are claimed by respondent to have some bearing upon the question presented, but we fail to see in what respect they can be used to validate an order previously made by the court upon grounds then only in existence.

The facts stated in the complaint do not constitute a cause of action, and are not claimed to have been stated for any purpose except for the appointment of a receiver. Respondent says in his brief that the action is not to enforce an illegal contract, but "is to distribute among creditors a joint fund." The action does not purport to have been brought on behalf of all the contract holders. There is no demand for an accounting for the common benefit of all contract holders or for the benefit of plaintiff. There are no appropriate averments for any relief, so far as we can discover by the complaint, except for the appointment of a receiver. True, the prayer asks for judgment for a certain sum, but the only averment looking towards a money judgment is the averment that defendant has received this amount upon the contracts mentioned, to the benefit of plaintiff, which, in itself, is not sufficient in an action for money had and received. There is no allegation of nonpayment of the money paid to the corporation. Hurley v. Ryan, 119 Cal. 71, 51 Pac. 20; Dodge v. Kimple, 121 Cal. 580, 54 Pac. 94. It is not possible to make anything out of the complaint except a recital of facts, all of them substantially upon information and belief or on belief alone, as ground for the appointment of a receiver.

It may be regarded as the settled law in this state that a court of equity has no inherent power to appoint a receiver of an insolvent corporation merely because of its insolvency, or to wind up its affairs, in the absence of a statutory provision. Murray v. Superior Court, 129 Cal. 628, 62 Pac. 191. Section 564, subd. 5, Code of Civil Procedure, provides that "a receiver may be appointed * * * in the cases when a corporation * * * is insolvent." In the French Bank Case, 53 Cal. 495, 553, the court said: "There is, of course, no such thing as an action brought distinctively for the mere appointment of a receiver. Such an appointment, when made, is ancillary to or in aid of the action brought. Its purpose is to preserve the property pending the litigation so that the relief awarded by the judgment, if any, may be effective. The authority conferred upon the court to make the appointment necessarily presupposes that an action is pending before it, instituted by some one authorized by law to commence it. But there is no statute of this state, none to which we have been pointed, which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver." This construction of the subdivision was followed and approved in Fischer v. Superior Court, 110 Cal. 129, 42 Pac. 561. It was there said: "The general rule, no doubt, is that so harsh a measure as the appointment of a receiver to take property out of one's possession without a trial will not be indulged in by a court without previous notice to the defendant. It would be unjustifiable, except where it clearly appeared that irreparable injury would be done during the few days necessary for a hearing on notice; and even in such an extreme case a temporary injunction would usually be sufficient." Mr. Beach, in his work on Receivers (section 141), says: "A motion to appoint a receiver will not be entertained unless notice has been given to the defendant, if practicable, and the appointment will not be made without notice, save in the case of irreparable injury." See Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192.

Respondent claims that Fischer v. Superior Court turned on the point that a bond was not required before making the order. In this respondent is in error. The decision deals particularly with the fact that the order appointing the receiver was without notice to the adverse party, while also showing that the court was without authority to make the order to take possession of the property of the corporation, as held in the French Bank Case, supra.

We do not find it necessary to pass definitely upon the nature of these contracts. Both parties seem to regard them as illegal, and for this reason appellant contends that the law leaves plaintiff where it finds him. (Wyman v. Moore, 103 Cal. 213, 37 Pac. 230), and that a contract against public policy may not be made the foundation of any action, either at law or in equity (Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63). A very slight examination of the contract shows that there can never accumulate in the redemption fund the amount required before the company can be called upon, under the terms of the contract, to furnish the merchandise referred to. Apparently each contract stands on its own feet, and the holder has no claim upon the redemption fund except to such money as he himself pays in. There appears to be no provision that forfeitures shall enure to the benefit of the redemption fund, but apparently they go to the benefit of the company. The holder has a fully paid up contract when he has paid $50, but of this amount only $29.75 goes to this redemption fund. The contract expressly provides that the merchandise will not be delivered until there is paid into that fund the full sum of $100, so that the holder must pay into that fund $70.25 additional, or in all $120.25, for the privilege of receiving $100 worth of merchandise at retail prices. A more perfect scheme of "heads I win and tails you lose" cannot well be conceived. Any person of ordinary understanding can see this by a moment's examination of the contract itself. It may be doubted whether equity will ever come to the relief of a sane person who deliberately, as in this case, without fraudulent inductment or concealment or through mistake or misrepresentation, becomes a party to such a contract. However this may be, we are convinced that the appointment of the receiver was without authority of law for the reasons hereinbefore stated. The order also contains a restraining clause but no appeal is taken from that part of the order, if indeed, it was intended to operate as an injunction or has been so treated.

So much of the order as appointed a receiver is reversed.

We concur: HART, J; BURNETT, J.

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5 Cal. App. 133

## HALL v. JUSTICES' COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 269.)

(Court of Appeal, First District, California. March 1, 1907. Rehearing Denied by Supreme Court April 29, 1907.)

1. Justices of the Peace—Procedure—Writ of Review.

Code Civ. Proc. § 911, requires every justice of the peace to keep a docket, in which he must enter the date of the summons and the time of its return and the time when either party appears, and their nonappearance if default be made. Section 912 requires that the several particulars in section 911 shall be entered at the time they occur. Section 845 provides that a defendant shall have five days in which to appear and answer if the summons is served in the city and county in which the action is brought. Section 871 provides that, if defendant fails to appear and answer or demur within the time specified in the summons, then, upon proof of service of the summons, if the action is based upon a contract, and is for the recovery of money or damages, the court must render judgment for plaintiff for the sum specified in the summons. Section 1068 provides that a writ of review may be granted when an inferior tribunal exercising judicial functions has exceeded its jurisdiction, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy. The summons in an action in the court of a justice of the peace having been served, and return thereof made, no further proceedings were had until more than eight years thereafter, when judgment was entered for plaintiff and against defendant by default. *Held*, that sections 911 and 912 were directory only, and, the justice having acted within his jurisdiction in entering the judgment, a writ of review, as authorized by section 1068, would not lie.

2. Same—Existence of Remedy by Appeal.

Where an appeal might have been taken from a judgment rendered in a court of a justice of the peace, certiorari, as authorized by Code Civ. Proc. § 1068, will not lie to review the same, though the right of appeal may have been lost by laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 774.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Certiorari by C. P. Hall against the justices' court of the city and county of San Francisco and another. From a judgment for plaintiff, defendants appeal. Reversed, with directions to dismiss the petition.

A. P. Dessoulavy, for appellants. H. V. Morehouse and J. E. Alexander, for respondent.

KERRIGAN, J. This is an appeal in a certiorari proceeding, in which the superior court of the city and county of San Francisco annulled a judgment of the justices' court of said city and county against the petitioner.

On December 2, 1896, Benjamin Lust commenced an action against C. P. Hall in the justices' court in the city and county of San Francisco to recover $253.75 for goods sold and delivered. Summons was issued on that date, and was served January 7, 1897. Summons was returned served January 28, 1897. Nothing further was done in the action until more than eight years after the return of summons, when on May 19, 1905, judgment was entered in favor of Lust, plaintiff, and against Hall, defendant, for $253.75, interest and costs. No appeal was ever taken from this judgment. It is the contention of Hall, the petitioner, that it was the duty of the justice, at the time of the return of the service of summons, January 28, 1897 (it disclosing that the time within which to appear and answer had expired), to note on the docket the nonappearance of the defendant therein, and to thereupon enter a judgment of default in favor of the plaintiff and against the defendant. That, if he did not do so then, he might do so later, but as of the date of the default. This contention rests upon sections 911, 912, 845, and 871, Code Civ. Proc. Section 911, Code Civ. Proc., requires, "every justice to keep a docket in which he must enter" (subdivision 3) "the date of the summons and the time of its return"; (subdivision 4) "the time when the parties or either of them appear, or their non-appearance, if default be made." Under section 912, Code Civ. Proc., these entries "must be made at the time they occur." Under section 845, Code Civ. Proc., defendant, having been served in the city and county court of San Francisco, had five days thereafter within which to appear and answer. Section 871, Code Civ. Proc., in part is as follows: "If the defendant fail to appear, and to answer or demur within the time specified in the summons, then, upon proof of service of summons, the following proceedings must be had: (1) If the action is based upon a contract, and is for the recovery of money, or damages only, the court must render judgment in favor of the plaintiff for the sum specified in the summons." Section 871, Code Civ. Proc., does not direct the justice to enter a judgment by default within any prescribed time. The entry of the nonappearance of the defendant, which sections 911 (subdivision 4) and 912 exact, is a ministerial duty. It is made by the clerk of the justices' court in the city of San Francisco. Section 93, Code Civ. Proc.

The failure to execute a ministerial duty does not divest a court of jurisdiction. Provisions of the Code much stronger and more definite in terms than the sections cited have been repeatedly held directory. In the case of Heinlen v. Phillips, 88 Cal. 557, 26 Pac. 366, a justice had made an order setting aside a judgment rendered by him after trial on the ground that it was void under section 892, Code Civ. Proc., having been rendered six weeks after the case had been submitted. Section 892, Code Civ. Proc., is as follows: "When the trial is by the court, a judgment must be rendered at the close of the trial." The court, at page 559 of 88 Cal., at page 367 of 26 Pac., said: "It is to be observed that no penalty is prescribed or consequence attached to a violation of this section, and we think that, if the Legislature had intended that the delay of a day by the justice (for that would be a violation of the provision) should subject the parties to the expense of a retrial, it would have said so in express terms. A similar but much stronger provision was enacted in relation to the district courts, and it was held to be merely directory. McQuillan v. Donahue, 49 Cal. 157. It is true that the superior court is a court of general jurisdiction, while the justices' court is one of limited jurisdiction; but the decision did not proceed upon the power of the court, but upon the intention of the Legislature." That case was followed and approved in American Typefounders' Co. v. Justices' Court of Sausalito Township, 133 Cal. 319, 65 Pac. 742, 978. In the case of Edwards v. Hellings, 103 Cal. 205, 37 Pac. 218, the default of the defendant was ordered by the superior court entered March 14, 1884, but judgment was not entered against him until January, 1892, nearly eight years later. In that case it is said, at page 207 of 103 Cal., at page 220 of 37 Pac.: "The provision [referring to section 585, Code Civ. Proc.] that the clerk must enter the judgment 'immediately' after entering his default is merely directory. His failure to do so may render him liable to an action by the judgment creditor, but does not render void the judgment subsequently entered upon such default; nor can the defendant against whom the judgment is entered invoke such failure for the purpose of annulling a judgment to which he has no other defense. The statute of limitations upon the judgment runs from the time of its entry, and not from its rendition. Trenouth v. Farrington, 54 Cal. 273. See, also, Franklin v. Merida, 50 Cal. 289. If the appellant had desired to set the statute of limitations running, he could himself have caused the judgment to be entered at any time after its rendition." In the case of Lynch v. Kelly, 41 Cal. 232, it was held that notwithstanding that section 594 of the practice act provided that upon the receipt of any verdict the justice should "immediately render judgment accordingly," "the formal entry of the judgment" was a mere clerical duty imposed upon him by statute. That case was approved in Montgomery v. Superior Court, 68 Cal. 407, 9 Pac. 720. In this connection reference may be made to Waters v. Dumas, 75 Cal. 563, 17 Pac. 685, where section 664, Code Civ. Proc. (providing that, after a trial by a jury, judgment must be entered by the clerk within 24 hours after the rendition of the verdict) is held to be directory; and to Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121, in which section 581, Code Civ. Proc., subd. 6 (providing that an action may be dismissed by the court when, after verdict or final submission, the party entitled to judgment neglects to demand and to have the same entered for more than six months), is held not to be mandatory. See, also, Disque v. Herrington, 139 Cal. 1, 72 Pac. 336; Larue v. Gaskins, 5 Cal. 507.

"A writ of review may be granted * * * when an inferior tribunal * * * exercising judicial functions has exceeded the jurisdiction of such tribunal * * * and there is no appeal, nor in the judgment of the court any plain, speedy and adequate remedy." Code Civ. Proc. § 1068. Tested by this section, and the decisions in this state, the writ should not have been granted. The justices' court acted within its jurisdiction, as has just been shown. Again, from the judgment in the justices' court defendant therein had an appeal, which he lost through his own laches; and, again, according to the petition itself for the writ of certiorari, the petitioner (Hall) knew of the rendition of the judgment against him within 30 days thereafter, and therefore within time to have moved in the justices' court, under section 859, Code Civ. Proc., as amended in 1905, to set aside the judgment if taken against him by his mistaken inadvertence, surprise, or excusable neglect.

The justices' court having acted within its jurisdiction, certiorari will not lie. In Borchard v. Supervisors, 144 Cal. 14, 77 Pac. 708, it is said: "It is too well settled to require the citation of authorities that the writ of review runs to inferior tribunals, boards, or officers exercising judicial functions solely to correct errors in excess of jurisdiction, or, in other words, to confine such tribunals and officers, exercising judicial functions, to their proper jurisdiction"—citing Farmers' & Merchants' Bank v. Bd. of Equalization, 97 Cal. 318, 32 Pac. 312; White v. Superior Court, 110 Cal. 60, 42 Pac. 480; Quinchard v. Trustees of Alameda, 113 Cal. 664, 45 Pac. 856. An appeal might have been taken, and it is no excuse that defendant did not know of the rendering of the judgment in time to avail himself of that remedy. In the case of Tucker v. Justices' Court, 120 Cal. 512, 52 Pac. 808, the court said: "And it is well settled that, when an appeal may be taken, resort cannot be had to a writ of review. The cases so holding are numerous, and need not be cited." See, also, Weldon v. Superior Court, 138 Cal. 429, 71 Pac. 502. It is also well settled that, where the remedy by appeal has once existed, certiorari will not be granted because the time for appeal has passed. McCue v. Superior Court, 71 Cal. 545, 12 Pac. 615; Stuttmeister v. Superior Court, 71 Cal. 322, 12 Pac. 270; Miliken v. Huber, 21 Cal. 166; Faut v. Mason, 47 Cal. 7; Reynolds v. Superior Court, 64 Cal. 372, 28 Pac. 121. And it is equally well settled that certiorari cannot be used as a substitute for an appeal after the opportunity to appeal has been lost by the neglect or laches of the applicant. In Bennett v. Wallace, 43 Cal. 25, it is said: "The statute was intended to supply a remedy where none existed in the first instance, and not to supplement one lost through the laches of the party himself." To the same point, see, also, Faut v. Mason, 47 Cal. 7; Valentine v. Police Court, 141 Cal. 615, 75 Pac. 336.

The judgment is reversed, and the trial court directed to dismiss the petition.

We concur: COOPER, P. J.; HALL, J.

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5 Cal. App. 39

## R. H. HERRON CO. v. MAWBY. (Civ. 166.)

(Court of Appeal, Second District, California. Feb. 19, 1907.)

1. Payment—Check of Debtor—Duty of Creditor.

Though, in the absence of an express agreement, the acceptance of a debtor's check is in fact merely conditional payment—that is, satisfaction of the debt if and when paid—its acceptance implies an undertaking of due diligence in presenting it for payment, and, if the party from whom it is received sustains loss by want of such diligence, it will be held to operate as an actual payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 86–88.]

2. Bills and Notes—Checks—Presentment for Payment—Diligence.

October 4th, a creditor received its debtor's check on a bank in a distant town, placed it in a local bank for collection, and it was mailed to the drawee bank, which received it October 5th, but did not acknowledge receipt. The drawee bank closed October 15th, and the check was returned the 18th, when the debtor was first notified of its nonpayment. *Held*, that the bank having sent the check directly to the drawee without instruction to do so, and there being no evidence of custom or usage to support its act, and there having been another and independent public agent for the collection of checks in a distant town, the creditor and its agent were negligent in the presentment of the check.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1067, 1069.]

3. Same—Common-Law Doctrine not Abrogated.

Civ. Code, §§ 3213, 3255, providing, when a check is not duly presented for payment within 10 days after the time it could with reasonable diligence be transmitted to the proper place for presentment, the drawer and indorsers are exonerated, unless such presentment is excused, does not abrogate the common-law doctrine of presentation of checks with reasonable diligence after the time taken in reaching the place of payment, but merely fixes a limit after which delay in presentment will exonerate the drawer and indorsers of such check, unless the delay be for one of the reasons expressly provided by statute.

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by the R. H. Herron Company against C. E. Mawby. From a judgment dismissing the action on its merits, plaintiff appeals. Affirmed.

Gill & Densmore and Oscar A. Trippet, for appellant. Lawler, Allen & Van Dyke, and Collier & Carnahan, for respondent.

TAGGART, J. From a judgment dismissing its action on the merits and awarding defendant costs, the plaintiff appeals.

Plaintiff is a corporation doing business at the city of Los Angeles, and defendant resides near the town of Coachella, in Riverside county. On the 1st day of October, 1904, defendant being indebted to the plaintiff in the sum of $620.28, drew his check for that amount on the Coachella Valley Bank, presumably located in Coachella, dated October 1, 1904, and payable to the order of plaintiff, deposited it in the United States mail, addressed to plaintiff at Los Angeles, and the check was regularly received by plaintiff before 3 o'clock p. m. on the 4th day of October. On the same day plaintiff placed said check in the National Bank of California at Los Angeles for collection, and the said bank thereupon, on the same day, mailed the check directly to the Coachella Valley Bank for payment. The Coachella Valley Bank did not acknowledge receipt of the check to either plaintiff or the National Bank of California, and neither of the latter parties made any inquiry of the Coachella Bank why it had not acknowledged receipt of said check or whether or not said check had been paid; and the National Bank of California did not notify either plaintiff or defendant of the failure of the Coachella Valley Bank to acknowledge receipt of said check. At the close of business hours on Saturday, October 15, 1904, the Coachella Valley Bank closed its doors and ceased to transact business, and ever since said time has been without funds with which to meet the claims of its depositors. The check in question was not paid, but was received by said National Bank of California at Los Angeles by United States mail on the 18th day of October, 1904, having been mailed to it at San Bernardino, October 17, 1904, by one Paul Bodenhamer. Defendant was not notified of the nonpayment of said check until the afternoon of October 18, 1904.

The trial court finds that at all times between the 1st day of October, 1904, and the close of banking hours on the 15th day of October, 1904, defendant had on deposit in said Coachella Valley Bank a sum of money more than sufficient in amount to pay said check, and that said bank was open for the transaction of business, and receiving deposits and cashing checks, and that the persons owning and conducting the same had sufficient property and funds subject to execution and legal process to pay said check at all times between said dates. It also finds that there were two daily United States mails each way between the town of Coachella and the city of Los Angeles, and that at all times between the 1st and 18th days of October, 1904, Wells, Fargo & Co., a corporation doing a general express business, was engaged in the collection of checks, etc., at Coachella, and in direct correspondence with the office of said company at Los Angeles.

The conclusions of law of the trial court are that the plaintiff and its agent, the National Bank of California, were negligent in sending the said check directly to said Coachella Valley Bank for payment, were negligent in not sooner knowing that said check had not been paid, and negligent in not notifying defendant of the failure to receive any response from the said check. Whilst a check drawn bona fide on a banker having funds of the drawer is prima facie payment, if accepted as cash, still, in the absence of any express agreement, the acceptance of a check of either the debtor or a third party is in fact merely conditional payment—that is, satisfaction of the debt if and when paid; but the acceptance of such check implies an undertaking of due diligence in presenting it for payment, and, if the party from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment. Comptoir D'Escompte v. Dresbach, 78 Cal. 15, at pages 20–22, 20 Pac. 28.

At common law the payee of the check has until the following day after its receipt to present it for payment as between himself and the drawer, when drawn on a bank in the same town or city where the check is given and received. Ritchie v. Bradshaw, 5 Cal. 228; Himmelmann v. Hotaling, 40 Cal. 115, 6 Am. Rep. 600. When drawn on a bank in a different place, the payee has the same time, and, in addition thereto, such time as will be required to transmit it to the place of payment by due course of mail. Manitoba, etc., v. Weiss, 101 N. W. 37, 18 S. D. 459. That the sending of a check by United States mail directly to the drawee bank does not constitute a proper presentment for payment in the absence of proof of usage or custom among banks to do so, is established by the weight of authority. This is recognized by most of the American cases, and in those in which the facts do not fall within the general rule the weight of authority is admitted and the case distinguished. This is true of most of the cases cited by appellant. For instance: The instrument was payable at the bank by its maker and not by the bank, (Indig v. City Bank, 80 N. Y. 106), a usage was directly proven and relied upon, much stress being laid thereon in the opinion (Kershaw v. Ladd, 44 L. R. A. 236, 34 Or. 375, 56 Pac. 402), positive instructions were given by the party for whom the collection was made, to make presentment in this way (First National Bank v. Citizens' Sav. Bank, 48 L. R. A. 583, 123 Mich. 336, 82 N. W. 66), or the facts showed that if sent through a third person it could not have reached the drawee bank before it failed (First Nat. Bank v. City Bank [Tex. Civ. App.] 34 S. W. 458), etc. The law and its reasons are declared in the following language from Daniel on Negotiable Instruments (volume 1, § 328–a): "For the purposes of collection the collecting bank must employ a suitable subagent. It must not transmit its checks or bills directly to the bank or party by whom payment is to be made, with the request that remittance be made therefor. It is considered that no firm, bank, corporation, or individual can be deemed a suitable agent in contemplation of law, to enforce in behalf of another a claim against itself." Drovers' Nat. Bk. v. Anglo-American, etc., 7 N. E. 601, 117 Ill. 100, 57 Am. Rep. 855; Anderson v. Rodgers, 36 Pac 1067, 53 Kan. 542, 27 L. R. A. 248; Minneapolis, etc., v. Metropolitan Bank, 78 N. W. 980, 76 Minn. 136, 44 L. R. A. 504, 77 Am. St. Rep. 609. The fact that a check is sent to the drawee bank through the mails does not amount to a demand for payment, and the bank may hold it any length of time without incurring the liability of an acceptance. Morse on Banks & Banking, 289.

We do not agree with appellant that, because section 3213 of the Civil Code by the provisions of section 3255 becomes applicable to checks required to be transmitted to another place for presentment, therefore the common-law doctrine of presentation of such checks with reasonable diligence after the time taken in reaching the place of payment is no longer to be considered in this state. On the contrary, this section merely fixes a limit after which delay in presentment will exonerate the drawer and indorsers of such a check, unless the delay in presentment be for one of the reasons expressly provided by statute. Under the provisions of section

3213 of the Civil Code, reasonable diligence in making presentment must still be exercised by the holder of such a check, and this must be within the statutory limit of 10 days, or he loses his right to hold the drawer or indorsers of the check. The presentation must be by some one capable of acting in the interest of the drawer of whom the collecting bank is the agent for the purpose of collection. The person making presentment should be prepared to treat with the drawee bank at arm's length. "Had presentment been made by another agent of the plaintiff and payment refused, steps might have been taken immediately to protect the drawer's rights; but the check (having been sent to it by mail) being in the hands of the drawee, of course, no effort would be made by it to prosecute itself," says the Kansas Supreme Court in Anderson v. Rodgers, supra. In that case a check was received by the drawee bank, by mail, on December 12th after business hours. The bank was open for the transaction of business all day December 13th, but failed to open December 14th. The court held the collecting bank negligent in making presentment of the check. That under the statute there was still time to make a proper presentment, after the abortive one, will not avail the collecting bank or excuse it from responsibility for its negligent act, if the fund be lost to the drawer. First Nat. Bank v. City Nat. Bank (Tex. Civ. App.) 34 S. W. 458.

The findings in the case at bar show that the National Bank of California, without instructions to that effect, or without evidence of custom or usage to support its act, and notwithstanding there was another and independent public agent for the collection of drafts, checks, etc., in the town of Coachella, sent the defendant's check to the Coachella Valley Bank to collect from itself. It failed to make good. There was no capable or proper agent selected to act in the interest of the drawer between October 5th and the close of banking hours of October 15th, and the fund in the Coachella Valley Bank was lost.

If it were conceded that, under section 3213, the National Bank, notwithstanding its negligent manner of making presentment, would be permitted to sit idly by, at defendant's risk, for 10 days after the check reached Coachella, still it was the negligence of the plaintiff and the agent it selected that caused the loss of the fund to the drawer. The check was in the hands of the subagent selected by the National Bank (the Coachella Valley Bank) on the morning of October 5th, and it was not presented "within ten days" after it reached the place of payment, as it had not been presented up to the close of banking hours, on October 15th. The conclusion that plaintiff and its agent were negligent is clearly supported by the findings, whichever view of the law is taken.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW J.

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5 Cal. App. 36

## PEOPLE v. WARD. (Cr. 46.)

(Court of Appeal, Second District, California. Feb. 18, 1907.)

1. False Pretenses—Issues and Proof.

On a prosecution for obtaining money under false pretenses, it is competent for the jury, in determining the truth or falsity of the representations, to take into consideration the acts and conduct of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 60.]

2. Same—Sufficiency of Evidence.

Where several false pretenses enter into a transaction, proof of any one thereof constituting an operative cause is sufficient to support the verdict.

3. Same.

On a prosecution for obtaining money under false pretenses, *held*, that the evidence was sufficient to sustain a conviction.

4. Same—Evidence—Admissibility.

Evidence of a certain person, to the effect that on the day of the procurement of the money from prosecutor, though not in prosecutor's presence, but about the same time, defendant represented to witness that he was expecting a shipment of tools for use in development work, and solicited storage room therefor, and represented that he was expecting a draft for the same sum that he had mentioned to prosecutor, was admissible as tending to corroborate prosecutor's evidence that defendant had told him that he expected a draft, and as inconsistent with defendant's plea of not guilty, which denied, among other things, that he made representations as to the expectancy of the draft and the employment of men.

Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

M. Ward was convicted of obtaining money under false pretenses, and he appeals from the judgment and from an order denying a new trial. Affirmed.

Shepherd & Barnes, for appellant. U. S. Webb, Atty. Gen., and E. E. Selph, Deputy Atty. Gen., for the People.

ALLEN, P. J. The defendant was charged in the superior court of Ventura county with obtaining money under false pretenses, and convicted. He appeals from the judgment and an order denying a new trial.

The information alleged that defendant falsely, etc., represented to Collins & Sons, a firm doing business at Ventura, that there had been mailed to said firm a draft for $5,000 to the credit of defendant, which would be received by said firm within a day or two; and, further, that defendant had in his employ in said county several men, and he desired an advance of $100 with which to pay said men; that thereby Collins & Sons were induced to deliver to said defendant $100; that all of said representations were false, and were made knowingly and designedly for the purpose of defrauding said firm. The information is sufficient; nor is the same challenged by appellant.

The chief contention of defendant is that there is no evidence that he had not ordered such draft sent, and the other representations so made are not sufficient to support the charge. That the representations were made is not controverted. It was competent for the jury, in determining the truth or falsity of such representations, to take into consideration the acts and conduct of the parties. That is permissible in determining the falsity of any pretense. People v. Wasservogle, 77 Cal. 174, 19 Pac. 270. The fact that defendant never called upon Collins & Sons after the transaction, nor made inquiry about the draft involving, as it did, a large sum of money, but left the county and was found three months thereafter several hundred miles from the scene of the transaction, in the absence of any explanatory circumstances, is convincing evidence that no draft had been ordered, nor was one expected. In addition to this, there was evidence warranting the jury in determining that the statement that defendant had several men in his employ in the county, for the payment of whose wages the money was demanded, was false, and that such representation was an inducement for the advance. Where several false pretenses enter into the transaction, proof of any one thereof constituting an operative cause is sufficient to support the verdict. It is obvious that such representation in relation to the employment of men in the vicinity was a representation as to an existing fact, and, if believed, tended to establish a credit and standing for the employer, and the effect of which would be to influence one desirous of aiding local enterprises in making such advance. The testimony in the record sufficiently proved the corpus delicti.

It is further insisted by defendant that the evidence of one Barnes, admitted under objection, was incompetent and an attempt to show that defendant had been guilty of another offense than the one with which he stood charged. This evidence was to the effect that on the day of the procurement of the money from Collins & Sons, though not in their presence, but about the same time and at the same town, defendant represented to Barnes that he was expecting a shipment of tools for use in development work in the Matilija, and solicited from Barnes storage room therefor, and, in addition, represented that he was expecting a draft that afternoon for $5,000; that these tools never arrived to the witness' knowledge. It will be observed that nothing in Barnes' testimony tended to show another or distinct offense, and we are not confronted with the question as to the admissibility of evidence in relation to another offense; but, even in such case, "whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion." People v. Walters, 98 Cal. 141, 32 Pac. 864. In the case under consideration, it was material for the jury to determine whether the representations made to Collins, as testified to by him, were actually made. Representations of similar import made to Barnes about the same time and place tended to corroborate Collins. In addition to this, the defendant by his plea of not guilty denied every material allegation in the information, among which was that he made the representations as to the expectancy of the draft and the employment of men in the Matilija. These representations and statements to Barnes were inconsistent with such denial. "Anything said by a party may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony. * * * It is their inconsistency with the party's present claim that gives them logical force." Wigmore on Ev., vol. 2, §§ 1048-1053. Nor is preliminary proof required to authorize the admission of independent statements of fact not amounting to a confession. People v. Le Roy, 65 Cal. 614, 4 Pac. 649. Were it even material as to the exact time of the representations made to Barnes in relation to those made to Collins, it will be noted that the transaction with Collins took place about noon, and defendant's statement to Barnes was that afternoon he was expecting a draft, from which it may be inferred that the statement to Barnes was made before the procurement of the money from Collins, and might well be accepted as proof of a scheme to commit the subsequent crime, and such evidence was cogent and material. Blake v. Assurance Soc., 4 C. P. Div. 94, cited in Carnell v. State, 36 Atl. 118, 85 Md. 1. The objections thereto go to its weight, rather than to its admissibility. People v. Martin, 102 Cal. 569, 36 Pac. 952.

We perceive no error in the record, either in the admission of this testimony or otherwise, and the judgment and order appealed from are affirmed.

We concur: SHAW, J.; TAGGART, J.

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5 Cal. App. 80

## MAIER PACKING CO. v. FREY. (Civ. 313.)

(Court of Appeal, Second District, California. Feb. 25, 1907.)

ADMINISTRATORS—CLAIMS AGAINST ESTATE—AFFIDAVITS—PERSONS WHO MAY MAKE—SUFFICIENCY OF AVERMENTS.

Code Civ. Proc. § 1494, provides that every claim when presented to an administrator must be supported by the affidavit of the claimant, or some one in his behalf, showing certain facts, and, when made by a person other than the claimant, he must set forth the reason why it is not made by claimant. A claim was supported by an affidavit made in the following form: "Maier Packing Company, by Simon Maier, Pres., * * * being duly sworn, says," etc., and signed "Maier Packing Company, Simon Maier, Pres." It did not disclose that claimant was a corporation. *Held*, that the affidavit was defective in not assigning some reason which would relieve claimant from making it.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Maier Packing Company against Margaret T. Frey, administratrix. From a judgment for defendant, plaintiff appeals. Affirmed.

Jones & Weller, for appellant. John H. Foley, for respondent.

SHAW, . Appeal from judgment. Maier Packing Company instituted suit upon a claim against the estate of one C. David Frey, deceased, of which respondent was the administratrix. The claim and affidavit in support of it was attached to and made a part of the complaint. A demurrer interposed by defendant was sustained upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. Plaintiff declined to amend, and judgment was thereupon entered in favor of defendant, from which this appeal is prosecuted.

The claim was allowed by the administratrix, but rejected and disallowed by the judge of the superior court to whom it was presented for approval. The only question involved is whether or not the affidavit to the claim complies with the requirements of section 1494, Code Civ. Proc., which provides that "every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. * * * When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant." The affidavit in question is as follows: "State of California, County of Los Angeles—ss.: Maier Packing Co., by Simon Maier, Pres., whose foregoing claim is herewith presented to the administrator of the estate of said deceased, being duly sworn, says, that the amount thereof, to wit, the sum of $962.09, is justly due to said claimant, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the claimant or affiant. Maier Packing Co., Simon Maier, Pres. Subscribed and sworn to before me, this 15th day of June, 1904. Sam'l Prager, Notary Public in and for Los Angeles County, Cal."

It appears both from the affidavit and the account constituting the claim that Maier Packing Company is the claimant. The affidavit is made by Simon Maier on behalf of the claimant, and under the section above quoted we must look to the affidavit for the assignment of some reason which will excuse claimant from making the same. The absence of such an averment has been held to be absolutely fatal. Perkins v. Onyett, 86 Cal. 348, 24 Pac. 1024. There seems to have been no attempt to state in positive terms any reason why Maier Packing Company did not make the affidavit. Counsel for appellant, however, assumes claimant to be a corporation, and then contends that a corporation cannot swear; that it must necessarily act through some one as its agent. This is true, and it follows that, where an incorporated company presents a claim against the estate of a deceased person, an averment of the fact that claimant is a corporation constitutes a sufficient reason why the affidavit is not made by the claimant. The affidavit before us does not disclose the capacity or character in which claimant appears; there is no statement in it from which we can conclude that Maier Packing Company is an incorporated company, and, in the absence of some averment setting forth such fact, we cannot assume that it is a corporation. The affidavit is defective in not assigning some reason which would relieve claimant from making it. Where the claimant is a corporation, it should appear from the affidavit that the person acting on its behalf is an officer thereof, presumed from his official position to have sufficient knowledge of its affairs; or, if made by other than such official, it should contain averments tending to show, when he swears that there are no offsets to his knowledge, that the nature of his relation to the company is of a character calculated to place him in possession of the requisite information upon the subject. Where the affidavit is made by an individual, who bases his claim upon transactions had with deceased, the law imputes to him knowledge of the truth of the averments contained in his affidavit. When made by another on his behalf, such person should, in addition to averring that he has no knowledge of any offsets, aver facts showing that he was in a position to know of them if any existed. These claims, when allowed, approved, and filed, partake of the nature of a judgment, and as such are to be paid in due course of administration, and the affidavit should set forth facts sufficient to at least make out a prima facie showing that the claim is justly due from the estate over and above all offsets.

We have examined the authorities cited by appellant; but, in view of the decision in the case of Perkins v. Onyett, supra, as well as the evident purpose of the section, we must hold that they are inapplicable to this case.

We find it impossible to reconcile the provisions of this affidavit with the requirements of the statute, and the judgment appealed from is therefore affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 140

## MARSHUTZ v. SELTZOR et al. (Civ. 310.)

(Court of Appeal, First District, California. March 4, 1907. Rehearing Denied March 30, 1907; Denied by Supreme Court May 10, 1907.)

1. LIMITATION OF ACTIONS—TRIAL BY COURT—FINDINGS.

A general finding of the court that the promissory note mentioned in the cross-complaint was barred by the statutes of the state, together with a finding of fact that the "claim of the defendant, * * * under the mortgage security so assigned to him is over 40 years past due, and has not been prosecuted in any way until the time of the filing of said cross-complaint," is sufficient to show that the note and the mortgage securing it was barred by Code Civ. Proc. § 337, providing that "an action on any contract * * * founded upon an instrument in writing" shall be brought within four years.

2. QUIETING TITLE—AFFIRMATIVE RELIEF TO DEFENDANT—EFFECT OF BAR BY LIMITATIONS.

A mortgagee, after the mortgage debt has been barred by the statute of limitations, cannot, on a cross-complaint in an action to quiet title to the land covered by the mortgage, obtain affirmative relief by setting up such outlawed mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 101.]

3. SAME — HEARING — FINDINGS — SUFFICIENCY.

In an action to quiet title to land, the court found that plaintiff obtained title in 1883 deraigned by mesne conveyances from the land commissioners of the state, that he entered into possession under such title, and for 18 years prior to the action had been in actual possession, holding the premises adverse to all the world, and had paid all taxes thereon since June, 1883, and that at the time of the commencement of the action he was the owner and seized in fee of the premises. *Held* to sustain a judgment quieting plaintiff's title against an outlawed mortgage, which was not proved to have ever been a lien upon plaintiff's title.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by L. C. Marshutz against Edward Seltzor and J. G. Klumpke. From a judgment for plaintiff, defendant Klumpke appeals. Affirmed.

R. H. Countryman, for appellant. R. Masson Smith, for respondent.

HALL, J. Plaintiff brought this action December 6, 1901, against defendants to quiet his title to beach and water lot No. 763, situate in the city and county of San Francisco. The complaint is in the usual form, and alleges that plaintiff is the owner and seized in fee of the described premises, and that defendants claim some estate or interest therein. Defendant Klumpke answered, and besides denying the title of plaintiff set up by way of answer and as a defense that on the 1st day of April, 1854, James C. Cary was the owner of an undivided one-half interest in the said lot, and on said day executed to one Edward F. Seltzor a mortgage of his interest in said lot to secure the payment of his promissory note to said Seltzor for $2,000, payable eight months after date thereof (April 1, 1854), with interest at 3 per cent. per month. Mortgage was duly recorded April 3, 1854, and no part of the principal and interest has ever been paid. The note and mortgage are alleged to have been assigned to defendant Klumpke by Seltzor for value February 4, 1859, and the assignment duly recorded on same day. Defendant Klumpke, in a cross-complaint, set up the same matters, and prayed, in the usual form, that his said mortgage be foreclosed. Plaintiff answered Klumpke's cross-complaint, and, among other things, pleaded that said cause of action was barred by the statute of the state of California, "and particularly by section 337 of the Code of Civil Procedure, and also by sections 319 and 343 of said Code of Civil Procedure." The court at the conclusion of the trial made findings, and entered a judgment quieting plaintiff's title as against Klumpke, and denied Klumpke any relief upon his cross-complaint, having found that the note and mortgage were barred by the statute of limitations. Defendant moved for a new trial, which being denied, he appealed from the order as well as from the judgment.

Appellant insists that the court should have directed a foreclosure of his mortgage, and in any event should not have quieted plaintiff's title as against appellant. First, as to the foreclosure of the mortgage, appellant urges that the plea of the statute is defective, and that the findings thereon are insufficient. In this he is mistaken. The answer to the cross-complaint distinctly alleges that the cause of action is barred by the provisions of section 337 of the Code of Civil Procedure, which is the appropriate section to plead. The court found that the promissory note mentioned in the cross-complaint is and was "barred by the statutes of the state of California," but did not specify by what section of the Code, and counsel now insist that this is not sufficient. But, in addition to the general finding, the court also found "that said claim of the defendant Klumpke, under the mortgage security so assigned to him, is over 40 years past due, and has not been prosecuted in any way until the time of the filing of said cross-complaint." This is such a finding of fact as necessarily shows that the action on the note and mortgage was barred by the section pleaded.

Further, it may be observed that the cross-complaint on its face shows the action therein set forth to be barred, and plaintiff might have raised the point by demurrer. By pleading the bar in his answer to the cross-complaint, plaintiff gave notice of his intention to stand upon the bar, that was shown to exist upon the face of appellant's pleading, and it is at least doubtful whether or not the court was required in such a case to make a finding of the fact. There was no issue as to the existence of the fact.

Appellant's main contention, however, is that the court should have ordered the mortgage foreclosed, notwithstanding that it was long since barred by the statute. In this connection appellant concedes that he could not have enforced his claim if he had brought the action to foreclose, as plaintiff, but insists that, where a plaintiff brings an action to quiet his title against a mortgage, the mortgagee may obtain a decree of foreclosure on an outlawed mortgage. It is true that a mortgagor, or the successor in interest of such mortgagor with notice of the mortgage, cannot obtain a decree quieting his title against the mortgagee, without paying the unpaid but outlawed mortgage debt (Grant v. Burr, 54 Cal. 298; De Cazara v. Orena, 80 Cal. 132, 22 Pac. 74; Brandt v. Thompson, 91 Cal. 458, 27 Pac. 763; Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200; Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225); but it does not follow from this that the defendant mortgagee can, upon a cross-complaint setting up such outlawed mortgage, obtain affirmative relief. This question was presented in Booth v. Hoskins, supra. Booth sued Hoskins to quiet his title, and Hoskins answered, and by way of cross-complaint set up a deed from Booth to Hoskins, and claimed title thereunder. Plaintiff answered the cross-complaint, and set up that the deed was intended as a mortgage to secure the payment of $408 loaned to plaintiff, and that the debt thus created was before the commencement of the action barred by the statute of limitations. The trial court entered a decree foreclosing the mortgage, which was on appeal reversed. After deciding that the deed was intended as a mortgage, the court said: "The next question is, Was the defendant's cause of action to recover back his money barred by the statute of limitations? We think it was. * * * The defendant's right to recover the money due him being barred, he was not entitled to have his mortgage foreclosed." The judgment of foreclosure was reversed. In Spect v. Spect, supra, it is said: "The mortgagee, after the mortgage debt has been barred by the statute of limitations, cannot by any affirmative proceedings on his part invoke the aid of the court for the collection of his debt. * * *" A proceeding under a cross-complaint to foreclose a mortgage is an affirmative proceeding to collect the debt secured by the mortgage. This disposes of the contention that the court should have entered a decree upon the findings for a foreclosure of the mortgage. No such decree should have been entered. Booth v. Hoskins, supra.

It is next urged that on the findings the court should not have rendered a decree quieting plaintiff's title against appellant, but should either have denied plaintiff any relief, or provided in the decree that his title be quieted only on his paying, within some designated time, the amount unpaid on the mortgage. It might be suggested in this connection that, inasmuch as by setting up the mortgage by way of cross-complaint and asking for a foreclosure, appellant compelled a finding that his mortgage was barred, which resulted in a denial to him of any relief thereon, he has practically caused the removal of any cloud that might exist on plaintiff's title by reason of the existence of such mortgage. The finding that the mortgage is barred, and the denial of any affirmative relief thereon, would seem to be an effectual bar to any future action to enforce the mortgage. However, we do not think that it is true that the findings in this case do not support the judgment as rendered. The law undoubtedly is that a mortgagor, or his successor in interest with notice of the mortgage, cannot quiet his title against the owner of the outstanding mortgage, even though the mortgage be barred, without paying the mortgage debt. All the cases cited to us are of that nature. But the findings in this case do not bring it within this rule. It is not alleged in the answer that plaintiff, or any grantor of plaintiff, made the mortgage set up by Klumpke. The mortgage was made by one Cary, and no attempt is made in the answer to connect the plaintiff with Cary. While it is alleged and found that Cary owned an interest in the lot in 1854, when he executed the mortgage, it is not alleged that plaintiff's title was acquired from Cary or was derived from him in any way. The findings, on the contrary, show that plaintiff obtained title in 1883, deraigned by mesne conveyances from the land commissioners of the state of California, and that he entered into possession under such title, and for 18 years past has been in the actual possession of the premises, holding the same adverse to all the world, and has paid all taxes levied and assessed thereon since June, 1883. It is expressly found that at the time of the commencement of the action plaintiff was the owner and seized in fee of the premises. These findings justified a decree quieting the title of plaintiff against an outlawed mortgage, which is not found to have ever been a lien upon the title of plaintiff. If the lien of appellant's mortgage was ever a lien upon plaintiff's title, the burden was upon the defendant to show it. He has not done it.

We have not overlooked the argument of appellant that because it is found that Cary owned an interest in the premises in 1854, which is prior to the date of the deed from the state land commissioners to the grantor of plaintiff, we must infer that plaintiff's title was derived from Cary, or is in some way subordinate to the title of Cary. While this condition suggests some uncertainty as to the facts, any uncertainty in findings must be construed so as to uphold the judgment, rather than to defeat it. Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257. Certain it is that justice does not demand that we construe uncertainties in findings so as to give any sort of vitality to a claim 45 years past due, and on its face bearing interest at 3 per cent. per month, and for which (as appears by the findings) the present holder paid nothing.

Appellant has not called our attention to any error occurring at the trial, but has confined himself to an attack upon the judgment as not supported by the findings.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

150 Cal. 710

## CRABTREE v. POTTER et ux. (L. A. 1,726.)

(Supreme Court of California. March 25, 1907.)

1. Trusts — Constructive — Fraud in Acquisition of Property.

In an action by a daughter against her parents to recover possession of land, where a cross-complaint was filed averring that the mother owned the land in question subject to a mortgage; that defendants were old and infirm, had no property save this land; that it was difficult for them to make a living; that plaintiff, their daughter, promised that if defendants would convey the land to her she would pay the mortgage, and defendants should retain the premises as their home as long as they lived, and they, through having confidence in her and relying on her statements and promises, executed a deed conveying the property to her; that the statements of plaintiff were false, and made with the intent to deceive; and that plaintiff had violated her trust —the court found the facts as alleged in the cross-complaint. *Held*, that these findings warranted a decree that plaintiff held the land in trust for the mother during the life of the mother, and should execute a deed conveying the land to her for life.

2. Same—Parol Evidence.

Constructive trusts are created by operation of law, and are expressly excepted from the provisions of Civ. Code, § 852, requiring trusts in land to be created by written instruments, and may be established by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 159.]

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Mrs. H. Crabtree against Z. M. Potter and wife. From a judgment for defendants and an order denying plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

M. C. Hester, for appellant. Bower & Hutchinson, for respondents.

LORIGAN, J. This is a controversy between daughter and parents over a couple of lots of land in Hazard's East Side addition in Los Angeles. The plaintiff filed an ordinary complaint in ejectment to recover possession of the land. Defendants, by answer, denied her ownership or right to its possession, and also filed a cross-complaint, the essential averments of which were: That defendants were husband and wife and purchased the property in question in 1900 for $400, taking title for the benefit of the marital community in the name of the wife; that on July 19, 1901, there was a mortgage debt upon the lots for $150, being the balance of the purchase price; that defendants were at that date old and infirm and financially poor, having no property save these lots, and it was difficult for them to make enough money to support their family, and it was a matter of struggle and self-denial for them to make payments on the mortgage; that plaintiff, their daughter, proposed to them that, if they would convey said property to her, she would pay the balance of said mortgage, and defendants should have and retain said premises as their home as long as they lived; that feeling they would thus be relieved from the burden of making payments on said mortgage, and also be secured in a home for life, they consented to her propositon; that they had confidence in her, and trusted and relied on her statements and promises, and so confiding and trusting, and induced to do so solely by her promises, they, on July 19, 1901, executed a deed conveying the property to her; that said property was then worth $800; that said statements of plaintiff were false and fraudulent, and made by plaintiff to defendants with intent to deceive and defraud them out of their property; that plaintiff did not intend to perform the same, but intended when they were made to deceive and defraud the defendants; that plaintiff has violated her trust, and seeks to eject defendants from the said premises. The cross-complaint closes with a prayer that the deed to plaintiff be set aside and annulled, that it be decreed that plaintiff holds the property in trust for defendants, and for general relief. Plaintiff, by answer to the cross-complaint, practically denied all the allegations therein, except as to the execution of the deed, and alleged that all the money that was paid by defendants for said property was money she had loaned her mother for that purpose. She further alleged that about July 19, 1901, her mother applied to her for a further loan to make payment on said property, which she refused to let her have; that her mother then offered to deed her the property if she would pay off the balance of the mortgage and release her from the loans theretofore made to her by plaintiff; that, plaintiff consenting to do so, defendants deeded her the property, and she released them from said loan and assumed and paid off the mortgage. Upon all the issues made by the cross-complaint and answer thereto, the court made findings in favor of defendants, and a judgment and decree were entered to the effect that the title to the lots involved was vested in the plaintiff in trust for the defendant Anna L. Potter, during her lifetime; that said Anna L. Potter owned an estate for life therein, and directed that plaintiff within 30 days, or on her default a commissioner designated in the decree for that purpose, should execute a deed conveying to said Anna L. Potter an estate for life in said premises. Plaintiff moved for a new trial, which was denied, and this appeal is taken from the order denying said motion and from the judgment.

In examining the points urged by appellant in his brief, we do not understand that he makes any claim of error under his appeal from the judgment. His attack seems to be devoted exclusively against the findings, upon the ground that some of them are not supported by the evidence. It is true that he claims the court erred "in adjudging that plaintiff have no relief by her action," and "in decreeing that the title to said property is vested in plaintiff in trust for defendant Anna L. Potter during her life, and that she owns a life estate in said property"; but after he states these points, and proceeds to elaborate them, his discussion is devoted entirely to an effort to show that the evidence in the case did not justify the findings made by the court, not that the findings did not support the judgment. If, however, appellant did intend, notwithstanding that his discussion would indicate differently, to attack the judgment upon the ground that it was not supported by the findings, we think it is without merit. The court specifically found all of the facts alleged in the cross-complaint as the defendants alleged them, and against the facts set up in the answer of plaintiff to it, except as to the payment by her of the mortgage. Among these were findings that defendants on the date of the conveyance to plaintiff were the owners of the lots in question; that they reposed full confidence in the plaintiff, their daughter; that the conveyance to her was made by them solely upon the conditions and in consideration of her promises and agreements with them to pay the balance of the mortgage on the property, and defendants should have and retain said premises as their home as long as said Anna L. Potter lived; and that the latter promise was made by plaintiff without any intention of performing it, and was fraudulent. These findings conclusively show that the conveyance of the property from defendants to plaintiff was obtained by fraud upon her part inducing it, and under such circumstances the law raises a constructive trust in favor of the defendants. Such a trust was decreed upon these findings, and there can be no question but that the decree is fully supported by them. This proposition is so firmly established that any discussion of it is unnecessary. It will be found fully considered in Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Nordholt v. Nordholt, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268; Hays v. Gloster, 88 Cal. 560, 26 Pac. 367; Hayne v. Herman, 97 Cal. 259, 32 Pac. 171; Jones v. Jones, 140 Cal. 590, 74 Pac. 143; Becker v. Schwerdtle, 141 Cal. 389, 74 Pac. 1029. Upon the authority of these cases, the findings fully warranted the decree made by the trial court in the case at bar.

On the point of insufficiency of evidence to sustain the findings, it is enough to say that, if there was not a decided preponderance of evidence in favor of every fact alleged by defendants and found by the court to be true, there was, at least, such a conflict in the evidence as precludes any disturbance of the findings by this court.

There was no error in admitting parol evidence to establish the trust as alleged in the complaint. What was sought to be established was a constructive trust, and the statutory provision (Civ. Code, § 852), declaring that a trust in lands can only be created by an instrument in writing, has no application to constructive trusts. Such trusts are created by operation of law, and are expressly excepted from the Code provision referred to requiring trusts in land to be created by written instrument, and may always be established by parol. This proposition is likewise clearly settled by the authorities above cited.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

150 Cal. 714

## WILLIAMS v. MYER. (L. A. 1,633.)

(Supreme Court of California. March 25, 1907.)

1. Pleading—Amendment—Leave of Court—Terms of Granting Leave—Proper Charges.

Under Code Civ. Proc. § 473, providing that a court may allow amendment of pleadings upon such terms as may be just, as terms of filing an amendment which would necessitate a continuance, plaintiff may properly be required to repay to defendant fees paid for the per diem of jurors impaneled and sworn to try the case, also the expense incurred in employment of attorneys and attending trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 631.]

2. Same—Improper Charges.

A repayment to the county of the amount of the per diem and mileage of jurors summoned for the trial could not legally be imposed as part of the terms of allowing an amendment.

3. Appeal—Preserving Objections—Amendment of Pleading—Terms.

Where an improper charge is imposed with proper charges as terms upon which the plain-

**tiff may amend his complaint after a jury is sworn, it is not incumbent on him to tender payment of the proper charges to avail himself of the error on appeal.**

4. PLEADING—AMENDMENT—CONDITIONS.

Though a court might be justified in denying unconditionally a motion for leave to amend, if it allows the amendment, it is error to impose unjust terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 626.]

5. APPEAL — PREJUDICIAL ERROR — CONDITIONS OF AMENDING PLEADING.

In an action to quiet title to a certain amount of water for irrigation purposes, evidence considered, and *held* to show that an error of the court in imposing unjust terms on allowing an amendment was prejudicial.

6. SAME — HARMLESS ERROR — WITNESSES—CROSS-EXAMINATION.

In an action to quiet title to a certain amount of water for irrigation purposes permitting cross-examination as to defendant's connection with certain irrigated land, if erroneous because such fact had not been brought out on direct examination, was harmless, where the fact was subsequently shown.

7. SAME—REVIEW—QUESTIONS CONSIDERED.

Where a case is reversed on other questions, it is not proper, in view of a new trial, to discuss the evidence with relation to the findings of the lower court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3338.]

Department 2. Appeal from Superior Court, Inyo County; Walter A. Lamar, Judge.

Action by Thomas Williams against Fritz Myer. From an order denying a motion for a new trial, plaintiff appeals. Reversed and remanded.

P. W. Forbes and Wm. D. Dehy (P. H. Mack, of counsel), for appellant. S. E. Vermilyea and Ben H. Yandell, for respondent.

LORIGAN, J. This is an appeal from an order denying the motion of plaintiff for a new trial.

The action was brought by plaintiff to quiet his title to 100 inches of water of Pine creek, in Inyo county, measured under a four-inch pressure, and conducted through dams, ditches, natural channels, and water courses to and upon the lands of plaintiff; said 100 inches being alleged to be one-half of 200 inches under said pressure, diverted by plaintiff and the grantor of defendant, and equally divided by them and used on their respective lands. In addition, plaintiff prayed for an injunction restraining defendant from diverting more than one-half of said waters, and for damages to his crops by reason of the alleged diversion by defendant of all of said waters. Defendant, by answer, denied the right of plaintiff to any of the waters of Pine creek, or to damages for the alleged diversion by him, and by cross-complaint alleged an exclusive prescriptive right acquired by his grantors' predecessors and himself to about 250 inches, measured under a four-inch pressure, of the waters of said Pine creek, and asked for a decree quieting his title thereto. On November 20, 1899 (the original complaint having been filed February 1, 1899), the cause was at issue, and thereafter was set down for trial on March 13, 1900; the trial to be had before a jury as advisory to the court on questions of fact. On the day set for the trial, a jury was impaneled and sworn, and thereafter the plaintiff moved the court for leave to file an amended complaint. The difference between the proposed amended complaint and the original was that in the original complaint the appropriated waters in litigation were stated to be "the waters of Pine creek," while in the amended complaint it is alleged that plaintiff had diverted from the natural channel of Pine creek more than 100 inches of the waters thereof, measured under a four-inch pressure, and by means of dams, ditches, natural channels, and water courses had conducted the said waters of Pine creek from their natural channel to the natural channel of Horton creek, and mingled the said waters with certain surplus waters flowing and being in the latter creek, and from thence conducted the said mingled and combined waters through the natural channel of said Horton creek to a dam constructed by plaintiff across the channel of said Horton creek, a short distance west of plaintiff's lands, where they were there equally divided between plaintiff and defendant, and from thence by ditches constructed by plaintiff he conducted 100 inches of the said mingled and combined waters to his land. In effect, the amended complaint differed from the original only in substituting "the mingled and combined waters of Pine creek and Horton creek" for "the waters of Pine creek." The defendant objected to the plaintiff being permitted to file the proposed amended complaint on various grounds: Laches in presenting it for filing, want of notice of the motion to be permitted to do so, and that the amended complaint raised a new and distinct issue for the trial of which defendant had had no opportunity to prepare. The court held that the plaintiff should be allowed to file said amended complaint, but only on terms, and the court stated the terms as follows: "Plaintiff to pay to the clerk of this court for the county the per diem and mileage paid by it and due from the county, to jurors summoned for this trial, amounting to the sum of $240.90; plaintiff to pay to defendant the sum paid by defendant to the clerk of this court for the fees of jurors, amounting to the sum of $24; plaintiff to pay to the defendant the sum of $56.50, expenses incurred by the defendant in obtaining the attendance of witnesses; plaintiff to pay to defendant $100 as compensation to defendant for expenses he has incurred in employment of attorneys herein, his own expense in attending this trial, and the expense he has been to on account of this trial, and that cannot be easily determined by the court or shown by the defendant"—in all $421.40. The plaintiff did not accept the terms, and hence did not file the amended complaint. He excepted, however, to each and every of the terms and conditions imposed by the court, and likewise to the ruling of the court imposing them, and the correctness of the action of the trial court on these matters is the question for present consideration.

Undoubtedly, the court had the right in allowing the plaintiff to file his amended complaint to impose terms upon him. It is provided that in the discretion of the trial court such amendments may be permitted upon such terms as may be just. Code Civ. Proc. § 473. The discretion to allow the amendment was exercised by the trial court. It determined that a proper case for permitting the amendment to be filed was presented, and that no valid objection to the character of the proposed amendment existed. Whether that discretion was properly exercised is not a matter of concern here. The only point is whether in exercising such discretion the court imposed such terms as were just. It is insisted by appellant that the court was not warranted in imposing any terms at all. We cannot agree with him. It is true, as contended by plaintiff, that there was no express showing by affidavit that the filing of the amended complaint would occasion any delay in proceeding with the cause, or necessitate a continuance of the trial, or require the presence of witnesses other than those in attendance, or entail any additional expense to meet the new issue presented. But under the circumstances we think no such showing was necessary. The motion of plaintiff was made in open court after the jury had been sworn and the trial about to be proceeded with. Without any notice of such application, plaintiff sought permission to file his amended complaint, on the ground that the original complaint of plaintiff did not fully state his cause of action. As presented, the amended complaint raised a new issue, upon which certainly different evidence would have to be presented than under the original pleading. The questions of the right of plaintiff to have his motion granted and the effect upon the progress of the trial by permitting it were immediately taken up and considered by the court, and in the presentation of the objections of defendant (which plaintiff did not question nor assert anything to the contrary), it was insisted that, if the amendment were allowed, the defendant would not be able to go on with the trial, and that a continuance would have to be had. This was a sufficient showing to invoke the discretion of the court, and warranted it in imposing such terms upon the plaintiff as the justice of the case required.

Now, as to whether the terms imposed on plaintiff were just, because, while under the statute the court is vested with discretion in imposing them, it is limited in the imposition to such only as are just. By this is meant that the terms imposed shall be such as will be just, considering the circumstances under which the amendment is asked, and particularly as between the parties to the action; such as will compensate the party for the loss or inconvenience which he will suffer by granting the application to amend. In imposing such terms, it is not to be understood that the court is constrained to allowing a party only such costs as might be properly taxed in the case. A reasonable discretion may be exercised in compensating him for expenses to which he has been put, although they may not be recoverable as costs. Pomeroy v. Bell, 118 Cal. 635, 638, 50 Pac. 683. But, whatever the terms, they should be such as have relation to expenses or charges incurred by the parties to the trial, or directly with reference to it, and be imposed with a view mainly of compensating the party prejudiced by granting the amendment. Within this view, it was proper for the court to require the payment by plaintiff of the fees paid by defendant for the per diem of jurors impaneled and sworn to try the case, and equally proper to require payment of the expenses incurred by the defendant in obtaining the attendance of witnesses. These items were such as would be ultimately taxable as costs should defendant prevail in the action. Nor was it improper to require the payment of $100 to defendant as compensation for expenses incurred in the employment of attorneys and his own expenses in attending the trial. While these were not taxable charges, they come within the rule of Pomeroy v. Bell, supra. Payment of all these charges mentioned we think was such as, in a reasonable exercise of its discretion, the court was warranted in imposing upon defendant, and appeared to be just.

But we can find no warrant in law for imposing on the defendant, in addition to these terms, the payment to the clerk of the court of the per diem and mileage paid by and due from the county to jurors summoned for the trial, amounting to $240.90. These were the expenses of the general panel of jurors, and under no circumstances could be considered as costs in the action or taxable as such. It was part of the governmental duty of the county of Inyo, in the administration of justice therein, to furnish to litigants in its courts, entitled to have their cases tried before a jury, a panel consisting of sufficient competent persons from which the litigants might select a trial jury. The expense of securing the attendance on court of that panel is paid by the county as one of the general expenses of government. When a trial jury has been selected from the panel, the liability of the litigants to pay that jury then attaches; but it only attaches then as far as the members of the trial jury are concerned. As to the rest of the panel, the litigants never were liable for any expenses relative to them. In the case at bar, the court made an order directing the plaintiff to pay the per diem of the jurors selected to try the case, and as a matter of justice this should have been all, as to the jurors, which he should have been required to pay. The expense of providing the general panel was not an expense of defendant, and, of course, payment was not directed to be made to defendant, but to the county of Inyo, which was not a party to the action. It was as much the governmental duty of the county of Inyo to furnish the panel of jurors, and pay the expenses of such as the litigants did not select to try their case, as it was to furnish a courthouse and court for the administration of justice, and the court could have as consistently charged the plaintiff with a proportionate share of the salary of the judge as with the expenses incurred by the county in providing the general panel out of which the trial jurors were selected. The matter here under consideration does not present a situation where a jury trial was demanded, a panel provided, and then an amendment allowed under circumstances which necessitated a continuance of the trial without the selection of a trial jury at all, and where the amendment is granted on condition that the moving party pay the expenses of the attendance of the panel. See Baumberger v. Arff, 96 Cal. 261, 31 Pac. 53. Here a trial jury had been selected from the panel, and all members of the panel other than those selected must have been discharged from attendance, or excused till some future date. In any event, as far as the case at bar was concerned, the panel had been discharged for all purposes. No amendment or continuance of the case could possibly affect the panel or the relation of the court, the litigants, or selected jury to it. It was at an end for all purposes as to them. Under such circumstances, we can perceive no reason, and none has been suggested, why plaintiff should have been charged with reimbursing the county of Inyo for governmental expense. Ample provision seems to have been made to reimburse defendant for expenses incurred by him and taxable as costs and for expenses not so taxable, which was all proper and just. But to tax plaintiff for expenses incurred by the county of Inyo for a panel of jurors which it was its duty to furnish, and which had served its purpose and been discharged before the motion to amend was made, and after a jury had been selected from it, a panel for the expenses of returning which neither party was liable, and the existence of which could not enter into or affect the motion to amend, and could have no relevancy to any future progress of the trial, was, we think, improper. It was in no sense the imposition of a term which under the circumstances, or as between the parties, was just, but was more in the nature of a fine or penalty imposed on plaintiff which the law does not sanction or sustain.

The court having imposed this improper charge upon plaintiff, in addition to proper charges imposed, it was not incumbent on plaintiff to offer to pay the amounts which he deemed were properly assessed, in order to avail himself of the error of the trial court on this appeal. It is the duty of the lower court to impose as a condition only just terms. The terms here imposed were in the aggregate, and a portion improper, and the plaintiff was not required to attempt a segregation of the proper from the improper, in the face of the ruling of the court that all were properly imposed and must be paid as a condition to granting leave to amend. Nor is it of any moment that the court might have denied the motion unconditionally. Assuming it would have been warranted in doing so, it did not. It exercised its discretion in favor of the amendment, and, having done so, it could only impose just terms therefor.

The only ground upon which this court would be precluded from reversing for such error would be if it appeared from the record that, notwithstanding the error, the appellant was not injured or prejudiced thereby. It is undoubtedly true that, though an error be committed, it may still be harmless; as, for instance, it may appear from an examination of the record that if the amendment had been allowed it could have been of no benefit to the plaintiff because, upon the trial of the case, it would appear that he never could have availed himself of it, or where it appeared upon the trial that, notwithstanding the amendment was refused, the case was still tried upon the theory that it had been allowed. But on examination of the record before us we cannot satisfy ourselves that the error of the trial court was harmless. In itself the issue as to the appropriation of the litigated waters presented by the amended complaint was a more enlarged issue, involving a more substantial right than presented by the original complaint—a difference between the appropriation and use of the waters of Pine creek, and the appropriation and use of the mingled and combined waters of Pine creek and Horton creek. It must be assumed as to this amendment that it was sought in good faith, and that the verified allegations in respect to the appropriation of said combined waters were true. This being so, it is quite evident that there could be no trial of the cause on its merits, nor determination of plaintiff's rights therein, by limiting the inquiry to the appropriation of the waters of Pine creek, because plaintiff did not claim a right by appropriation to the waters of Pine creek alone, but to the mingled and combined waters of Pine creek and Horton creek.

In addition to this, during the actual trial of the case, while plaintiff, in introducing his evidence, was necessarily precluded, under the ruling of the court refusing permission to file his amended complaint, from submitting evidence as to any appropriation by him of the combined waters of Pine and Horton creeks, defendant, on cross-examination of some of the witnesses of plaintiff, showed that the lands of plaintiff were in fact watered by the mingled and combined waters of these creeks appropriated by plaintiff. There was also evidence tending to show the same fact brought out by defendant in producing evidence to sustain the allegations of his cross-complaint. Having this evidence in view, the plaintiff at the close of his case, and also at the close of the case when all the evidence was in, moved the court again to be permitted to file the amended complaint in order that the pleadings and proof might conform. Both applications were refused, and plaintiff excepted. Waiving consideration of the alleged error predicated on these refusals, it is quite apparent, from the evidence to which we have referred, that the court in originally denying leave to plaintiff to file his amended complaint, and confining the parties to litigate an appropriation of the waters of Pine creek alone, precluding him to his prejudice from having determined the real and substantial claim upon which he relied, namely, a right to the mingled and combined waters of Pine and Horton creeks.

It is further insisted by appellant, aside from the claim of error we have been considering, that the court erred in overruling objections to questions asked the plaintiff on cross-examination. There was no error in permitting the inquiry made. The plaintiff had testified in chief as to a division and use of water between himself and one J. W. Dickenson; the latter using his share of the water on what was known as the "Hank Horn" land. The objection was mainly that there was no evidence connecting defendant with this land. We think, however, plaintiff's direct examination sufficiently showed it for the purpose of the cross-examination. In any event, it was subsequently shown, so that the error, if any, was immaterial and harmless.

Appellant also attacks many of the findings of the court on the ground that they are not sustained by the evidence. These findings all relate to waters of Pine creek alone, their appropriation by defendant, the extent of his rights therein, and against the right of plaintiff to any claim or interest thereto. As we will have to reverse the order denying a new trial on account of the error of the court in accompanying its leave to plaintiff to amend by the imposition of illegal terms, we see no useful purpose to be subserved by discussing the findings. In view of a new trial, when other findings may be prepared, it would be improper to discuss the evidence with reference to those here presented, which must fall with the reversal of the order. To discuss them would only result in commenting on, contrasting, and expressing our views on the testimony, matters which, in view of another trial, should particularly be avoided. And, in as far as we have referred to the testimony, we are not to be understood as holding that it was sufficient to sustain the claim of plaintiff as to his alleged appropriation of the combined waters of the two creeks. We refer to it solely as tending to support his claim that only by allowing the proposed amendment could his rights to the waters in dispute, combined and flowing in those two creeks, be determined.

The order denying the motion for a new trial is reversed, and the cause remanded. As the reversal of the order vacates the judgment, the trial court is directed to allow either party to amend his pleadings.

We concur: McFARLAND, J.; HENSHAW, J.

150 Cal. 689

## HENDERSON v. LOS ANGELES TRACTION CO. (L. A. 1,555.)

(Supreme Court of California. March 21, 1907.)

1. STREET RAILROADS—INJURIES TO TRAVELERS—INSTRUCTIONS—CARE REQUIRED.

An instruction, in an action for injuries in a collision with a street car, that it was the duty of the operator of the railway to exercise "ordinary care" and caution in the management and operation of the car to avoid inflicting injury on a person traveling on or using a street on which the car was operated, was not objectionable for failure to require the use of "great care."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 261.]

2. TRIAL—INSTRUCTIONS—DUTY TO REQUEST.

Plaintiff cannot object that an instruction correctly announcing the law was too general, where he presented no requests for an instruction making it more definite and specific.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 628.]

3. STREET RAILROADS—INJURY TO TRAVELERS—COLLISION—ORDINARY CARE—INSTRUCTION.

In an action for injuries to a traveler in a collision with a street car, the court charged that a person operating a street car was bound to anticipate the presence of vehicles and pedestrians on the highway; that he should be watchful to see that the way was clear and to regulate his speed accordingly; that a speed of eight miles an hour would be negligence, unless it was a safe rate under all the circumstances; and that the motorman was bound to run his car consistent with proper care for the safety of persons using the street, and for the safety of plaintiff. *Held*, that such instruction sufficiently charged what was required of defendant in order to exercise ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 172, 174, 175.]

4. TRIAL—INSTRUCTIONS—REFUSAL OF REQUEST.

Where, in an action for injuries to plaintiff in a collision with a street car, an instruction given properly submitted to the jury the question of plaintiff's negligence in not leaving the wagon in which he was seated, before the collision, it was not error for the court to refuse an instruction on such issue in the language of the request.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651–659.]

5. TRIAL—INSTRUCTIONS—DUTY TO REQUEST.

Where plaintiff's requested charge did not require that plaintiff's negligence should be found to have been the proximate cause of his injury in order to preclude his recovery, plaintiff could not object on appeal that the court's modification of such instruction did not contain such requirement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 628.]

6. SAME.

Where, in an action for injuries in a street car collision, none of the instructions requested or given remotely suggested a submission of the last clear chance doctrine, plaintiff could not object on appeal that a modification of a requested charge, submitting plaintiff's contributory negligence, was erroneous, as in effect withdrawing such doctrine from the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 628.]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Charles Henderson against the Los Angeles Traction Company. From a judgment for defendant, plaintiff appeals. Affirmed.

D. M. Hammack and Hunsaker & Britt, for appellant. E. E. Millikin (E. W. Camp, of counsel), for respondent.

LORIGAN, J. This action was brought to recover damages for personal injuries sustained by plaintiff through a collision between an electric car of defendant and a wagon in which plaintiff was seated. The jury returned a verdict for defendant, and plaintiff appeals from an order denying his motion for a new trial.

Plaintiff, a plumber's help, 23 years of age, who was accustomed to and understood the driving and handling of horses, on the morning of July 2, 1901, accompanied his employer in an ordinary one-horse uncovered plumber's wagon to a residence on the west side of Georgia street, in the city of Los Angeles, which his employer entered to examine its plumbing, leaving plaintiff in charge of the horse and wagon. Georgia street is a street 40 feet wide between the curbs, running in a northerly and southerly direction, and defendant on the day of the collision operated a double-track electric railway over it; the distance between the curb and the west side of defendant's track being 13 feet. The residence at which they called was on Georgia street, between Fifteenth and Sixteenth streets, and, soon after his employer had gotten out of the wagon and entered the house, plaintiff, on account of a fear entertained by him that the horse would become frightened by the cars of defendant moving along Georgia street, drove off of that street on to Fifteenth street, remained there some time, and then drove back and again took up his position in front of the residence where his employer was engaged. When plaintiff returned he drove up close to the west curb of the street; the rear end of the wagon being nearer to the track of defendant than its front. The horse faced north, and plaintiff sat in the wagon holding the lines. This was the situation when a car of defendant approached traveling from the north along Orchard street towards the point where plaintiff was stationed and where the collision occurred. As to such collision: According to the testimony of plaintiff, he first discovered the approach of the car which occasioned it when distant a little more than 300 feet from him; that it was then moving towards him on the west track at a high rate of speed; that when it approached to within something over 200 feet from where he was the horse he was holding became restless and commenced backing; that despite plaintiff's efforts to prevent it the horse backed the rear right wheel of the wagon on to the west track of defendant's road, where it was struck by the car, causing plaintiff to be thrown out of the wagon to the ground and injured; that the horse and wagon were plainly visible to the motorman of defendant from the time the car turned into Georgia street from Thirteenth street (several blocks away); and that the motorman made no effort to check the high rate of speed of the car until it was almost on top of the wagon. The evidence on the part of the defendant tended to show that the motorman did not discover the horse and wagon until the car was something over 100 feet from it, and that the horse did not begin to back until the car had approached within 20 feet of him. There was some other evidence that the horse showed signs of being frightened when the car was within 40 or 50 feet of him, but did not commence backing until it got nearer. There was also evidence that the car during its entire movement along Georgia street was going at a speed of seven or eight miles an hour, and that as soon as the motorman saw the horse begin to back he applied the brakes and reversed the current, and used all available means to stop the car. This is a sufficient statement of the evidence in the case for the purpose of considering the grounds urged by appellant for a reversal, which are confined solely to alleged errors on the part of the trial court as to instructions.

1. It is insisted that the court erred in instructing the jury: "That it is the duty of the operator of a street railway to exercise ordinary care and caution in the management and operation of its car to avoid inflicting injury upon a person traveling upon or using the street upon which the car is being operated. * * *"—and in refusing to give the instruction requested by plaintiff: "That the conductor and motorman in charge of the car of the defendant which collided with the wagon on which the plaintiff was seated were required to use great care to see that no injury was caused to persons or teams having business in the streets." We perceive no error committed by the court in its action as to these instructions. It is not the law that in the operation of a street railroad the operator is required to use great

care to avoid injury to persons traveling on or using the streets over which the cars are operated. The operator of a street railroad over a street, and the traveler on or person using said street, are reciprocally bound to exercise that degree of care which a person of ordinary prudence would use under the same or similar circumstances, which is ordinary care only. This is the general rule laid down by text-writers on the subject, and we confine ourselves in the citation of authorities to the rule as applied in the operation of street railways alone. Nellis Street Railway, etc., Law, § 25, p. 303; Joyce on Electric Law, § 575. It is likewise the rule in jurisdictions other than our own as to the same subject. Pendleton Street R. R. Co. v. Shires, 18 Ohio St. 255; Gorman's Adm. v. Louisville Ry. Co. (Ky.) 72 S. W. 761; Stafford v. Chippewa E. R. Co., 110 Wis. 331, 85 N. W. 1036; Kube v. St. Louis Transit Co., 103 Mo. App. 382, 78 S. W. 55; Perras v. United Traction Company (Sup.) 84 N. Y. Supp. 992; West Chicago Railroad Company v. Wizeman, 83 Ill. App. 403. It is also the rule expressly laid down in this state. Section 1714, Civ. Code; Cunningham v. Los Angeles Railway Company, 115 Cal. 561, 47 Pac. 452; Harrington v. Los Angeles Railway Company, 140 Cal. 514, 74 Pac. 15.

It is insisted by appellant that the instruction, tendered by him and refused is supported by Mock v. Los Angeles Traction Company, 139 Cal. 616, 73 Pac. 455. It is true that in that case an instruction was approved which stated that ordinary care to be exercised by an electric street car line required "great care in keeping its appliances for stopping cars in good condition." The court said: As these cars cannot be operated upon the public street with safety unless this is done, "ordinary prudence requires that 'great care' should be exercised in that direction." It was, however, stated by the commissioner who wrote the opinion in that case that it was not essential to a disposition of the appeal before it that this instruction should be considered, and it was not, because the order granting a new trial was affirmed on other grounds, exclusive of any consideration of the correctness of the instruction at all. Under these circumstances, the language used by the court cannot be held to be an authoritative declaration of a rule of law as to the care to be exercised in the general operation of electric car lines, either as to the selection of appliances, or the active operation of the cars over the tracks. The rule as declared by the general authorities on the subject, and by the decisions of this court in cases involving the question as to the degree of care required, and to which we have referred, is that only ordinary care must be exercised—that degree of care which an ordinarily prudent person exercises in the operation of electric street car lines—and, if the language used in Mock v. Los Angeles Traction Company is to be considered as laying down a different rule, the decision is to that extent erroneous and is overruled. And as we read the other authorities cited by appellant in support of the instruction asked by it and refused, we do not understand them as laying down any different rule than that ordinary care must be exercised. They discuss and elaborate the proposition that the degree of vigilance and prudence to be exercised by one operating cars upon a street railroad depends upon the nature and character of the agencies, or instrumentalities employed in their propulsion, taking into consideration the time, place, and circumstances attending their operation. They lay down the rule, the justness and soundness of which none will question, that a higher degree of vigilance and caution in order to prevent accidents to travelers is exacted from those operating cars propelled by electricity than from those operating cars propelled by a less powerful agency and one more subservient to the will of the person in charge of the cars. This is in harmony with the familiar rule that the greater the danger to be apprehended the greater the vigilance to be exercised in guarding against it; but, because the degree of vigilance to be exercised in the operation of the cars must be greater in the one case than in the other, does not affect the standard under which the liability of the person operating the car is to be measured in the event of an accident. The standard remains the same. While a less degree of watchfulness and vigilance may be required of one operating cars moved by horse power than is required of one in control of cable cars, and a still greater degree of caution and vigilance required from those in control of electric cars, still, when the question of negligence in the operation of cars by any of these different modes or agencies arises, the same standard of accountability is applied, namely, was ordinary care being exercised by the person in control of the car at the time when his conduct relative to its operation is under consideration. No matter by what agency the car he is operating is propelled, whether by the now practically obsolete system of horse power, or by cable, or by electricity, he is not required, in its operation, to use the highest degree of care, nor is the duty cast on him to use great care, but he is only required to use ordinary care, and responsible only for his failure to do so.

The standard by which ordinary care is to be measured is not absolute, and in the case of the operation of street cars it must vary with circumstances attending their operation—the character of cars, the agency of propulsion, the locality in which they are operated, whether in the county or in a city, whether over much traveled or unfrequented streets, and the possibility or probability of danger attending their operation.

Taking these circumstances into consideration, it is quite apparent that the same degree of precaution, and the same pains to avoid accidents, are not required in the movement of a horse car as in that of an electric car. We take these systems simply as extremes for the purpose of illustration. The movement of a horse car being comparatively slow, and the car being readily in the control of the driver, the same degree of vigilance and caution in its operation would not be required, as in the case of an electric car, an instrument of greater weight and momentum, propelled with greater speed and more difficult to control. Danger is more probable in the operation of the one than in the other, and greater precautions are required to prevent injury. But these differences in the circumstances attending the operation of the cars on the different systems do not change the standard of accountability attending the operation of either. The standard to be applied when the question arises as to how either was being operated at a given time is: Was it being operated with ordinary care? The precautions which were required to be taken to comply with the standard may be greater in the one instance than in the other, but in either instance the standard is the same. In the case of the driver of the street car the question is: Considering the power by which his car was being moved and the circumstances attending his operation of it, did he exercise that care which an ordinarily prudent man would, with the same instrumentalities and under the same or similar circumstances, have exercised? In the case of the motorman, the same standard is applied, namely, considering the instrumentality under his control, its momentum, and speed capacity, did he exercise that degree of care with it which a person of ordinary prudence would have exercised with the same instrumentality under the same or similar circumstances? In either case the question is, was ordinary care used? This is the standard which, while the circumstances under which it is to be determined may be different, is the proper standard to be applied. Hence, when in the case at bar the court instructed the jury that in the operation of the electric car the motorman was only required to use ordinary care and caution, it stated the proper legal rule under which the liability of the defendant was to be measured.

It is insisted, however, that the definition of ordinary care as given by the court was too general, and did not tend to assist the jury in applying the particular circumstances in the case in determining whether such care had been exercised or not. We cannot assume, however, that when the court correctly instructed as to a rule of law that the jury was unable to apply it to the facts and circumstances surrounding the operation of the electric car and which were shown for the sole purpose of having them determine therefrom whether ordinary care was used or not. It is to be assumed that the jury understood the instruction and applied it to the evidence. If appellant thought the instruction was too general, he should have presented other instructions, which in his opinion would have made it more definite and specific. Besides this, when we take into consideration all the instructions given by the court, it appears therefrom that the court did instruct the jury as to what should be considered in determining what was "ordinary care" required to be exercised by defendant. It instructed them that a person operating a street car is bound to anticipate the presence of vehicles and pedestrians on the highway; that he should be watchful to see that the way is clear in which he is going, and regulate his speed accordingly; that a speed at the rate of eight miles an hour would be negligence, unless it was a safe rate under all the circumstances; that the motorman was bound to run his car consistent with proper care for the safety of persons using the street and for the safety of plaintiff. And, taking the instructions as a whole, it satisfactorily appears therefrom that the jury was instructed that whether the defendant exercised ordinary care or not was to be determined by all the facts and circumstances disclosed by the evidence in the case.

2. As to the next instruction complained of: The court instructed the jury that: "In determining whether or not the plaintiff was negligent, you should consider whether or not, under all the circumstances of the case, it was his duty, using ordinary care for his own safety, to have jumped from the wagon." This was, doubtless, given in place of an instruction tendered by plaintiff. Appellant complains because the instruction which was tendered by him on the subject was refused. While, without critically examining it, it would appear that the court might have properly given the instruction as asked, still we do not see that any injury was sustained by plaintiff in modifying it, or in substituting for it the instruction given. The instruction as given left it to the jury to determine from all the circumstances in the case whether it was the duty of plaintiff to have left the wagon to avoid injury. The instruction tendered referred more particularly to circumstances to be considered by the plaintiff in determining whether he should have left the wagon or not; but as in any event, under either instruction, the question of negligence in this particular was left to the jury to be considered under all the facts and circumstances in the case, which under the record do not seem to be particularly complicated, and, as in the nature of things this resolved itself into a simple question of the exercise of ordinary judgment in a situation of apparent danger, we hardly think that prejudicial error can be predicated upon the re-

fusal to give the instruction literally as asked, or in giving the substituted instruction. The instruction as given was proper, and the circumstances particularly referred to in the instruction tendered, which it is claimed the jury should take into consideration in determining whether it was negligence or not for the plaintiff to have remained in the wagon, were such as jurors would naturally take into consideration, whether their attention was called to them or not.

3. Appellant tendered an instruction as follows: "You are instructed that a person in charge of a street car upon a public highway is bound to anticipate the presence of other vehicles and pedestrians on such highway. The law requires that a person who is managing a street car should be watchful to see that the way is clear in the direction in which he is going, and accordingly regulate the speed at which he is running the car; and if you find from the evidence in this case that the street car of the defendant was being run at a rate of speed at which it could not readily and quickly be stopped should occasion require, and that such rate of speed was careless and dangerous, considering the character and location of the street and all of the surrounding circumstances, and you further find the plaintiff was injured by reason of such negligence, *and not by reason of his own negligence*, then your verdict should be for the plaintiff." This instruction the court modified. The modification consisted of substituting for the words italicized in the instruction tendered the following: "*Unless you find that the plaintiff was negligent, and that such negligence contributed to such injury*"—and as so modified was given to the jury. Appellant complains of the modification; his ground of complaint being that in giving the instruction as modified the court ignored the principal point in the instruction as tendered, which was that, in order to relieve defendant from responsibility from its negligence, the contributory negligence of plaintiff must have been the proximate cause of his injury; that the word "proximately" should have been inserted before the word "contributed" in the substituted clause, in order to clearly define the negligence of plaintiff which would relieve the defendant. Or, to state the contention of appellant more clearly, it is insisted that by the substitution the court eliminated from consideration by the jury the doctrine of the "last clear chance" which, formulated, is that, even assuming the negligence of plaintiff contributed to the injury of which he complains, still if, after the occurrence of such contributory negligence, the employés of defendant saw the dangerous condition in which plaintiff was placed, and by the exercise of ordinary care could have stopped the car, and so have avoided injuring him, and failed to do so, the defendant is responsible. It will be perceived, as far as the insertion of the words "proximate" or "proximately" is concerned, that neither of these words is used in the instruction as tendered by appellant, and he can hardly be heard to complain that the court was not more accurate in framing the modification than plaintiff was in framing the tendered instruction. In other parts of the charge the jury was clearly instructed that, in order to avail itself of the defense of contributory negligence on the part of plaintiff, it was necessary for defendant to show that such negligence contributed proximately to his injury. In determining whether a jury has been properly instructed as to the law, the instructions taken as a whole must be considered. Where numerous instructions are given (as in this case), it may well be that some particular instruction fails to contain a complete or accurate statement of the law. If however, when the entire charge is examined, the omissions or inaccuracies in a particular instruction appear to have been supplied, and the jury fairly and consistently instructed, generally, as to the law, this is sufficient to defeat any claim of error predicated on defects in particular instructions. Stevenson v. S. P. Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; Dolan v. Sierra Ry. Co., 135 Cal. 435, 67 Pac. 686; Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521. Aside from this, however, it is quite apparent from a mere reading of the instruction tendered that it was not formulated upon the theory that there was thereby being submitted to the jury the doctrine of the "last clear chance." That doctrine is capable of very simple and clear expression in an instruction. There is, however, not one word in the tendered instruction which even remotely or suggestively pretends to declare it; nothing declaring (as the instruction would if it was so contemplated) that notwithstanding the jury might find the plaintiff was guilty of contributory negligence, yet, if they found that the motorman perceived the dangerous situation in which plaintiff was placed in sufficient time by the exercise of ordinary care to have stopped the car, and so have avoided injury to the plaintiff, and failed to do so, the defendant was liable. The instruction, it is clear to us, as it must have been to the trial court, was intended to inform the jury as to the care to be exercised by the defendant in the ordinary operation of its car, and its liability to plaintiff for injury resulting to him in such operation, through want of ordinary care on the part of defendant, without fault of plaintiff. That this was the purpose of the instruction is further confirmed by the fact that an instruction was tendered by plaintiff, and given by the court, clearly and specifically stating to the jury the rule as to the duty of the employés of the defendant to avail themselves of the last clear opportunity to avoid injuring plaintiff after discovering his peril, even though such peril was occasioned by his own contributory negligence.

There are no other points made by appellant as to the instructions which we think merit any discussion.

The order appealed from is affirmed.

We concur: SHAW, J.; HENSHAW, J; SLOSS, J.; ANGELLOTTI, J.; McFARLAND, J.

5 Cal. App. 105

## NORTHWESTERN PACKING CO. v. WHITNEY et al. (Civ. 173.)

(Court of Appeal, First District, California. Feb. 27, 1907.)

1. Corporations — Officers and Agents — Authority of President.

The president of a corporation wrote to defendants, "I will give you the handling of all the salted salmon packed by the Northwestern company and other companies in which I may be interested this year," etc., signed with the name of the corporation, by the president. *Held*, that the letter did not constitute a valid executory contract binding upon the corporation, since the president had no authority by virtue of his office to sell the corporation's property without the sanction of the board of directors.

2. Same—Actions—By-Laws as Evidence.

Where a corporation is sought to be charged for a breach of an agreement which has not been performed, and there is no question as to estoppel or ratification, the by-laws of the corporation providing that the president shall sign, as president, instruments in writing which have first been approved by the board of directors, are admissible in evidence to show that the contract was not executed as the by-laws provide.

3. Evidence—Conclusions of Witness.

A question to a broker as to whether he "had purchasers ready, willing, and able to buy," is incompetent as calling for an opinion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149, 2150.]

4. Brokers—Commissions—Performance of Service.

A broker is not entitled to a commission until he negotiates a sale by bringing the buyer and seller to an agreement; the fact that he found a buyer ready, willing, and able to buy, being insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 69, 73, 75.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Northwestern Packing Company against Arthur L. Whitney and others. From a judgment for plaintiff, defendant appeals. Affirmed.

Myrick & Deering, for appellants. H. W. Hutton, for respondent.

COOPER, P. J. The complaint alleges that in October, 1902, plaintiff sold and delivered to defendants 250 barrels of red Alaska salt salmon at $7.50 per barrel, less a discount of 5 per cent., making the total amount due $1,781.25; that the same has not been paid, except the sum of $850 on account, leaving $931.25 due and unpaid. The answer denies specifically the allegations of the complaint, and by way of counterclaim alleges that the plaintiff is indebted to the defendants in the sum of $1,593.75 for work and labor performed by defendants for plaintiff at its special instance and request, no part of which has been paid except the sum of $931.25, and concludes with a prayer for judgment against plaintiff in the sum of $662.50. The court found that the allegations of the complaint are true, and as to the answer it found: "It is not true that within the two years prior to the filing of defendants' answer herein, or at any other time, the defendants performed work and labor or either thereof for plaintiff at the plaintiff's special instance and request or otherwise, or for which the said plaintiff promised and agreed to pay the said defendants the sum of $1,593.75, or any other sum of money." Upon the findings judgment was entered for plaintiff as prayed for in its complaint. Defendants prosecute this appeal from the judgment, and urge certain rulings as prejudicial.

There is no question as to the sufficiency of the evidence to support the findings, and there seems to be no serious question as to the sale of 250 barrels of the salmon to defendants, the price agreed to be paid, and the balance due upon that transaction. The rulings complained of relate to the defendants' counterclaim. Their counterclaim is based upon what is claimed to be a contract binding upon plaintiff for the sale of all the salmon packed by the plaintiff for the season of 1902. This alleged contract is contained in a letter of which the following is a copy:

"Arthur L. Whitney. Albion H. Whitney.

"C. E. Whitney & Co., Commission Merchants,
904 Hayward Building.

"San Francisco, Cal., April 15th, 1902.

"C. E. Whitney & Co., 904 Hayward Building, City—Gentlemen: Confirming verbal understanding with you, I will give you the handling of all the salted salmon packed by the Northwestern company and other companies in which I may be interested this year, relying on your discretion and judgment to realize the best prices possible. You to receive a commission of 5 per cent. net on the sales. Yours truly,

"Northwestern Packing Co.,
"L. A. Pedersen."

It is admitted that defendants did not sell the plaintiff's salmon pack for the year referred to, but that plaintiff sold its entire pack of 4,300 barrels, save and except the 250 barrels, the subject of the complaint in this action. Defendants' contention is that the letter signed by Pedersen is a contract binding upon plaintiff corporation, and that they should have been permitted to prove that they had or procured purchasers ready, able, and willing to purchase the entire pack of salmon, and thus earned the commission of 5 per cent. as provided in said letter. The main contention is as to whether or not the letter constitutes a binding executory contract upon plaintiff corporation. Aside from the question as to the letter being unilateral and no valid consideration on the part of the defendants, we are of the opinion that the letter does not of itself constitute a valid contract binding upon the plaintiff corporation. It is written by the president of the corporation, and in it he says: "I will give you the handling of all the salted salmon packed by the Northwestern company and other companies in which I may be interested this year." It is not attested by the seal of the corporation. There does not appear to have been any resolution of the board of directors authorizing the contract. The salmon pack of 1902 was the property of the plaintiff, an artificial being, created under the provisions of the statute. The title was in the corporation and not in Pedersen. The corporation could only act, could only speak, through the medium prescribed by law—the board of directors. The statute under which the corporation was created contains the express mandate: "The corporate powers, business, and property of all corporations formed under this title must be exercised, conducted, and controlled by a board of not less than three directors." Civ. Code, § 305. The rule has been adhered to by the courts. Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; Alta Silver Mining Co. v. Mining Co., 78 Cal. 629, 21 Pac. 373; Fontana v. Pacific Cann. Co., 129 Cal. 51, 61 Pac. 580. The president of a corporation has no authority by virtue of his office to buy or sell the property of the corporation, or to make an executory contract binding upon the corporation. Bliss v. Kaweah C. & I. Co., 65 Cal. 502, 4 Pac. 507. The doctrine of estoppel does not apply, because the corporation has not availed itself of any benefit in any way or manner by reason of the alleged contract. Id. Nor was the contract authorized by the course of business between the plaintiff and defendants, for the reason that it does not appear that they had ever had any business dealings with each other prior to the time the letter was written by Pedersen; nor was there ever a ratification of the alleged contract by the board of directors. If the defendants had in fact sold the salmon referred to in the letter, and the plaintiff had availed itself of the services of the defendants in making such sale, and had delivered the salmon to the purchaser or purchasers procured by defendants, then an entirely different question would be presented. In such case the plaintiff would not be allowed to reap the benefits of the contract and at the same time escape the burdens. In the case at bar it is sought to charge the plaintiff under a contract which it never made and from which it has never received any benefit, and to compel it to pay defendants a commission for a sale they did not make and which they never agreed to make.

The court, under defendants' objection, allowed the plaintiff to read in evidence article 7 of plaintiff's by-laws, which provides that the president shall sign, as president, "all certificates of stock and all contracts and other instruments in writing, which have been first approved by the board of directors." The defendants now urge that the ruling was erroneous, because they were strangers to and had no notice of the by-laws introduced in evidence. The record does not disclose that any such ground was stated in the objection. The objection was "to their introducing in evidence their own by-laws as a part of their own case as against us." However, the ruling was not erroneous under the circumstances of this case. As has before been stated, there is nothing to show that the plaintiff has been guilty of such conduct as to estop it from denying the validity of the contract signed by Pedersen. Where a corporation is sought to be charged for a breach of an agreement which has not been performed, and there is no question as to estoppel or ratification, the by-laws of the corporation are admissible in evidence for the purpose of showing that the contract was not executed as the by-laws provide.

It is claimed that the court erred in sustaining plaintiff's objections to certain questions asked of the defendant Arthur L. Whitney for the purpose of showing that he had procured purchasers for the salmon, who were ready, able, and willing to purchase. If we are correct in our conclusion that the contract made by Pedersen was not the contract of plaintiff, then the evidence was properly excluded. The questions were each objected to as calling for the opinion of the witness, and the objections might well have been sustained on that ground. Each of the questions contained the interrogation as to whether the witness "had purchasers ready, willing, and able to buy the salmon." Whether a purchaser was ready to purchase, able to purchase, and willing to purchase, would depend upon facts. If the party making an offer was able to purchase, and the price was agreed upon, the plaintiff must have been informed of the facts. Plaintiff could not have disproved the statement of the witness by independent evidence if he only said that he had a purchaser ready, willing, and able to purchase. And furthermore the defendants would not have earned their commission by simply finding a purchaser who was ready, able, and willing to purchase. A person might be ready, able, and willing to purchase, and yet make no agreement to purchase. The broker is not entitled to a commission until he negotiates a sale by bringing the buyer and seller together. The broker does not earn his commission until he procures a valid contract to purchase, or brings the buyer and seller to an agreement. Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105. It appears from the testimony of Arthur L. Whitney that defendant did not negotiate a sale. He testified: "I had a conversation with Mr. Webster during this time. He said that they needed the money, he was quite anxious to sell, that they had been offered $6.75 for the salmon, and I told him that was too low, and he said that they needed the money, and I said I would advance them five dollars a barrel on it. I said, 'That is too low, and I want to get something like what the goods are worth,' and I said I would guaranty to get him at least $7 net for the salmon. I remember that I said to Mr. Webster, if they insisted upon selling at those prices that I would sell and could sell to better advantage to the party who eventually bought the salmon than they could, and let me do it, and he said he would. The first that I knew that the pack had been sold by the plaintiff company was shortly after that I heard it rumored that it had been, and I called up Webster, and he said, yes, that it had been sold. It was not done with my knowledge or consent." He further testified as to a conversation with Webster, plaintiff's bookkeeper, as to the sale of the 250 barrels, the subject of this case. His language is: "Mr. Webster told me one day that they were offered $6.75, and seemed to think we ought to sell, and I told him that that was too cheap, that we could get more money, and finally he said, 'Well, I cannot afford to take any chances,' and I said, 'Well, I will guaranty you $7 net for your salmon, but you hold on and do as you agreed with me, and I will get you more.' Well, he said they would, and shortly after that I heard, directly or indirectly, I don't know which, that they had sold their fish to a party who had been trying to buy it from me, and I called him up on the phone and asked him if that was true, and he said, 'yes,' and I said, 'I have got some orders left with me that I must fill, and I want you to deliver them,' and they delivered this 250 barrels in that way, and they were sold in that way at $7.50, less 5 per cent. commission." It thus appears that the 250 barrels were sold to defendants to fill the orders they had, and they were given credit for the 5 per cent. commission.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

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5 Cal. App. 153

## Ex parte VICE. (Cr. 81.)

(Court of Appeal, First District, California. March 6, 1907.)

1. Criminal Law—Limitation of Prosecution—Necessity for Demand.

A railway ticket agent converted money of the company April 13, 1903, and May 1st he left the company's employ; its officers knowing of the conversion. *Held*, that the embezzlement occurred when he converted the money or when he left the company's employ, no demand upon him being necessary, and hence prosecution was barred October 25, 1906; he having remained within the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 270–274.]

2. Same—Preliminary Examination—Commitment — Reasonable Cause — Limitation.

Where, in a prosecution for embezzlement, it appeared at the preliminary examination that more than three years had elapsed since the crime was committed, and that the case did not come within any exception to the running of the statute of limitations, he should have been discharged, since to warrant a commitment there must not only be a probability that a crime has been committed, but that it has not been barred.

3. Same—Limitation of Prosecution—Assumed Name.

That after embezzling money one lives in another county in the state, under an assumed name, does not suspend the running of the statute of limitations against his offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 277.]

Application by William R. Vice for a writ of habeas corpus against Thomas F. O'Neil, sheriff. Petitioner discharged.

Lewis H. Smith and R. E. Rhodes, for petitioner. Geo. A. Knight, Aylette R. Cotton, and Robert Harrison, for respondent.

COOPER, P. J. It is alleged in the petition that the prisoner is unlawfully imprisoned and restrained of his liberty by Thomas F. O'Neil, sheriff of the city and county of San Francisco. The imprisonment is claimed to be unlawful for the alleged reason that the prisoner has been committed and held to answer by a judge of the police court of the said city on a criminal charge of embezzlement without reasonable or probable cause. This is made a ground for discharging a party in habeas corpus proceedings. Pen. Code, § 1487, subd. 7. And a discharge in such case is the rule in the Supreme Court. Ex parte Sternes, 82 Cal. 245, 23 Pac. 38; In re Kennedy, 144 Cal. 635, 78 Pac. 34.

The commitment in this case, so far as material here, is as follows: "The People of the State of California to the Sheriff of the City and County of San Francisco: An order having this day been made by me, that William Robert Vice, complained of as W. R. Vice, be held to answer upon a charge of felony, to wit, embezzlement, committed as follows: Said William Robert Vice, complained of as W. R. Vice, did in the city and county of San Francisco, state of California, on or about the 24th day of October, 1906, who on or about the 13th day of April, A. D. 1903, was the clerk, agent and servant of Union Pacific Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the state of Utah, and doing business in the city and county of San Francisco, and then and there by virtue of his said employment and trust as such clerk, agent and servant, on or about the 13th day of April, 1903, there came into the possession, care, custody and control of him the said William Robert Vice, complained of as W. R. Vice, five hundred and eighty-four dollars in lawful money of the United States of America, of the value of five hundred and eighty-four dollars, in lawful money of the United States of America, and the personal property of the said Union Pacific Railroad Company, a corporation as aforesaid, and he, the said William Robert Vice, complained of as W. R. Vice, after the said personal property had come into his possession, care, custody and control, as aforesaid, did, to wit, at said city and county of San Francisco, on or about said 24th day of October, A. D. 1906, willfully, unlawfully, fraudulently and feloniously convert, embezzle and appropriate the same to his own use, contrary to his trust as such clerk, agent and servant; and not in the due and lawful execution of his said trust and employment. You are commanded to receive him, the said William Robert Vice, complained of as W. R. Vice, in your custody, and detain him until he be legally discharged.

It is provided in the Penal Code (section 800): "An indictment for any other felony than murder, the embezzlement of public money, or the falsification of public records, must be found, or an information filed, within three years after its commission." Section 802 provides that if, when the offense is committed, "the defendant is out of the state the indictment may be found, or an information filed, within the term herein limited after his coming within the state, and no time during which the defendant is not an inhabitant of, or usually resident within, this state is part of the limitation."

There is no claim that defendant embezzled public money, nor that he was out of the state when the offense was committed. We are clearly of the opinion that, unless it was made to appear that the offense was committed within three years prior to the commitment, there was no reasonable or probable cause for holding the defendant. The evidence taken down before the magistrate is before us, and the facts are not disputed. It appears that on April 13, 1903, the prisoner was in the employ of the Union Pacific Railroad Company as their passenger agent in the city and county of San Francisco. His duties were the usual duties of a passenger agent, to solicit passenger business, collect money from passengers for tickets, and deliver tickets to them, and to act as the representative of the company generally in handling such business, and has been in such employ since 1890. On the said 13th day of April, 1903, he sold as such agent to one Newman certain passenger tickets to be thereafter delivered over the lines of the Union Pacific Railroad, and collected from Newman for said Union Pacific Railroad the sum of $584, which he failed to account for or pay over, but appropriated to his own use. Prior to May 1, 1903, some question arose, and the question was discussed as to Vice giving proper accounts of the moneys received for tickets, and on that day he was discharged, or at least left the employ of the Union Pacific Railroad Company. The officers of said railroad company knew the fact that Vice had collected the money and failed to pay it over about the time he was discharged. After he left the employ of the railroad company, he immediately went to Madera, in Madera county, in this state, and has ever since continued to reside in that county under the assumed name of Thomas R. Ryan. He openly resided and attended to business in said county of Madera during all this time, but under said assumed name. On October 24, 1906, demand was made upon Vice by said Union Pacific Railroad Company for said $584, but he has never turned it over or paid it to said company. The complaint was filed in said police court on October 25, 1906, charging the prisoner with the crime of embezzlement.

We are of the opinion that the crime had become barred by the statute before the prisoner was arrested. He embezzled the money when he appropriated it to his own use. It was his duty, as the agent of the railroad company, to pay over and account for the money he received as such agent at the time he received it, or certainly by the 1st of May, 1903, when he left the employ of the company. He could have been arrested as soon as he failed to turn over the money to his employer and appropriated it to his own use. A demand was not necessary. It is not necessary under any section of the Penal Code to which our attention has been called, and we have found no such section. There are cases in this state where the party charged has held the funds as trustee, or in some official capacity, and the evidence has failed to show any party to whom the defendant could legally turn over the funds, and in such cases it has been held that the crime was not proven. Thus, in People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524, the defendant was treasurer of the Veterans' Home Association, and deposited the money in a bank to his personal account. It did not appear that he was ever called upon to apply the money to any need of the association, or to make any particular use of it, or to put it in any special place, or that any demand was ever made upon him for the money. It was held that such facts were not sufficient evidence upon which to convict defendant of embezzlement; but the court said: "No doubt embezzlement may be established, under certain circumstances, without proof of a demand, as where other evidence clearly shows an appropriation by an employé of his employer's funds with intent to do so fraudulently and feloniously." In People v. Page, 116 Cal. 394, 48 Pac. 326, the defendant was guardian of an insane person, and as such guardian had the right to the money in his custody subject to the orders of the court. He had drawn the money he held in trust from the Savings & Loan Society, but it did not appear what he did with it. The court, in holding the evidence to be insufficient to justify the verdict, said: "So far as appears the defendant at the time of the trial may have still had the money ready to be paid over on demand to any one authorized to receive it." The Supreme Court of Arizona, in a late case (Territory v. Munroe, 85 Pac. 651), expressly hold that a demand is not necessary. The language of the court is: "In our view the offense, which is purely statutory, is complete when the property is fraudulently converted. Refusal to return the property upon demand has always been held to be evidence, and in some cases indispensable evidence of intentional conversion." In 10 American & English Encyclopedia of Law (2d Ed.) p. 995, it is said: "Unless the statute thus requires it, a demand is not necessary." See the cases cited in support of the text in note 5, Id.

It then being clear that the crime for which the prisoner was committed is barred by the statute of limitations, was there reasonable or probable cause for holding him to answer? The mandate of the statute is plain that the information must be filed within three years after the crime has been committed. Is there reasonable or probable cause for holding a defendant in the face of the statute, and under a state of facts which would not justify a conviction? Reasonable or probable cause means such a state of facts as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion that the person accused is guilty. There must be a probability that a crime has been committed by the person named in the commitment, and not only that a crime has been committed, but that it is one that has not become barred by the statute of limitations. There certainly would be no justification for a magistrate holding a defendant to answer in a criminal case, and causing the county to incur the expense of a trial in a case where it is plain that there is no probability that defendant can be convicted. This is not a case in which it is uncertain as to whether or not the offense has became barred by the statute. There is no conflict as to when the crime was committed. The evidence shows that the accused does not come within the exceptions named in sections 799 or 802 of the Penal Code. It is urged on behalf of the prosecution that, because the defendant went under an assumed name after he went to Madera county, for this reason he was not "an inhabitant of, or usually resident within, this state" during such time. We cannot take this view of the matter. He was an inhabitant of the state, and usually resident within it, no matter what name he assumed. The Legislature has prescribed the period of limitation for the prosecution of criminal cases. It has named the exceptions in which the case is taken out of the statute. It is not for the courts to legislate or add to the statute. It is the duty of the courts to interpret the law according to its true meaning and intent, even if the consequences are not what could be desired. It is of much greater importance that the rules and interpretations should be certain, consistent, and applied alike to all, than that some particular case should meet with its just punishment.

Let the prisoner be discharged.

We concur: HALL, J.; KERRIGAN, J.

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5 Cal. App. 161

## In re KILBORN.

## KILBORN et al. v. TITLE INS. & TRUST CO. (Civ. 351.)

(Court of Appeal, Second District, California. March 9, 1907. Rehearing Denied by Supreme Court May 8, 1907.)

1. PRINCIPAL AND AGENT—POWER OF ATTORNEY—DEATH.

A power of attorney ceased to be operative on the death of the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 67, 68.]

2. WILLS—REVOCATION—POWER OF ATTORNEY.

The execution of a power of attorney subsequent to the making of a duly executed will by the grantor did not revoke the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 447.]

3. CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—CORPORATIONS AS EXECUTORS.

St. 1891, p. 490, c. 264, authorizes certain corporations to act as executors, and provides that, when such a corporation having a paid-up capital of $250,000 is authorized by its articles to act as executor, it must be appointed without bond other than that afforded by the deposit of securities of the value of $200,000 with the State Treasurer, and that, before accepting such corporation as executor, it must procure a certificate from the bank commissioners stating that it has complied with the law. *Held*, that since such certificate was not conclusive of the corporation's solvency, but the court to which application was made for its appointment as executor was authorized under the general law to require additional security, such act was not unconstitutional, as granting a privilege or immunity to a corporation not afforded to a natural person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 595.]

4. EXECUTORS—APPOINTMENT—CORPORATIONS—FINANCIAL RESPONSIBILITY.

Where the financial responsibility of a trust company appointed as executor of a will is challenged, the court has power to inquire into its financial condition and refuse its appointment in case its assets are deemed insufficient, under Code Civ. Proc. § 1349, providing that the court may on objection decline to appoint an executor, though named in the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 95.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Application for the probate of the will of William Henry Kilborn, deceased. From a judgment and order admitting the will to probate, and from an order appointing the Title Insurance & Trust Company as coexecutor with Julia Ann Kilborn, without requiring a preliminary undertaking, Mrs. Kilborn and others appeal. Affirmed.

Will D. Gould and E. C. Oggel, for appellants. Morton, Houser & Jones, for respondent.

ALLEN, P. J. Appeal from a judgment and order admitting a will to probate, and an order appointing respondent coexecutor thereunder without preliminary undertaking.

The facts are these: One W. H. Kilborn died seised of certain property in this state, leaving a will by which all of such property subject to testamentary disposition was devised to his wife, the appellant, and the Title Insurance & Trust Company, a corporation as co-trustees, with directions to convert all of his real estate into money, invest and reinvest the proceeds, and pay the income thereof quarterly to a daughter during her life, if she should need the same for her comfortable support, and, in the event such income should prove insufficient for such support, then such amount of the principal as the probate court might order. After the death of the daughter the estate remaining after payment of certain specified legacies, was devised to the heirs of the testator in the proportion and amount to which they would be entitled under the succession laws of California. This will was filed for probate by the respondent corporation, accompanied by the usual petition, to the probate of which the widow, who had acquired by assignment all interest of the other beneficiaries specifically named, objected because she averred that the testator had executed a general power of attorney to her after the date of said will, and said testator believed that the will had been revoked. Then followed 20 other objections to said probate, none of which related to the validity of the execution of the will, but all as to the sufficiency and validity of certain provisions and directions therein contained, with the exception of objection "r," which is the statement of a conclusion that the instrument is not the will of the testator, but no facts are set out warranting such conclusion. The court sustained a demurrer to these objections, and, the contestant not desiring to amend the same, proof was taken as required by section 1317, Code Civ. Proc., and the will was ordered admitted to probate, and a certificate thereof, duly signed, was filed. Thereupon the widow filed her objections to the granting of letters testamentary to petitioner as coexecutor and trustee, assigning as objections the fact that she was the sole party interested in the estate, that the appointment of petitioner would entail unnecessary expense upon the estate, and that the petitioner had no capacity or authority to act as coexecutor or co-trustee. These objections were overruled by the court and the widow and respondent were appointed coexecutors of such will. The widow accepted the appointment as executor, executed her undertaking, and qualified. The court by its order directed letters testamentary to issue to respondent without an independent undertaking.

We perceive no error in the action of the court sustaining the demurrer to the objections filed to the probate of the will. The execution of the subsequent power of attorney to the widow was a matter of no consequence. It ceased to be operative upon the death of the decedent, and in its execution could in no sense be given effect as a revocation of the prior duly executed will. The court upon a petition for the probate of a will is called upon merely to determine the validity of its execution. "The sufficiency or invalidity of its provisions will be determined when effect is sought to be given to them." Estate of Pforr, 144 Cal. 125, 77 Pac. 825. The evidence warranted the finding that the will was duly executed, and that the testator was of sound and disposing mind and memory at the time of its execution, and not acting under duress, menace, fraud, or undue influence. Under the act of April 6, 1891 (Statutes 1891, p. 490, c. 264), respondent corporation was authorized by its articles of incorporation to act as executor and was competent and eligible to appointment; and, being named in the will as one of the executors, it was the duty of the court to so appoint, unless the objections thereto were of a character warranting the court in withholding such appointment. None of the objections filed had such an effect. It will be noted that there was no objection to the solvency or insolvency of the respondent, or its financial responsibility.

Appellant presents with much earnestness a question which relates to the authority of the court to order the issuance of letters testamentary to the respondent without bond. This order is justified by the provisions of the act of 1891, above referred to, which in terms provide that, when a corporation having a paid-up capital stock of $250,000 is authorized by its articles of incorporation to act as executor, it must be appointed without bond or security other than that afforded by the deposit of securities of the value of $200,000 with the treasurer of state, and that before accepting such trust the corporation must procure a certificate from the board of bank commissioners stating that it has complied with the requirements of this law; and further provides that the revocation of such certificate shall be cause for the removal of said corporation from such trust.

It is insisted that the general law requires a preliminary undertaking from all persons, and that this statute excepts from its operation a class, and therefore the uniformity of the general law is destroyed. The manner of affording ample security to those interested in the estate before appointment is the subject-matter of the general law. What that security shall be, its kind, character, and extent, is a matter for the Legislature; and, as said by the Supreme Court of Minnesota in the case of Minnesota Loan & Trust Co. v. Beebe et al., 41 N. W. 232, 40 Minn. 7, 2 L. R. A. 418, "if they deem the securities deposited with the State Auditor, and the other safeguards placed by the statute around the organization and management of such corporations, to insure the faithful execution of all trusts imposed upon them as an equivalent for the bond and oath required of natural persons, they have the undoubted power so to provide." It is a matter of no concern to the coexecutor or devisees under the will how such security is afforded, provided it is ample for their protection. This protection deemed by the Legislature to be ample is provided under the general law and under the act above mentioned. The court is shorn of no power in connection with its probate jurisdiction. The certificate of the bank commissioners is made evidence proper for the court to receive in determining the solvency of the corporation and the propriety of its appointment, but such certificate is not conclusive evidence of any of such facts. Section 1349, Code Civ. Proc., provides that the court may, upon objections, decline to appoint an executor, although named in the will. Appellant made no objection to the appointment of the respondent based upon any facts tending to show that its financial condition and its securities on deposit were not such as to afford ample protection to the estate. Had such objections been made, notwithstanding the certificate of the bank commissioners, it would have been within the power of the court to inquire into the financial condition of the petitioner, and, if it should appear that the assets were insufficient as security for the faithful performance of the trust, to have refused the appointment. Those sections of the general law which give to the court authority to require additional security from an executor when it is made to appear that the original undertaking is insufficient for any reason apply to the equivalent of the bond given by a corporation; and, even though a court may in the first instance appoint a corporation as executor without bond, yet at any time during the administration of the trust, under these sections, it may require further and additional security if satisfied that the interests of the estate demand it. This act, therefore, in our opinion, grants no privilege or immunity to a corporation. By the terms of the act the corporation is required to amply secure those interested in the estate from loss. Natural persons are required to do neither more nor less; and, while the manner of furnishing the security is different, one is the equivalent of the other and the burden is alike upon each.

There is no error apparent in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

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5 Cal. App. 159

## In re KIDD. (Cr. 54.)

(Court of Appeal, Second District, California. March 9, 1907.)

INTOXICATING LIQUORS—CONSTITUTIONALITY OF ORDINANCE—DISCRIMINATION.

An ordinance prohibiting the sale of liquor, except that the council may permit keepers of hotels to serve liquors as part of a regular meal, is not invalid as an unjust discrimination under the constitutional requirement with reference to uniformity in operation of all laws of a general nature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 21–23; vol. 44, Statutes, § 72.]

Application by J. L. Kidd for habeas corpus to obtain his release from custody under a sentence for a violation of an ordinance of the city of Riverside. Writ denied.

Thomas E. Porteous, for petitioner. W. A. Purington, City Atty., for respondent.

ALLEN, P. J. Application by petitioner for writ of habeas corpus based upon the claim that his imprisonment for the violation of an ordinance of the city of Riverside is illegal because the ordinance so violated is unconstitutional and void.

This ordinance, regularly adopted, in plain terms prohibits the sale of all intoxicating liquors in said city by any person, except that the council may issue a permit to keepers of hotels having 40 bedrooms or more to sell vinous and malt liquors served in the dining-room thereof as part of a regular meal. The ordinance is claimed to destroy petitioner's right to engage in business upon the same terms as other citizens, and that it creates a monopoly in favor of a certain class. Let the correctness of his conclusions be assumed, and we have a case where the lawmaking power is regulating a business, the tendency of which is injurious to the public morals, safety, and welfare. "The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than any other source. * * * There is no inherent right in a citizen thus to sell intoxicating liquors." Foster v. Police Commissioners, 102 Cal. 491, 37 Pac. 763, 41 Am. Rep. 194. It is only a calling not in any way injurious to the community which every one has a right to pursue. In re Parrott (C. C.) 1 Fed. 481, 6 Sawy. 349. That the legislative power may prohibit a traffic by retail of intoxicating liquors is conceded. If the governing power can prohibit a thing altogether, it may impose such conditions upon its existence as it pleases, even arbitrary ones. Ex parte Christensen, 85 Cal. 213, 24 Pac. 747.

The constitutional requirement with reference to the uniformity in operation of all laws of a general nature has no application to ordinances enacted in pursuance of a legitimate exercise of the police power, and only when it is manifest that there is an unjust discrimination do courts interfere. In re Zhizhuzza, 147 Cal. 334, 81 Pac. 955. There being no inherent right to engage in the busines involved in this ordinance, the operation of the exception applying alike to all of the class so excepted, petitioner, not being of that class, and in no wise affected by its operation upon the class, has no cause of complaint. Petitioner presents no instance of unjust discrimination. The right to classify exists. The difference in the relation which the ordinary retail liquor dealer occupies from that of a regular hotel keeper, whose business is that of entertaining guests and serving vinous and malt liquors with meals, "suggests a reason which might rationally be held to justify the diversity in the legislation." Bloss v. Lewis, 109 Cal. 499, 41 Pac. 1081.

The ordinance, in our opinion, is valid, and a proper one to be enacted in the exercise of police power.

Writ denied.

We concur: SHAW, J.; TAGGART, J.

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5 Cal. App. 146

## MURPHY et al. v. UNION TRUST CO. OF SAN FRANCISCO (SPRECKELS, Intervener). (Civ. 242.)

(Court of Appeal, Third District, California. March 5, 1907.)

TRUSTS—SALE OF LAND BY TRUSTEE—NECESSITY FOR CONFIRMATION BY COURT.

Where money is bequeathed to a trustee to invest in land, with liberty to change the investment at his discretion, the superior court is without jurisdiction to entertain a suit by the cestui que trust to order the trustee to sell the land subject to confirmation by the court, nor an application by an intervener in such a suit to confirm an alleged contract of sale to him by the trustee, and to direct the execution of conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 241–247.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Suit by Mary Pope Murphy and another against Union Trust Company of San Francisco; Rudolph Spreckels intervening. From a judgment dismissing the complaint in intervention and an order denying a new trial, intervener appeals. Affirmed.

Heller & Powers, for appellant. Jas. L. Robinson, for respondent Murphy. Bishop, Wheeler & Hœfler, for respondent trust company.

HART, J. The respondent, Union Trust Company, a corporation, as trustee upon certain trusts declared in the last will and testament, and a codicil thereto, of Andrew J. Pope, who died in the city of San Francisco about the 18th day of December, 1878, acquired and became seised in fee of certain real property situated in said city and county of San Francisco. In the month of September or October, 1902 (it is not clear which), Rudolph Spreckels, intervener and appellant, and I. W. Hellman, Jr., the secretary and cashier of the defendant corporation, had a conversation relative to said real property, and in which Mr. Spreckels made an offer to Mr. Hellman to buy said property for the sum of $226,000. After some discussion by the parties of the proposition, Mr. Hellman, according to his own testimony, said to Mr. Spreckels: "I will tell you how we can arrange this. We will go into court, make the statement that we are offered $226,000, and ask the court to confirm it, and then, if there are any other parties that wish to raise the bid, they can come forward and do so." There is little, if any, variance between Mr. Spreckels and Mr. Hellman as to the purport of the conversation to which we refer. On the 21st day of October, 1902, Mary Pope Murphy and Florence Pope Frank, cestuis que trustent under the trust declared and created by the said will of Andrew J. Pope, deceased, instituted suit in the superior court of the city and county of San Francisco against the defendant and respondent, Union Trust Company, for the purpose of presenting to the court the proposition of Mr. Spreckels to purchase said property, and, according to the prayer of the complaint, to secure an order or decree of the court directing "the defendant to sell and convey the said premises for the said sum of $226,000, or such other sum as may be obtained therefor, subject to the confirmation by this court." The defendant filed an answer to the complaint, denying the averments thereof, and alleging that "the defendant has the absolute authority and discretion, under the decrees of distribution, and the will and codicil mentioned in plaintiffs' complaint, to sell and convey any or all of the property belonging to said trust estate, and to reinvest the proceeds thereof in other investments, securities, or other properties, at its absolute discretion; but the defendant is unwilling to sell and convey the real property particularly described in plaintiffs' complaint for the sum of $226,000, and is willing to sell said real property at a greater price than $226,000, if this honorable court will confirm the sale thereof." On the 31st day of October, 1902, Rudolph Spreckels, having previously been granted leave so to do by the court, filed a complaint in intervention. After confirming by appropriate averments the allegations of plaintiffs' complaint as to the offer of the sum of $226,000 for said property, and alleging the fairness of the price thus offered, the intervener's complaint proceeds to allege that: "Intervener further avers that the defendant, Union Trust Company of San Francisco, then and there accepted the said offer subject only to the condition that this honorable court would confirm the said sale, and then and there agreed with intervener that the intervener should buy from it, the said Union Trust Company of San Francisco, and the said Union Trust Company of San Francisco should sell to him, the said intervener, the real property in said complaint described for the said sum of $226,000, provided that this honorable court would confirm the said sale." The complaint in intervention also alleges that "intervener is ready and willing to complete the said purchase." The prayer of intervener's complaint is "that the said sale be confirmed, and that the defendant be directed to make, execute, and deliver to said intervener a good and sufficient deed of conveyance conveying the said property with a merchantable title to this intervener," etc. Mary Pope Murphy and Florence Pope Frank, beneficiaries, as before explained, of the trust herein mentioned, and plaintiffs in the original complaint, and the defendant, Union Trust Company, each interposed an answer to the complaint in intervention, specifically denying the averments thereof. The complaint, as well as the complaint in intervention, is verified. The answer of the defendant to the complaint in intervention, among other averments, contains the following: "Further answering this complaint of intervener, this defendant alleges that it, as trustee of the trusts set forth in the complaint of plaintiffs, had a verbal understanding, and no other, on or about October 1st, 1902, with said intervener, that it would sell the real property described in the complaint of plaintiffs, to said intervener, for $226,000, provided that no higher sum than $226,000 was offered by third persons therefor through bids made in this honorable court, and provided, further, that the sale to said intervener of said property for the sum of $226,000, or the sale to a third person bidding more than $226,000, as hereinabove mentioned, should receive the confirmation of this honorable court." Upon the issues thus made up, a trial was had, and judgment went for the defendant, dismissing both the complaint and the complaint in intervention. A motion for a new trial was made by intervener and refused by the court. The intervener appeals from the judgment and from the order denying his motion for a new trial.

The court, from the evidence adduced, found that within 10 days prior to the commencement of this action, as alleged in the complaint, the defendant, as trustee, was offered the sum of $226,000 for the real property involved in this controversy, and that the plaintiffs, as beneficiaries under the trust, requested the defendant, as trustee, before the inauguration of the suit, to make a sale and conveyance of the "said real property, and the defendant refused to do so"; that the said offer of $226,000 was made for said real property to defendant by the intervener, Rudolph Spreckels; that the "defendant did not at any time agree with the intervener that the intervener should buy from it, or that the defendant should sell to the said intervener, the real property in said complaint described, for the said sum of $226,000, or for any other sum; that the defendant did not at any time agree with the intervener that the intervener should buy from it, or that the defendant should sell to the said intervener, the real property in said complaint described, for the said sum of $226,000, or for any other sum, provided that this court would confirm said sale." The court concluded as a matter of law, from the facts found, that "the defendant, as trustee as aforesaid, is vested with full power and authority to manage the said trust property, and to exercise its own discretion as to when, and how, and to whom, and upon what terms, and for what consideration it shall or may sell and convey the same, without any order or direction of this court in the premises," etc. At the trial there was received in evidence, over the objection of intervener, a written offer signed by one Henry Kahn, and addressed to defendant, to purchase the property in dispute for the sum of $230,000, or $4,000 in excess of the sum offered by Mr. Spreckels. Accompanying this offer was a check for $5,000, payable to the order of defendant, and tendered as a deposit or payment on account of said proposed purchase price.

Counsel for respondents contend that, so far as the intervener is concerned, the proceeding here is in the nature of and nothing less than a suit for the specific performance of a contract to sell real property. This contention is opposed by appellant. It is claimed by him that the proceeding, "although cast in the form of a civil action," to adopt the language of his counsel, "amounts to no more than a report by a trustee to the court, of the fact that a contract of sale had been made by him and a request of the judgment of the court confirming his action in making the contract." In its practical purpose and effect, it would at least appear that the relief sought by the suit is that suggested by counsel for respondents. But we do not feel at liberty to consider the case from that point of view. We deem it our duty rather to confine ourselves in the consideration of and reaching a conclusion on this appeal to the theory upon which the cause was tried in the lower court and as presented here by appellant. And we do not, therefore, feel called upon to declare whether or not, as within the scope of intervener's complaint and the issues, a decree specifically enforcing the performance of the alleged contract, assuming the evidence warranted it, could appropriately have been demanded. We shall, as we have declared, direct our investigations toward the solution of the question of whether or not the proceeding, under the theory of appellant as the case was presented in the court below and urged upon this appeal, was one by which the controversy upon the merits could be definitively or at all determined and settled by the court. What we are asked to do is (to quote from appellant's brief) "to reverse the judgment for failure of the evidence to support the finding that no contract was made, and direct the lower court to enter a judgment confirming the sale, in accordance with the evidence introduced." Although several questions are presented and discussed by counsel, there is, after all, in the consideration of the case upon appellant's theory, but one point necessary to be noticed and determined, which may be stated in the form of a question, thus: Was it within the duty of the court under the law, viewed through the circumstances developed at the trial, to order a confirmation of the sale, assuming that a perfect agreement by defendant to sell to intervener had been made, and assuming that "no further and higher bids" had been offered for the property? This question involves, of course, the jurisdiction of the court to act in the premises, and its decision must depend upon the proposition, first, of whether there is any rule of law requiring confirmation in such a case; and, second, if there be no law upon the subject, then upon the nature and extent of the authority with reference to the trust property vested in the trustee by the terms and provisions of the will declaring the trusts. If the trustee is clothed, by the instrument creating and declaring the trusts, with plenary and discretionary authority to conclude a contract for the sale and disposition and investment of the trust property and funds, subject, of course, to the purposes of the trust, without the intervention or supervisory control of the court, either by the commands of the trust clauses of the will or of law, then this proceeding under the issues as framed and presented must be held to have been entirely gratuitous or coram non judice.

As to the first proposition, there cannot be found in our law any express requirement that sales of property by a trustee, testamentary or otherwise, shall be confirmed by a court. And it is admitted by appellant "that there is no decision in this state fixing the rules upon which a court may or may not refuse to confirm the sale of a trustee," although he undertakes to maintain that upon the court is imposed the legal duty of confirming the sale of the trustee here, by analogy to the court's power and duty to confirm the sale of an executor. But as to whether this last-mentioned position would or would not be maintainable under certain special circumstances, it is not necessary for us to decide. We are, in the absence of express law requiring the confirmation of a sale by a testamentary or other trustee of an express trust, to look to the instrument creating such officer and defining his duties, for the purpose of ascertaining with what authority over the trust property he is clothed by said instrument, and whether such authority is without qualification or not subject under any circumstances to be controlled or interfered with by a court. The last will and testament of the deceased was admitted in evidence, and we find that the powers granted thereby to the trustee over the trust property are defined in the following language: "* * * And I give and bequeath to said three trustees [the predecessors of defendant] the sum of one hundred thousand dollars upon trust to invest the same in their names in any funds or securities of the United States or of the city and county of San Francisco, then considered responsible and permanent, or in improved real estate in the city of San Francisco, or to place the same out at mortgage on real securities in this state, or in any other state in the United States, with the liberty to change the investment or investments at their discretion for any other, of the kind above described, and to accumulate the yearly income and profits by similar investments," etc. It will at once be observed, from the language thus quoted from the trust clause of the will of the deceased, that there can be nothing clearer than that the testator intended to and did thereby confer upon the trustees, and their successor, defendant, full, complete, and unquestionable discretionary power and authority to deal with the property made the subject of the trust. Indeed the language of the trust clause is so plain and free from ambiguity that there is even no dispute here as to what the testator meant and intended by it, for, in their opening brief, counsel for appellant say that "the Union Trust Company, defendant herein, holds title to a certain piece of real property situated in San Francisco, on the corner of Summer and Montgomery streets, as trustee under the will of Andrew J. Pope, having full powers of sale in relation thereto."

We think the court was without jurisdiction of the matter. The trustee, under the terms of the instrument of its creation, has, as seen, absolute discretion vested in it to dispose of the trust property without referring a proposed sale to the court for its judgment as to whether the sale or contract of sale should be consummated or not. There is, admittedly, no law, either legislative or deducible from judicial construction, in this state, which, under the circumstances of the case at bar, authorizes any such proceeding, and, in the absence of any authority for any such proceeding in the trust clause of the will of the deceased, the same could amount to no more than if the parties had agreed to refer the proposition of sale to some third party, who could, of course, act or not act upon the matter, according to his own pleasure. The court below, after hearing the evidence and thus learning the nature of the proceeding, concluded, as a matter of law, that no duty devolved upon it to act in the matter, and properly, we think, dismissed the complaints. The authorities cited by counsel relate to the duty of the court in the case of the sale of property by an executor. They are not in point here. A court having jurisdiction of proceedings involving the estates of deceased persons always retains jurisdiction over such estates until their final settlement and the discharge of the executor or administrator. The law charges courts with the exercise of special care and control over such proceedings, and the statute expressly provides for and requires the concurrence of the court in sales by executors and administrators of property belonging to the estates of deceased persons. In the case of trust property, as we have shown and as has been conceded, there is no such duty expressly imposed upon the court by the law, and the court cannot acquire jurisdiction to exercise or perform such duty in such a case by the mere agreement of the parties. We hold that the proceeding as presented submitted for the decision of the court a moot question only, and that the court's action in dismissing the complaints was absolutely proper. From this view of the case, it is apparent that whether the evidence supports the findings of the court as to the alleged contract, or whether the evidence might or might not sustain a decree for the specific performance of the alleged contract of sale, if such relief may be said to be within the fair import of the complaint in intervention, are questions which, as we have before indicated, possess no significance or importance.

Judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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7 Cal. Unrep. 331

## McPHERSON et al. v. GARBUTT et al.

(Civ. 309.)

(Court of Appeal, First District, California. March 13, 1907. Rehearing Denied by Supreme Court May 9, 1907.)

EVIDENCE—SUFFICIENCY TO SUPPORT FINDING.

In an action to determine the rights of the parties in certain land in which plaintiff prayed that she be declared the equitable owner of a one-sixth interest therein on certain payments being made by her, evidence examined, and *held* sufficient to support the finding of the court, except in regard to credit given plaintiff for a certain sum.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by S. W. McPherson, as administratrix, and others, against Frank A. Garbutt and others. From a judgment for defendants, plaintiffs appeal. Modified and affirmed.

Houx & Barrett, for appellants. J. L. Murphy, for respondents.

KERRIGAN, J. This is an action by which the plaintiff in part prayed: That the nature of the interest of the defendants in certain land be declared; that she be decreed the equitable owner of an undivided one-sixth interest therein upon certain payments being made by her at a time to be fixed by the court; that the property be sold, and one-sixth of the proceeds, less the amount due from her to Garbutt, be paid to her. The case was tried by the court sitting without a jury, and in accordance with the prayer of the answer it was adjudged that the plaintiff had no interest whatever in the land described in the complaint; that title to it was in the Moody Gulch Oil Company (hereinafter called the M. G. Co.). The defendant Garbutt, in addition to other matters set forth in the answer, counterclaimed against the plaintiff for the amount due him on her three certain promissory notes, with interest, costs, and the sum of $12.81, an expense incurred by him for her; upon which claim judgment was rendered in his favor for $1,068.57. The appeal is from an order denying plaintiff's motion for a new trial upon the grounds that the decision is against law, insufficiency of the evidence, and errors of law. The principal ground relied upon is the insufficiency of the evidence to support the findings.

The facts of the case are somewhat involved. Briefly, they are as follows: Prior to April 16, 1900, the appellant's intestate, Mrs. Walker, and the defendant Sorey, owned a majority of the stock in the Golden Gate Oil & Development Company (hereinafter called the G. G. Co.), which company had a lease for 10 years on 200 acres of land in Santa Clara county owned by D. B. Moody. After some negotiations by Mrs. Walker, Sorey, and Garbutt, on April 16, 1900, they made an agreement which, in substance, was as follows: (1) It provided for the organization of a corporation known as the "Moody Gulch Oil Company," in which each was to subscribe for one-third of the capital stock. In payment for the stock, Mrs. Walker and Sorey were to transfer 16,625 shares of stock in the G. G. Co. fully paid, and Garbutt was to pay into the treasury of the new company $4,000 in cash. (2) Mrs. Walker and Sorey represented that the outstanding indebtedness of the G. G. Co. did not exceed $1,000. (3) Mrs. Walker was to obtain an option from Moody to purchase the Moody land at a price not to exceed $7,300; the option and purchase to be in the name of Garbutt. (4) At the completion of the organization of the M. G. Co., and on payment for the subscribed stock therein, as above mentioned, Garbutt was to purchase from Mrs. Walker one-half of her stock (one-sixth of the subscribed stock) in the M. G. Co., and to pay therefor $2,000. (5) Mrs. Walker was to buy a one-sixth interest from Garbutt in the Moody land for the sum of $1,216.66, plus one-sixth of the expense of making the purchase. $500 was to be paid June 16, 1900, the balance in two equal payments at 90 and 120 days, with interest on deferred payments at 6 per cent. per annum. (6) Upon payment of these amounts by Mrs. Walker, she and Garbutt were to transfer their interests in the land to the M. G. Co., taking pay therefor either in money or stock in said company at its option; but, if Mrs. Walker defaulted in any of her payments, then Garbutt was to be released of all liability to convey any interest in the land to her or the company.

Another agreement was made April 18, 1900, by Mrs. Walker and Garbutt, which, after stating that Garbutt had agreed to purchase the Moody land for $8,000, provided substantially: (1) That by reason of certain desires Mrs. Walker was to make such payments, and rebates in her commission for making the sale, as would make the price paid by Garbutt for the land not to exceed $7,300. (2) That she was to purchase a one-sixth interest therein from Garbutt, paying therefor the sum specified in the agreement of April 16th (to which reference has been made above) at the times therein set forth. These amounts were to be evidenced by three promissory notes, and as security for the payment of these notes she was to give Garbutt her stock in the M. G. Co. (3) In case of default in the payment of any of her notes, Garbutt, at his option, might return her notes, together with the stock securing them, and terminate the interest of Mrs. Walker in the land. (4) If she carried out her contract, then, at the option of Garbutt, she was to join with him and others in transferring the land to the M. G. Co., taking payment for the same at cost price, either in cash or stock at the par value thereof at the company's option.

On April 16, 1900, Garbutt and Sorey made an agreement by which, upon payment of $1,216.66 (one-sixth of the cost of the land), they and others would transfer the land to the M. G. Co., on payment to them by the company of the cost of said land either in money or stock, etc. It is unnecessary to summarize the contents of this contract. April 23, 1900, Mrs. Walker executed her notes to Garbutt, and thereafter delivered 70 shares of the M. G. Co. stock as security for the payment thereof. In May, 1900, the sale of the land from Moody to Garbutt was consummated. Moody received from Garbutt $7,300 in cash, a note from Mrs. Walker for $300 and a waiver by her of $400, which Moody had agreed to pay her as commission for making the sale. November 30th an option to purchase for $28,000 the Moody land and other interests was given to C. C. Blair. The only payment made by Mrs. Walker was $250 on account of her note for $500, which became due June 16, 1900. After a number of requests for payment of the balance due from her, on December 3, 1900, Garbutt, through his agent, Neumaber, handed Mrs. Walker a letter dated November 30, 1900, signed by Garbutt, which purported to terminate any and all interest that she might have in the Moody land under their contract of April 18th. Together with this letter were her notes, her 70 shares of stock of the M. G. Co., and an unsigned document for her signature, which in effect was a receipt for the notes and stock, and a release of Garbutt from his obligations to her under the contract of April 18th. December 4, 1900, Mrs. Walker returned the notes, security, and the document unsigned to Neumaber, together with a letter offering to pay the amount remaining unpaid on her notes, and one-sixth of the expenses of making the purchase of the Moody land. On December 7th Garbutt replied to her letter of the 4th, saying: "I am willing however to forego my strict legal rights in the matter, provided you make the payments offered by you in your letter of December 4th and otherwise perform your portion of said agreement of April 18th, 1900, on or before 3 o'clock p. m. of Wednesday, December 12th. The amount of the expenses of purchase is $76.90, of which your one-sixth would be $12.81. You have the notes in your possession and can readily compute their present value. I am writing Mr. Neumaber today of 232 California street, your city, to accept these payments under the above conditions on my behalf, provided that, at the same time, you join with me in executing a deed of the said Moody property to the Moody Gulch Oil Company, in accordance with paragraph fourth of our agreement of April 18, 1900. On the execution of which deed the Moody Gulch Oil Company will make payment for said property as provided in the above contract." December 11th, in reply to this letter, she informed Garbutt that she had commenced this suit on December 8th, and, among other things, said: "When you present me a deed duly executed by you and your wife and all parties having an interest in said land * * * necessary to convey me a good * * * title to one-sixth of said land, or present a deed executed by you, your wife and other parties, sufficient to vest * * * title in the M. G. Co., when I execute said deed I will concurrently pay the balance remaining unpaid on my said notes and one-sixth of expense of purchase, and concurrently join with you * * * in transferring said land to the M. G. Co., taking payment for the same * * * as provided in the contract of April 18, 1900."

Subsequently, a deed, conveying to the M. G. Co. the Moody land, signed by Garbutt and his wife, was handed to Mrs. Walker, with a request that she also sign the deed, and at the same time she was tendered 12.3 shares of stock in the M. G. Co. She refused to sign the deed, claiming that others held interests in the land, and until their signatures were obtained to the deed she would not execute it;. and she also insisted that the land had cost her one-sixth of the $7,300 paid by Garbutt, to wit, $1,216.66, $12.81 expense of purchase, $40 interest, $300 paid to Moody, and $400 commission, making a total of $1,970, and that she was therefore entitled to 19.7 shares of stock in the company. On January 1, 1901, Garbutt, for himself and for Mrs. Walker, acting under the power given him in the contract of April 18th, executed a deed of the land in question to the M. G. Co. The court, after trial, upon evidence sufficient, found in part: That plaintiff had failed to perform the conditions of the agreement of April 18, 1900, on her part to be performed; that prior to the commencement of this action she was indebted to Garbutt in the sum of $1,068.57; that the purpose of the agreements of April 16 and 18, 1900, was not that plaintiff should have an undivided one-sixth interest in said land for her separate use and benefit, but it was the purpose of those agreements that the land when purchased should be conveyed to the M. G. Co.; that defendants Garbutt and Sorey, January 1, 1901, conveyed to the M. G. Co. the Moody land; that Garbutt executed the deed in his own name, and for and in the name of plaintiff as her attorney in fact; that he was empowered to so act for her by the contract of April 18th. The court further found that prior to that conveyance to the M. G. Co., and on or about December 4, 1900, the M. G. Co. demanded of plaintiff and Garbutt that they convey the land to it, and offered to pay to plaintiff one-sixth of the cost price of said land and one-sixth of the expenses incurred in obtaining it, in all amounting to $1,229.47, in fully paid up stock of said company; that plaintiff refused to accept said stock; that plaintiff's offer on December 4th to perform her part of the contract was made in bad faith.

It would serve no useful purpose to take up and pass upon each of the points discussed in the briefs. Findings were made on all the material issues presented by the pleadings. Those just referred to meet nearly all of the contentions of appellant. Other points made are covered by other findings, and all the findings are based on ample evidence, except that the evidence does not disclose that plaintiff was given credit for $133.41 paid Garbutt by the G. G. Co. at her request. There is no other point made by appellant that requires notice.

The judgment in favor of Garbutt against appellant is directed modified by deducting therefrom $133.41. In all other respects the judgment and order appealed from are affirmed.

We concur: COOPER, P. J.; HALL, J.

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(5 Cal. App. 166)

## LAGUNA DRAINAGE DIST. v. CHARLES MARTIN CO. (Civ. 278.)

(Court of Appeal, First District, California. March 11, 1907. Rehearing Denied by Supreme Court May 9, 1907.)

1. JUDGMENT—CONCLUSIVENESS—CONDEMNATION PROCEEDINGS—SCOPE AND EXTENT OF ESTOPPEL.

The rule that a judgment upon the merits rendered in a former suit between the same parties or their privies, in the same right upon the same cause of action by a court of competent jurisdiction is conclusive in all actions between the same parties, or their privies, applies to condemnation proceedings, unless the facts and circumstances in the second suit show a greater or different necessity from that set forth in the first.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1306; vol. 18, Eminent Domain, §§ 627-629.]

2. SAME—IDENTITY OF SUBJECT-MATTER.

Plaintiff was not estopped to bring an action to condemn land for drainage purposes by the fact that in a former action against defendant's predecessor in interest he sought to condemn the same land for the same purpose, where by stipulation the first action was in effect withdrawn, and an agreement made whereby, for a certain consideration, he obtained an easement to lay a pipe in the land different from that described in the complaint, and judgment was entered upon the stipulation for the purpose of making the agreement therein set forth a matter of record.

3. SAME—EVIDENCE—BURDEN OF PROOF.

In an action to condemn land for drainage purposes where the evidence shows that it is now necessary to take it, the defendant setting up prior adjudication must show not only the prior judgment between the same parties as to the same subject-matter, involving the same issue, determining that it was not then necessary to take the land for drainage purposes, but that there are no facts or circumstances to now justify the taking.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1822.]

4. EMINENT DOMAIN—PROCEEDINGS—NECESSITY FOR TAKING—SUFFICIENCY OF EVIDENCE.

In an action to condemn land for drainage purposes, evidence examined, and *held* sufficient to show the present necessity for taking the land for the use designated.

5. SAME.

Code Civ. Proc. § 1238, subd. 4, declared a ditch for draining land a public use, and, where the board of trustees of a district created and existing as a corporation under a valid act of the Legislature and authorized to drain and reclaim lands determined that it was necessary to drain the district in accordance with the plans of engineers employed by them, their determination as to the necessity for draining is final, and not subject to review by the courts, and hence, in an action to condemn defendant's land for the purpose of a drainage ditch, it was not necessary to prove the drainage of the district necessary, but only that the taking of the lands of defendant was necessary for such drainage.

6. SAME—DAMAGES—EVIDENCE—ADMISSIBILITY.

In an action to condemn land for drainage purposes, where defendant showed that the laguna to be drained was dry by the 1st of May, it was not error to exclude evidence on the question of damages that draining the laguna would deprive defendant of the seepage therefrom during the summer months.

Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Action by the Laguna drainage district against the Charles Martin Company. From a judgment for plaintiff, an order denying defendant's motion for a new trial, and an order allowing plaintiff's possession of the property in controversy pending the appeal, defendant appealed. Judgment and orders affirmed.

E. S. Lippitt and F. K. Lippitt, for appellant. T. J. Geary, for respondent.

COOPER, P. J. Action for condemnation. Plaintiff recovered judgment. Defendant has appealed from the judgment, the order denying its motion for a new trial, and an order allowing plaintiff possession of the property pending the appeal.

The complaint alleges that plaintiff is a public corporation created for the purpose of draining a part of the lands of the state included within the boundaries of the drainage district as set forth in the complaint; that it is necessary for the purposes of draining the said district to cut down and excavate the bed of a natural stream leading from the lower end of the said laguna following the meanderings of the stream, according to the courses and distances set forth in the complaint, the width of the said easement sought being 30 feet, and that the defendant is the owner of the piece or parcel of land sought to be condemned; that the only mode of draining the said district is by deepening the bed of the said stream and placing proper contrivances in the channel where necessary in order to carry the water uninterrupted. It concludes with a prayer that the strip of land may be taken, held, and used by plaintiff for the uses and purposes set forth therein, and that the compensation to be paid defendant may be ascertained and fixed. The defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action, and upon the further ground that the plaintiff has not the legal capacity to sue, for the reason that the act under which the plaintiff was formed is unconstitutional. The court below sustained the demurrer. Judgment was accordingly entered for defendant. From that judgment the plaintiff appealed, and the judgment was reversed. Laguna, etc., Dist. v. Chas. Martin Co., 144 Cal. 209, 77 Pac. 933. The Supreme Court held against defendant on both propositions raised by the demurrer, and fully discussed the question as to the constitutionality of the act under which plaintiff was organized. It thus became the law of the case that the complaint states facts sufficient to entitle the plaintiff to the relief demanded, and that the plaintiff is a valid corporation and authorized to condemn land for its uses and purposes. We will therefore not discuss further the argument of defendant's counsel that the act under which the plaintiff was organized is unconstitutional.

Upon the going down of the remittitur from the Supreme Court the defendant filed its answer. It denied that it was necessary to take the land described in the complaint for the uses and purposes of the plaintiff. It also pleaded a former judgment between the same parties by way of estoppel. The case was tried with the assistance of a jury, to whom three interrogatories were propounded and answered as follows: "Is it necessary that the strip of land described in the complaint be taken by the plaintiff for the uses for which it is sought to be condemned? Answer. Yes. What is the value of the strip of land sought to be condemned by the plaintiff? Answer. One hundred dollars. What is the damage to the balance of the land not sought to be condemned by reason of its severance from the land sought to be condemned and the construction of the improvement proposed by the plaintiff? Answer. Five hundred dollars." Upon this verdict judgment was entered for plaintiff; and in the judgment it is recited: "That the use to which the land sought to be taken and applied is a use authorized by law. The issues in this action were not determined in the judgment pleaded by the defendant in his answer herein. That the judgment described in the answer of defendant and duly offered in evidence by the defendant is not a bar to the prosecution of the present action by the plaintiff, and that the plaintiff is not estopped from prosecuting the present action by reason of the said judgment." The court also awarded the defendant its costs, taxed at $123.20. No error is claimed as to any instruction given the jury, and all the evidence and the reasonable inferences which the jury might have drawn therefrom must be called to the support of the verdict. The defendant relies upon certain rulings as prejudicial, and insists that the judgment and orders should be reversed because of such alleged rulings.

The first point urged, and upon which the defendant places the most stress, is the claim that plaintiff is estopped by reason of a former judgment. In the year 1889 the plaintiff commenced a prior action against Charles Martin, the predecessor in interest of the defendant, for the condemnation of substantially the same land sought to be condemned in the present suit, and for the same purpose, to wit, for the purpose of a ditch to convey away the waters, and drain the lands of the district. During the trial of the former suit and before its conclusion, the parties entered into a stipulation to the effect that in consideration of $250 the plaintiff should have the right to lay an iron pipe 12 inches in diameter from a point designated at the lower end of the laguna in a straight line across the lands of Charles Martin, for a distance of about 600 feet to a curve in the stream, the said pipe to be laid under ground and the earth filled upon it, and to be a perpetual easement upon the lands of the said Charles Martin, and an appurtenance to the lands of the plaintiff. The stipulation provided that judgment should be entered accordingly, which was done. The judgment described the location of the pipe, the manner in which it should be laid and maintained, and recited the terms and conditions of the stipulation. The line so described, and over which the pipe was laid, was not over or through the land sought to be condemned for a ditch, either as described in the former action or in the one at bar. The plaintiff paid Martin the $250 and the costs incurred, and proceeded to and did lay the 12-inch pipe in the manner agreed upon and provided in said judgment. The rule is that a judgment upon the merits rendered in a former suit between the same parties, or their privies, in the same right, upon the same cause of action by a court of competent jurisdiction, is conclusive and an estoppel in all other actions between the same parties, or their privies. This doctrine applies also to condemnation proceedings, unless the facts and circumstances in the second suit show a greater or different necessity from that set forth in the first suit. After a careful consideration of the record in the former suit we conclude that it does not estop the plaintiff in maintaining this one. It was sought in the former action to condemn the same land for the same purpose, and, if that issue had been determined, in the absence of any change of circumstances, it would be conclusive here; but tne issue was not tried, nor was it determined. By stipulation it was in effect withdrawn, and an agreement made for an easement to lay a pipe in the ground of defendant not within the descriptive calls of the land described in the complaint. No land was taken. The easement to lay the pipe was through and over different land from that described in the complaint. The plaintiff agreed to pay, and did pay, $250 and the costs that had been incurred for the right to lay the pipe. Judgment was entered upon the stipulation evidently for the purpose of making the agreement set forth in the stipulation a matter of record. The judgment can have no greater effect than if the complaint had asked for an easement to lay a 12-inch iron pipe over the precise location described in the judgment and after trial the court had determined that the plaintiff was entitled to the easement as prayed for. In such case the judgment would be an estoppel as to the question of the right to lay the iron pipe in the ground of defendant as located and described in the judgment. It would not estop the plaintiff from again bringing an action to condemn different land for the purposes of a drainage ditch. The plaintiff withdrew its claim for the condemnation of the land in the first suit by reason of the stipulation. The issue was therefore not determined, nor could it have been determined if we regard the stipulation as a pleading authorizing a judgment for a different easement over different land. Suppose the stipulation had been to allow the plaintiff to lay an iron pipe in the ground of defendant on a different tract of land, wholly disconnected with the drainage of plaintiff's land, and judgment had been entered accordingly, could it be said that the judgment would estop the plaintiff from maintaining the present action? The issue in the present suit is as to the necessity of taking the land described in the complaint for the purposes therein set forth. After the stipulation was made in the prior suit no such issue was in the case. It is not the policy of the law to estop a party from maintaining an action by reason of a prior judgment upon an entirely different issue. We have not lost sight of the fact that a judgment upon stipulation by consent of the parties is binding and valid; but it is binding only as to the matter consented to by the stipulation. The authority for the judgment in such case is the stipulation and the judgment decides nothing except as authorized by the stipulation. The plaintiff paid for the easement it took by stipulation in the prior case. The law compels it to pay for the land condemned in the present case.

In Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859, it appeared that in a prior action between the same parties, in which the Last Chance Mining Company was defendant, it had answered, and issue was joined as to the possession of a certain triangular part of a mining claim and the ores therefrom. The action resulted in a judgment for the plaintiff in said prior suit, and against the Last Chance Mining Company by reason of the withdrawal of its answer. The Tyler Mining Company afterwards amended its application, so that it excluded the triangular piece of land included in the prior suit. The other portions of the claim of the Last Chance Mining Company, except the triangle, were not involved in the prior suit. The court held that the judgment was not an estoppel except as to the triangle, and in the opinion said: "The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter in dispute in this action. The judgment in that case is therefore not conclusive as to matters which might have been decided, but only as to matters which were in fact decided."

In Haldeman v. United States, 91 U. S. 584, 23 L. Ed. 433, it was held that a judgment by consent dismissing a prior suit was not a bar. The court said: "But there must be at least one trial of a right between the parties before there can be said to be an end of the dispute, and before a former judgment can avail as a bar to another suit. * * * There was neither trial, nor decision, nor averment even, that the parties had, by their agreement, adjusted the matter in controversy. * * * But the general entry of the dismissal of a suit by agreement is no evidence of an intention to abandon the claim on which it is founded, but rather of a purpose to preserve the right to institute a new suit if it becomes necessary. It is a withdrawal of a suit upon terms. These terms may be more or less important. They may refer to costs, or they may embrace a full settlement of the contested points. If they are sufficient to estop the plaintiff the plea must show it." Applying the reasoning of the above case to the case at bar, the stipulation does not show that plaintiff agreed to abandon its right forever to condemn the land in controversy.

In McCormick v. Gross, 135 Cal. 304, 67 Pac. 766, it was held that in an action of replevin the plea in abatement of a prior action pending between the same plaintiff against the same defendant to recover money alleged to be due under a contract for the price of the same property was not good. In the opinion it is said: "It is provided in section 1908 of the Code of Civil Procedure that a judgment or order in certain cases is conclusive between the parties as 'to the matter directly adjudged', and, in section 1911, 'that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.'" In an opinion of Mr. Justice Harrison in Oakland v. Oakland Water Front Company, 118 Cal. 220, 50 Pac. 300, the doctrine of estoppel by reason of a former judgment is fully discussed, and the authorities cited. It is there said: "The form of the judgment is immaterial, but unless it appear from the record that it was given upon a consideration of the merits of the controversy, or if it affirmatively appears that the merits were not considered, it is not available as an estoppel."

In Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303, the court said: "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties, or their privies, and the point of controversy must be the same in both cases and must be determined on its merits. If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

In Foster v. Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125, the rule is thus stated: "To be a bar to future proceedings it must appear that the former judgment necessarily involved the determination of the same fact to prove or disprove which it is pleaded or introduced in evidence. It is not enough that the question was one of the issues in the former suit. It must also appear to have been precisely determined." See Freman v. Marshall, 137 Cal. 159, 69 Pac. 986; Ephraim v. Pacific Bank, 136 Cal. 646, 69 Pac. 436; Freeman on Judgments, §§ 251, 253, 256, 257, 260, 271; Krutsinger v. Brown, 72 Ind. 468.

It may further be said that the complaint having alleged, and the jury having found, that the taking of the land is now necessary for the uses and purposes of plaintiff, the presumption, in the absence of evidence, is that new facts and circumstances were shown. It is claimed by the defendant that the former judgment in effect determined that it was not then necessary to take the land for the purposes of a ditch. The evidence showing that it is now necessary to take it, the burden is placed upon defendant to show, not only the prior judgment between the same parties as to the same subject-matter, involving the same issue, but that there has been no new facts or circumstances to now justify the taking. Our attention has not been called to any evidence showing such fact, and we have been unable to find any in the record. On the other hand, plaintiff's witness Frost, a civil engineer, testified that in April, 1903, he found the water standing five feet deep on the land in the lagoon at a point 5,000 feet above the bridge; that the natural outlet of the laguna is the creek, the bed of which should be widened, deepened, and cleaned out; that the proposed plan is the only practicable plan of draining the lagoon, and the quantity of land proposed to be taken is a little over half an acre. Dodge, a civil engineer, also testified that to carry the flow of water it is necessary to excavate the ditch a distance of 840 feet below the bridge. When asked if the pipe line would carry off the water of the lagoon as well as the natural flow of the creek, he answered: "It won't run off at all; no natural flow of the creek. The natural flow of the creek is four feet higher than the lagoon. The bed of the creek below the bridge has been raised several feet since I surveyed it in 1888." There is other testimony, but the above is sufficient to show the present necessity for taking the land for the public use designated in the complaint.

Defendant contends that there is no necessity for the public improvement proposed—the drainage of the lands included in the district. As before stated, it has been held that the district is a corporation created and existing under a valid act of the Legislature. The board of trustees of the district employed civil engineers to survey, plan, locate, and estimate the cost of the works, necessary to drain the district, and determined that it was necessary to drain the district in accordance with the plans of the engineers. The determination of the board of trustees as to the necessity for draining the district is final in this case. It is not a matter that is subject to review by the courts. The plaintiff is a corporation authorized to drain and reclaim lands. A ditch or aqueduct for draining or reclaiming land has been declared by the Legislature to be a public use. Code Civ. Proc. § 1238, subd. 4. It was therefore not necessary to prove that the drainage of the district was necessary, but only that the taking of the lands of defendant was necessary for such drainage. City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Santa Ana v. Harlin, 99 Cal. 539, 34 Pac. 224. As to the necessity for taking the land, the verdict of the jury was for plaintiff, and it is sufficient to say that the evidence supports it.

It is claimed that the court erred in certain rulings as to the amount of damage to which the defendant was entitled by the severance of the land not sought to be condemned from the portion sought to be condemned. We have examined the rulings, and find nothing of sufficient importance to justify a reversal of the case. The principal claim is that defendant should have been permitted to show that the portion of its land north of the road and adjacent to the laguna receives moisture by the seepage from the laguna, and that the drainage of the laguna will damage its land by depriving it of such moisture. The evidence offered for the purpose of proving this was that of the Martins. By examining the testimony of Charles Martin, we find that he testified that "the pipe as it is now constructed, in connection with the creek, drains the lagoon, and carries the water from the lagoon in time to permit of the cultivation of the lagoon." He further testified that the water has been off the lagoon sufficient to permit its cultivation by the 1st of May during the average for the past 15 years. Charles E. Martin testified that the water is off the lagoon in May. "The pipe carries the water away until it is entirely dried up. There has not been a year to my knowledge when that pipe has not carried away the water, and entirely dried the lagoon." It is thus seen that when defendant claims that the condemnation is not necessary it produces evidence to show that the old pipe drained the laguna dry by the 1st of May, and then, on the question of damages, it offered evidence to prove that draining the laguna by the proposed system would deprive it of the seepage from the laguna during the summer months. We are of opinion that the question of damages to the parcel of land not sought to be condemned was fairly submitted to the jury on the evidence, and its finding of $500 damage to such land is a fair deduction from the evidence.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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5 Cal. App. 205

## PEOPLE v. STOKES. (Cr. 47.)

(Court of Appeal, Second District, California. March 18, 1907. Rehearing Denied by Supreme Court May 9, 1907.)

1. Criminal Law—Trial—Reception of Evidence—Discretion of Court.

Code Civ. Proc. § 1848, provides that the rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them. Section 1870, subd. 6, provides that after proof of a conspiracy evidence of the acts or declarations of a conspirator may be offered against his co-conspirators. *Held*, that there was no error in the admission against a co-conspirator of evidence of acts and declarations of a conspirator before proof of a conspiracy, where the district attorney stated that he proposed to show a connection between the conspirators, and the jury was instructed that, if not satisfied that there was an understanding between the parties, then that they should disregard the evidence of such acts or declarations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1012–1017.]

2. Same — Conspiracy—Evidence—Admissibility.

Facts and circumstances which go to establish a conspiracy are none the less admissible because at the same time they supply evidence tending to prove the guilt of the conspirator on trial.

3. Same — Conspirators — Imputed Knowledge.

Where there was a conspiracy to commit a robbery, knowledge of one of the conspirators that the person robbed had the money upon his person would be imputed to the other conspirators.

4. Same—Evidence—Admissions.

Proof of admissions by a prisoner which, though they themselves did not involve his guilt, tended, in connection with other facts, to prove it, is competent without preliminary proof that they were voluntarily made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1212–1218.]

5. Same—Appeal—Harmless Error—Admission of Evidence.

In a prosecution for robbery, a witness, after stating that there was a jingle of some coin in the pocket of prosecuting witness, and that he could tell the difference between gold and silver by the jingle, was permitted to testify that the jingle sounded like heavy gold. *Held*, that defendant was not prejudiced by the admission of this evidence.

6. Same.

Pen. Code, § 1258, provides that on appeal the court must give judgment without regard to technical errors or defects not affecting substantial rights. In a prosecution for robbery, evidence was admitted of the acts of a co-conspirator with defendant, to the effect that after the commission of the offense he procured a towel and washed the blood from the face of the person robbed, and showing where such co-conspirator came from and his movements immediately preceding that act. *Held*, admissible as tending to corroborate claim of prosecuting witness that he had been robbed but immaterial in connecting accused with the robbery, and harmless as to him.

7. Same—Judgment—Time to Pronounce Judgment.

A delay of 35 days in pronouncing judgment of sentence did not deprive the court of jurisdiction to pronounce the same; pronouncing judgment being no part of the trial within Const. art. 1, § 13, providing that in a criminal prosecution the defendant shall have the right to a speedy trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2492.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Thomas Stokes was convicted of robbery, and he appeals. Affirmed.

Alfred Daggett and H. T. Miller, for appellant. U. S. Webb, Atty. Gen., and E. E. Selph, Deputy Atty. Gen., for the People.

SHAW, J. The defendant was convicted of the crime of robbery, and prosecutes this appeal from the judgment, as well as from an order of the court denying his motion for a new trial.

The case was tried upon the theory that defendant, Stokes, a man by the name of Kincaid, and one Mart Bennett, formed a conspiracy to commit the robbery. The latter was called as a witness and testified on behalf of the prosecution. It appears from his testimony that he was a self-confessed, active participant with defendant in the commission of the crime. The facts, briefly stated, are: That on the night of October 18, 1905, one Owen Connolly was robbed in the back yard of the Visalia House in the city of Visalia.

He had on the day before come to Visalia from Millwood, where he had been working, and had brought with him the proceeds of his labor, consisting of several hundred dollars. There was adjoining the office of the Visalia House a saloon and bar, and at the time William Kincaid was the bartender in charge thereof. During the evening of October 18th Connolly spent most of his time in this bar, and it seems became quite well acquainted with Kincaid, and the latter had learned of the fact that Connolly had upon his person a considerable sum of money. During the daytime, and until about 11:25 p. m. of October 18th, when he arrived at Visalia, going immediately to the Visalia House saloon, the defendant was in Tulare City. Prior to his arrival Connolly had applied to the clerk of the Visalia House for a room. The clerk demanded payment in advance, and Kincaid paid to the clerk the amount demanded for the room, at the same time telling the clerk that he (Connolly), had lots of money, and, if he (Connolly), paid him for the bed, the clerk should return to him (Kincaid), the sum paid by the latter.

The first alleged error in the record to which our attention is directed was the ruling of the court in permitting the hotel clerk to state what was said by Kincaid upon the occasion of his paying for this room for Connolly's use. It was and is now claimed by defendant that the evidence sought to be adduced by the question calling for this conversation was irrelevant, incompetent, and immaterial to any of the issues in the case, that the conversation did not take place in the presence of the defendant, and that there was no evidence introduced that tended to show any relation between Kincaid and defendant and Connolly, who was robbed. Whereupon the district attorney stated to the court that he proposed to make that connection. Defendant's objection was thereupon overruled.

The same objection was interposed to like questions throughout the trial, and the rulings of the court were adverse to defendant.

Defendant contends that there was no evidence tending to establish any conspiracy or other unlawful relation between Kincaid and defendant, and that hence, under section 1848, Code Civ. Proc., defendant could not be prejudiced by any act or word of Kincaid not occurring in his presence. And, further, that subdivision 6 of section 1870 provides that it is only after proof of a conspiracy that evidence of the act or declarations of a conspirator can be offered against his co-conspirator. Defendant places great weight on the word "after." We cannot, however, agree with counsel in his contention upon this point. It is not often that direct proof of a common design to commit a crime can be had. Its existence is usually established by independent facts, which, although they may be remote from the main subject of inquiry, and standing alone seem of little importance, but nevertheless when all are taken together are amply sufficient to establish a prima facie case of the existence of an agreement to commit a crime. Conspiracy, like any other fact in issue, may be proved by circumstantial evidence, and, notwithstanding subdivision 6 of section 1870, Code Civ. Proc., the order in which the evidence may be introduced must rest largely with the trial judge. The provisions of the Code cited are not mandatory. People v. Compton, 123 Cal. 408, 56 Pac. 44; People v. Donnolly, 143 Cal. 394, 77 Pac. 177. The prosecution here, in substance, stated in reply to the objection that it would show the relation existing between Kincaid and defendant; that the act or circumstance was merely a link in the chain of circumstances going to establish the relation of conspirators, and showing defendant's connection with the crime. Under the circumstances of this case, we find no fault with the course adopted by the trial court. People v. Daniels, 105 Cal. 262, 38 Pac. 720. If all the evidence bearing upon the question of the alleged conspiracy, taken together, tends to establish its existence, it then becomes like any other fact pertaining to the subject of inquiry, a question for the determination of the jury. Where the existence of a conspiracy is one of the issues, independent facts and circumstances which establish it may at the same time supply evidence tending to prove the guilt of a conspirator on trial, but the fact that it performs the dual function is no reason for excluding it. There were three alleged conspirators here, but it was Kincaid's conduct, acts, and movements which were the subject of inquiry when the alleged errors were committed, and his conduct, conversation, and acts during the period covered by the inquiry was not only competent and material as tending to show the existence of a common design between him and the defendant to commit the robbery, but, at the same time, in case the jury found the conspiracy to be actually established, constituted evidence tending to establish defendant's guilt. Taken together, the circumstances and facts disclosed tended to show that the conspiracy existed, and the jury were instructed that, "if not satisfied from the evidence beyond all reasonable doubt that there was an agreement and understanding made and had between the said William Kincaid, Martin Bennett, and the defendant to perpetrate the offense alleged in the information, then it is the duty of the jury to disregard all the testimony adduced in this case tending to prove any declaration, act, or conversation of said William Kincaid and Martin Bennett and each of them made or done in the absence of the defendant Thomas Stokes." Under this instruction the jury found that there was such an agreement and understanding made, and its conclusion is final. People v. Fehrenbach, 102 Cal. 394, 36 Pac. 678; People v. Donnolly, supra.

Appellant lays much stress upon the fact that all the evidence relative to Connolly's having money shows a knowledge on the part of Kincaid only, and that this was acquired by Kincaid before the defendant arrived in Visalia. The existence of the conspiracy being shown, it must be presumed that the knowledge of all the conspirators was brought into play in the execution of the joint undertaking. The individual knowledge of each is imputed to all, and it is not material when or how this knowledge was acquired, provided it was before the consummation of the crime. The purpose of the robbery was to wrongfully obtain money, and evidence tending to show that the defendant knew that Connolly had money would show a motive for the crime. The jury being satisfied of the existence of the conspiracy had a right to presume that the defendant had the same knowledge and information relative to Connolly having money upon his person that Kincaid was shown to have had. Upon cross-examination both Connolly and witness Wessendorf were interrogated as to their testimony given on a former trial, and objections were sustained. No foundation was laid for such impeachment. Section 2052, Code Civ. Proc.; People v. Fitzgerald, 138 Cal. 41, 70 Pac. 1014. Later, the former testimony of Wessendorf was read to him and he answered the question. The court ruled that witness Wessendorf might make an explanation of his testimony, to which ruling defendant excepts; but, as it does not appear that the witness offered to make any explanation, such ruling could not affect the rights of defendant.

No exception was taken to the ruling of the court in sustaining objection to the question asked witness Bacon as to whether he was in the bar when they were talking about closing up the house; and the later question as to whether he took supper with the defendant that night was clearly objectionable for the reason that it was not cross-examination. The sheriff, who placed the defendant under arrest, was permitted over objection of defendant to testify as to conversation had with him after he was placed in jail. It is urged that it does not appear that the statements made by defendant to the sheriff were voluntary, and defendant invokes the well-recognized rule applicable to confessions: "A confession, in criminal law, is the voluntary declaration made by a person who has committed a crime or misdemeanor to another, of the agency or participation he had in the same." People v. Strong, 30 Cal. 151. The defendant does not admit that he had any agency in the commission of the crime, but, on the contrary, his statement as to his movements and whereabouts is calculated to negative any participation in it. Even if he made statements which in themselves did not involve his guilt yet when connected with the other facts tend to prove him guilty, such admissions would nevertheless be competent without preliminary proof. People v. Le Roy, 65 Cal. 613, 4 Pac. 649; People v. Ammerman, 118 Cal. 23, 50 Pac. 15; People v. Jan John, 144 Cal. 284, 77 Pac. 950.

Witness Bentley, after stating that there was a jingle of some coin in the pocket of Connolly, the prosecuting witness, was asked with reference to what kind of coin it was. Objection was made to his testifying upon this subject. After testifying that he could tell the difference between gold and silver by the jingle or sound and that he had often noticed the difference, he was permitted to testify over defendant's objection that the jingle that he heard in the pocket of Connolly sounded to him like heavy gold. He does not state that it was gold, but merely that the jingle sounded like gold. In view of the test made as disclosed by the record, the evidence carried little weight, and it cannot be said that defendant was prejudiced by its admission.

We have fully considered every alleged error occurring at the trial. Only one other merits notice. Connolly had been knocked down in the back yard of the Visalia House as he was leaving a water-closet. After regaining consciousness, he made his way to the door of the hotel and was let in by the clerk. Just what space of time elapsed after he was knocked down and his money taken before he again entered the hotel is not disclosed. Just before Connolly came in Kincaid and defendant came from the bar through the office of the hotel and entered a hall from which a stairway led upstairs, where defendant had a room. After the clerk had let Connolly into the hotel he (the clerk) went to the door, calling for the marshal, and during this time Kincaid came out from the hallway. The witness Deible was asked the following questions: "What did he [Kincaid] do when he came into the room, where did he first go?" "He walked up to the barroom door, then he turned and he went back, I think, towards the main entrance that was on the east side, this hallway [showing on the map]. He might possibly went out. I wouldn't be positive in regard to that. Question: What did you see Kincaid do after that? Now, I am not asking for anything he said, but what did you see him do? Answer: Well, Mr. Kincaid came back and he made the remark to— He walked over to the wash bowl and he got a towel and he sponged Mr. Connolly off." The witness Wessendorf, after stating that he saw Kincaid after the consummation of the robbery—after he came back into the hotel—was asked the question: "Where did he come from? Answer: He must have come out from the stairs. He couldn't come from nowheres else, because the doors were all locked. Question: Where were you when you saw him? Answer: I was standing on the sidewalk hollering for the marshal when I saw Kincaid. I saw him come out of the office onto the street, and I saw him back in that office again wiping the blood off of Connolly. He had gone out onto the street before he wiped the blood off Connolly." The sheriff, after stating that he arrested Kincaid, was asked: "What was done with him when he was brought down? Answer: I asked him to remove his shoes, which he did, searched him and locked him up. He removed his shoes at my request and in my presence." Defendant objected to all of these questions upon the ground that they were irrelevant, incompetent, and immaterial, and related to what took place subsequent to the consummation of the alleged offense and not in the presence of defendant. We are not unmindful of the general rule that evidence of the declarations and appearance of a coconspirator directed to matters occurring after the commission of the offense, and not in the presence of the defendant on trial, is inadmissible. People v. Opie, 123 Cal. 294, 55 Pac. 989; People v. Dilwood, 94 Cal. 89, 29 Pac. 420. The fact that Kincaid procured a towel and washed the blood from Connolly's face was, however, competent evidence as tending to corroborate Connolly's testimony that he had been knocked down. It tended to show his condition immediately after the robbery; that his face was covered with blood to such an extent that another, whether as an act of kindness or otherwise, deemed it necessary to remove the blood. It was an independent act, and where Kincaid came from and his movements around the saloon immediately preceding the act of washing Connolly's face were but recitals of the circumstances connected with the principal act of washing the face. They amounted to but a detailed history of the transaction which tended to corroborate the statement of the prosecuting witness that, by force and violence, he had been robbed. Conceding the questions to be irrelevant and the testimony elicited incompetent, and for that reason erroneously admitted, still the evidence, so far as fixing the robbery upon Stokes, was of such a character as to be wholly immaterial and without any weight. The answers threw no light whatever upon the issue as to whether or not Stokes was a participant in the robbery. We are unable to see how it affected the substantial rights of the defendant, without which being made to appear affirmatively, the error, if any, must be disregarded. Section 1258, Pen. Code. "If the evidence objected to had been excluded, we do not see how the jury could have entertained a doubt of the fact of the robbery, or of the identity of the defendant as one of the robbers." People v. Clark, 106 Cal. 41, 39 Pac. 55.

The jury rendered its verdict on March 19, 1906, and April 2d following was by the court fixed as the date for pronouncing judgment, which, however, upon motion of counsel for defendant, was postponed to April 16th, and on that date, upon like motion, again postponed until April 30, 1906. Nothing further was done until June 4, 1906, when defendant was brought before the court for judgment, whereupon he objected to judgment being pronounced upon the ground that, by reason of the delay, had without defendant's consent, the court had lost jurisdiction to pronounce any judgment upon said verdict, and it is now claimed that the judgment entered is without authority and therefore null and void. At defendant's request, April 30th was the time fixed by the court for pronouncing judgment. There was, at most, a delay of 35 days, including intervening Sundays and holidays. We cannot assent to the proposition that, by reason of this delay, the court lost jurisdiction to pronounce sentence. The delay was undoubtedly due to the holidays proclaimed by the Governor of the state and which continued throughout the month of May, 1906. It is not necessary to pass upon the question as to whether this holiday period of one month would excuse and justify an otherwise unwarranted delay, for the reason that we are of the opinion that, even though it be held that the act of pronouncing judgment is a part of the trial, the court did not by reason of the postponement from April 30th to June 4th lose jurisdiction in the matter.

A trial is "the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue." Anderson v. Pennie, 32 Cal. 267; Tregambo v. Mining Co., 57 Cal. 501. Pronouncing judgment, which is the formal declaration of sentence, is not the trial, nor any part thereof within the meaning of section 13, art. 1, of the Constitution. Reed v. State, 147 Ind. 41, 46 N. E. 135. In a Missouri case (State v. Watson, 95 Mo. 415, 8 S. W. 383) judgment was pronounced two years after verdict, and the court passing upon a statute requiring that defendant be brought to trial within a specified time after indictment, otherwise to be discharged, held that such limitation did not apply to the pronouncing of sentence. The Supreme Court in People v. Felix, 45 Cal. 163, upholds a sentence pronounced at the third term after conviction. The trial ended with the announcement of the verdict of the jury, whereby it declared the result of its deliberations upon the issues of fact which had been submitted to it for its decision.

A careful examination of the voluminous record in this case impresses us with the fact that, notwithstanding the very able, ingenious and persistent effort of counsel to specify an error therein, such effort has failed, and the order and judgment should be and are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 175

## WOLFSKILL v. SMITH et al. (Civ. 331.)

(Court of Appeal, Second District, California. March 11, 1907.)

1. Mines and Minerals—Placer and Oil Claims.

The laws governing the location of placer claims on the public domain apply with equal force to the location of oil claims.

2. Waters and Water Courses— Artesian Wells—Ownership.

An oil company bored three wells in the bed of a canyon on the public domain in a vain search for oil, and after producing two artesian wells, abandoned the land without making any attempt to comply with the laws applicable to the location of an oil claim. *Held*, that the company's rights, if any, to the land, wells, or water, terminated when it ceased work and abandoned its efforts to discover oil, so that its deed to the wells and water passed no title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 21.]

3. Same.

Where an oil company abandoned its attempts to find oil after it had produced two artesian wells on the public domain, such wells reverted with the land to its original status as unoccupied government land.

4. Same—Appropriation.

Water flowing from artesian wells on the public domain is subject to appropriation for irrigation purposes, under Civ. Code, § 1410, providing that the right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 2.]

5. Same—Acts of Appropriator—Priority of Right.

Civ. Code, § 1416, provides that within 60 days after posting notices the claimant of a water appropriation must commence the construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly. Section 1418 declares that by compliance with the rules contained in section 1416 the claimant's right to the use of the water relates to the time of posting the notice. Rev. St. § 2339, as amended [U. S. Comp. St. 1901, p. 1437], provides that appropriators of water rights on the public domain shall have vested rights therein, and that all homesteads allowed shall be subject to vested and accrued water rights and rights to ditches used in connection therewith. *Held*, that where plaintiff posted notices of appropriation of water flowing from certain artesian wells on the public domain, and thereafter proceeded within 60 days to construct her ditches, etc., which work she prosecuted continuously until enjoined, her rights to the water flowing from the wells were prior to those acquired by a locator of the land as a homestead after the posting of the notices.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 14.]

6. Same—Estoppel.

Where, after plaintiff had appropriated water flowing from certain artesian wells on the public domain and had begun the construction of her irrigation works to use the water, S. located land including the wells as a homestead, capped the wells, and enjoined plaintiff from entering on the land to complete her irrigation ditch, S. was estopped to deny that plaintiff had prosecuted her work with sufficient diligence to become an actual appropriator.

7. Same—Notice—Posting.

Where three artesian wells were driven in a canyon within 500 feet of each other, notices of appropriation posted at the wells, describing them and their location, sufficiently designated the point of diversion.

8. Same—Copy—Record.

Where notices of appropriation of water flowing from artesian wells located within 500 feet of each other were identical, it was not necessary to record more than one copy thereof.

9. Same—Pipe Line—Right of Way.

Where M., prior to plaintiff's posting of notice of appropriation of water flowing from artesian wells on the public domain, had taken steps to obtain a right of way for a pipe line over the land, and the boundaries of the right of way included the wells, such acts did not confer on M. any right to the stream of water flowing from the wells.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 14.]

10. Same—Appropriation Notice—Signing.

Under Civ. Code, § 1415, requiring a copy of a water appropriation notice to be recorded, the copy intended for record need not be signed by the party claiming the water, but may be made and filed by a stranger.

11. Same—Acknowledgment—Record.

A copy of a water appropriation notice, required to be recorded by Civ. Code, § 1415, was not an instrument within section 1161, providing that before an instrument can be recorded, unless it belongs to certain excepted classes, not including such a notice, it must be acknowledged, and hence no acknowledgment is necessary in order to entitle a copy of such a notice to record.

12. Same—Rights of Appropriator.

An appropriator of water flowing from artesian wells on government land prior to the location of the land as a homestead was only entitled to enter the land to avail herself of the water flowing from such of the wells as supplied a stream of running water, and not for the purpose of developing water by boring additional wells.

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Elena P. de Wolkskill against George A. Smith and another. From a judgment in favor of defendants, plaintiff appeals. Reversed and remanded.

Barstow & Variel and Thos. F. Porteous, for appellant. John G. North and O. P. Sanders, for respondents.

SHAW, J. Appeal from judgment in favor of defendants. This action involves the right to water flowing from artesian wells located upon government land. It is based upon the following facts:

Some time during the year 1900 an oil company commenced boring for oil in a canyon in the S. E. ¼ N. W. ¼ section 4, township 3 S., range 2 W., S. B. M. It continued the prosecution of its work until January, 1901, when, after having bored three wells and found no oil or other mineral substance, it abandoned the work. At the time of the commencement of said work, and up to October 20, 1902, the said land was unsurveyed land of the government, and, except as to the time that said oil company was prosecuting said work, was unoccupied. The three wells bored are in line with the bed of the canyon, distant about 500 feet apart. The lower well has since its completion by said oil company flowed five inches of water, measured under a four-inch pressure; the second or middle well, three inches under like measurement; and from the upper well no water at all flows. On the 9th day of October, 1902, and after the oil company had abandoned all work upon the premises upon which said wells were located, it executed to the plaintiff a deed, whereby, for a valuable consideration, it purported to convey to said plaintiff all its right, title, and interest in and to said 40 acres of land and said wells and the water therein and flowing therefrom. Thereafter, on October 13, 1902, plaintiff posted in a conspicuous place at each of said wells a notice of appropriation, as follows: "Notice of Appropriation of Water. Take notice that the undersigned claims 1,500 inches of water measured under a four-inch pressure flowing from and at the wells bored by the San Jacinto Oil Company on the land which would be the northwest quarter of section four, township three south, range two west, San Bernardino meridian, if said lands were surveyed by the United States, and I intend to divert said water at the three several points where this notice is posted, to wit, at each of said wells bored by the San Jacinto Oil Company. I intend to use said water for domestic and irrigation purposes on the land which was known as the Rancho San Jacinto Nuevo and the Moreno, Lakeview and Alessandro Colonies, and adjoining lands in the county of Riverside, state of California. I intend to divert said water by means of ditches of sufficient capacity to carry same, leading from each of said points. Dated the thirteenth day of October, 1902. Elena P. de Wolfskill. Witness: David G. Wolfskill." On October 16th following, one copy of the above notice was filed for record in the office of the county recorder of Riverside county, but that neither of said notices or copy filed was ever acknowledged. On October 20, 1902, one of the defendants, George A. Smith, entered upon and took possession of the entire northwest quarter of said section as a homestead under the laws of the United States, and since said date Smith has been in possession of said premises and of the wells located thereon and the water flowing therefrom, and has fully complied with the provisions of the law relating to the acquisition of government land by settlers thereon for homesteads. On August 21, 1902, Datus E. Myers did, under and in accordance with a certain act of Congress, file in the proper United States land office certain documents, data, and maps required by said act of congress, whereby he located a right of way for a pipe line 100 feet in width and extending across and through said 40 acres upon which said wells were located, and embracing within its boundary lines the land upon which all of said wells are located. Thereafter, on November 17, 1902, said Myers, under the act of Congress entitled "An act for the relief of Thomas B. Valentine," selected said southeast quarter of said northwest quarter, and being the 40 acres upon which said wells were located, and duly filed certificate of location "E No. 20" for 40 acres of land issued in accordance with said act, and said selection was allowed. Plaintiff duly commenced the construction of the ditch required to convey the water sought to be appropriated to her land, and prosecuted the work continuously until, at the instance of defendant Smith, she was enjoined from entering or working upon the northwest quarter of said section on which he had, on October 20, 1902, located his homestead. Said defendant Smith capped the wells, fenced the land in, and prevented plaintiff from doing any work on said premises, or taking or diverting any water therefrom, and claims the right so to do by virtue of this claim and occupancy of said premises as a homestead.

No issue as between defendants is involved; the sole question being the right of plaintiff as against both defendants. From a judgment in favor of defendants, the plaintiff appeals. Appellant bases her claim to the water, first, upon the deed of conveyance from the oil company; second, upon the notice of appropriation, duly followed (so far as not prevented by the acts of defendant Smith) by the statutory steps required for the actual appropriation of water subject to appropriation under the laws of this state. As against plaintiff, the defendant Myers claims the water by virtue, first, that the wells are located within the boundary lines of the right of way for the pipe line which he located on August 21, 1902, which location was prior in date to either the alleged posting of notice of appropriation or purchase made by plaintiff; second, that his selection of the 40 acres of land under the Valentine script entitles him to the flow of the wells as against plaintiff. Smith's claim is by virtue of his being an actual occupant of the land under the homestead laws of the United States.

Plaintiff's claim to the wells or the water flowing therefrom, so far as such claim is based upon purchase and conveyance from the oil company which had bored the wells, cannot be sustained. The fact that these flowing wells resulted from a fruitless effort to discover oil gave the company no right, title, or interest in the land or stream of water flowing thereon. The laws governing the location of placer claims apply with equal force to the location of oil claims. Miller v. Chrisman, 140 Cal. 441, 73 Pac. 1083, 74 Pac. 444. The oil company had acquired no right, title, or interest in the land or water which it could legally convey. No attempt had been made to comply with the laws applicable to the location of an oil claim. Its rights, if it had any, to the land, wells, or water flowing therefrom, terminated when it ceased work thereon and abandoned its efforts to discover oil. Admitting that actual occupation of the land accompanied by active work thereon, in the prosecution of its efforts to discover oil, entitled the company to possession, such right terminated upon a failure to discover oil, and when, prior to October 9th, it abandoned the enterprise. Weed v. Snook, 144 Cal. 439, 77 Pac. 1023; Miller v. Chrisman, supra. Where a miner abandons his claim, it reverts to its original status as part of the unoccupied public domain. A subsequent locator takes it with all shafts, tunnels, and drifts, however extensive or costly. Vol. 20, Ency. of Law, p. 733. The same principle applies to an oil claim, and it follows that, inasmuch as the San Jacinto Oil Company had, prior to October 9, 1902, abandoned the premises upon which the wells, one flowing five inches and one flowing three inches, were located, the land reverted to its original status as a part of the public domain. It was, on October 13, 1902, the date of posting the notice of appropriation of the water, a part of the unoccupied government land. Was this water subject to appropriation? In our opinion it was. The law is well settled that water flowing from springs upon the public lands of the United States is subject to appropriation, under section 1410 of the Civil Code, which provides that "The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation." Ely v. Ferguson, 91 Cal. 187, 27 Pac. 587; De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497.

The fact that the flow of the stream from the spring is caused by water percolating through the soil does not deprive it of the character which makes it subject to appropriation. "Where percolating waters collect or are gathered in a stream running in a defined channel, no distinction exists between waters so running under the surface or upon the surface of land." Cross v. Kitts, 69 Cal. 217, 10 Pac. 409, 58 Am. St. Rep. 558. Water passing through the soil, not in a stream, but by way of filtration, is not distinctive from the soil itself; the water forms one of its component parts. In this condition it is not the subject of appropriation. When, however, it gathers in sufficient volume, whether by percolation or otherwise, to form a running stream, it no longer partakes of the nature of the soil, but has become separate and distinct therefrom, and constitutes a stream of flowing water subject to appropriation. The water in question here is the stream issuing from the wells, and it is immaterial for the purposes of this discussion whether this stream is supplied by water percolating and filtering through the earth or not; at all events, it has gathered into a stream. No distinction can be made between the water flowing from these artesian wells and that flowing from springs. "Water rising to the surface of the earth from below, and either flowing away in the form of a small stream or standing as a pool or small lake," is the definition of a spring given by the Century Dictionary. This definition is equally applicable to an artesian well. The stream in either case may result from the gathering of water at some point, whether near or distant, which produces the stream, the flow of which is by natural causes forced to the surface. In the one case the aperture or opening through which it finds its way to the surface is the result of nature's forces; in the other, it is produced by artificial means. The fact that it is produced by boring a hole in the ground in no wise changes its character. In either case the water flows to the surface naturally. When a stream of unappropriated water flows from an artesian well, having its location upon unoccupied government land, it is the subject of appropriation to the same extent as the waters of a natural spring likewise located.

Posting the notice of claim to the water does not constitute an appropriation. Civ. Code, § 1416, provides that within 60 days the claimant must commence the construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly. And section 1418, Civ. Code, provides that by a compliance with the rules contained in section 1416 the claimant's right to the use of the water relates back to the time the notice was posted. His right to the water depends upon his complying with the provisions of the law, and making an actual appropriation of its use. The court finds that the claimant did commence the work within 60 days after posting the notice, and prosecuted it continuously until enjoined therefrom at the instance of defendant Smith on December 10, 1902, after Smith had settled upon the land, and that Smith fenced the land and prevented her from constructing the ditch. Having capped the wells, and enjoined appellant from entering upon the land to complete the ditch, by means of which she sought to divert the water to the place of intended use, respondents are in no position to assert that appellant has failed to prosecute the work with diligence and become an actual appropriator.

By act of Congress passed July 26, 1866, c. 262, 14 Stat. 253, it is provided: "That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other useful purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed." Section 2339, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1437]. Later this act was amended by a provision to the effect that all homesteads allowed should be subject to vested and accrued water rights and rights to ditches used in connection therewith. By posting the notice appellant from that time became vested with the right to the use of the stream of water then flowing from these wells, together with the right to construct over and across the land the necessary ditches to divert and conduct the same to the place of intended use. Both Myers and Smith took the property subject to the rights of appellant to the stream of water then flowing thereon, together with the right, without interference, to construct the necessary ditches for its diversion, which rights accrued and became vested in her under the said act of Congress and the laws and decisions of this state. The language used in Taylor v. Abbott, 103 Cal. 421, 37 Pac. 408, where it is said that the above-quoted section "does not confer the right to enter upon lands in the possession of another for the purpose of securing the water thereon, or of completing an attempted diversion of water," is not applicable to this case, for the reason that in that case no sufficient notice had been posted, and therefore no right to the water had accrued or become vested under the local laws and decisions of the courts.

The notice was posted in a conspicuous place at each well, and the claim is for fifteen hundred inches of water "flowing from and at the wells." It appears that these wells are in line with the bed of the canyon, and the lower one about 500 feet distant from the one next above, or middle one, and that no water flows from the upper one. Under these facts we regard the notice as a sufficient designation of the point of diversion, as well as sufficient in substance to meet the requirements of section 1415, Civ. Code. Nor was it necessary, the notices being identically the same, to record more than one copy. The purpose of recording is to furnish notice of claimant's rights to subsequent settlers upon the land or appropriators of the water, and this object was fully attained by recording one copy. The fact that defendant Myers had, prior to the posting of the notice of appropriation, taken steps to obtain a right of way for a pipe line over the land, the boundaries of which proposed right of way included the land on which the wells were located, gave him, as against appellant, no right to the stream of water flowing therefrom.

It is finally urged in support of the judgment that the copy of the notice recorded was not acknowledged, and therefore not entitled to be recorded, and if recorded did not constitute constructive notice of appellant's claim to the water, or impart any notice to defendants. Section 1161 of the Civil Code provides that, "before an instrument can be recorded, unless it belongs to the class provided for in either sections 1159, 1160, 1202, or 1203, its execution must be acknowledged." Copies of notices of appropriation of water are not designated in the excepted classes mentioned in said sections. The copy of such notice required to be recorded by section 1415, Civ. Code, is not, in our judgment, such an instrument, the execution of which is required to be acknowledged as a condition of being recorded, within the meaning of section 1161 above quoted. "The word 'instrument,' as used in the Codes, invariably means some written paper or instrument signed and delivered by one person to another, transferring the title to or giving a lien on property, or giving a right to a debt or duty." Hoag v. Howard, 55 Cal. 564. This language was used in holding that a writ of attachment was not an "instrument," within the meaning of the statute; but it is cited with approval in Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209, where it is held that a notice of lis pendens is not an instrument, yet provision is made for recording such notice of an action affecting the title to real estate (section 409, Code Civ. Proc.). And also in Foorman v. Wallace, 75 Cal. 555, 17 Pac. 680. Rapalje defines an acknowledgment to be "the act of one by whom a deed has been executed, in declaring before a competent court or officer that it is his act and deed." Section 1415, Civ. Code, does not require the notice which is posted, and which presumably is signed by the claimant, to be recorded, but a copy thereof, not necessarily signed by the party claiming the water. It may be made and filed by a stranger. Inasmuch as the copy of the notice is required to be recorded, and as this copy is not required to be made or filed by the claimant, it seems clear that the Legislature did not contemplate that it should be acknowledged in order to be recorded.

The northerly or upper well supplies no stream of running water, and hence affords no water subject to appropriation. Nor do the facts entitle appellant to enter the land for the purpose of developing water by boring additional wells, but she has an accrued and vested right to prosecute her work under and in accordance with the provisions of section 1416 of the Civil Code in the construction of the necessary ditches to convey the stream of water flowing from the two southerly wells to the place of intended use, and do all things necessary to complete the actual appropriation of the stream of water, in accordance with the notice posted on October 13, 1902.

The judgment is reversed, and the trial court will render a judgment for appellant in accordance with the views herein expressed.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 218

## GIACOMINI v. PACIFIC LUMBER CO.

(Civ. 252.)

(Court of Appeal, Third District, California. March 18, 1907.)

1. MASTER AND SERVANT — INJURY TO SERVANT—EXISTENCE OF RELATION—EVIDENCE.

In an action for injuries to an employé in a sawmill, defended on the ground that a third person operated the mill as an independent contractor, evidence examined, and *held* to justify a verdict that the employé was the employé of defendant, and that the third person was a fellow employé.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 953.]

2. TRIAL—INSTRUCTIONS—SPECIAL EMPHASIS ON SPECIAL EVIDENCE.

Where, in an action for injuries to an employé in a sawmill, the issue was whether a third person operated the mill as an independent contractor or was an employé of defendant, the action of the court in calling attention in its instructions specifically to the evidence which must be the basis of the finding on the issue was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 577, 578.]

3. SAME—INSTRUCTIONS.

It is not error to refuse instructions covered by those given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651–659.]

4. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE .

Where a machine originally furnished in a sawmill was unsafe, and an appliance was put on to render it less dangerous, the employer was required to see that the appliance was safely secured.

5. SAME—ASSUMPTION OF RISK.

An employé in a sawmill went to adjust an appliance on a machine at the request of an inexperienced workman. The employé was ignorant of the manner in which the appliance was fastened to the machine, and was injured while at work. *Held*, that the employé did not assume the risk, precluding a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 252, 253.]

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Albert E. Giacomini against the Pacific Lumber Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Gillett & Cutler and Denver Sevier, for appellant. Mahan & Mahan and Coonan & Kehoe, for respondent.

BURNETT, J. A jury awarded respondent the sum of $3,500 as damages for injuries received in a shingle mill belonging to appellant. The appeal is from the judgment and order denying the motion for a new trial.

The complaint alleges: That "on the 12th day of December, 1900, and for some time prior thereto, said plaintiff was employed by defendant in the capacity of shingle sawyer at one of said machines (a hand shingle machine) so known and designated as machine 'No. 3,' with instructions to attend to the setting of the screws of said other hand shingle machines when the same were being operated by inexperienced men. That on said 12th day of December, 1900, and for some time prior thereto, said machine, known and designated as machine 'No. 2,' was in a defective and dangerous condition, in this: That on the frame of the carriage of said machine, and on the side nearest the saw, was fastened at the time of the accident hereinafter described, an appliance used to prevent spalts from coming in contact with the saw." Then follows a description of said appliance and the manner in which it was fastened to said machine, and an allegation that it was so insecurely fastened as to render the machine "defective, dangerous, and unsafe to persons engaged in operating or working about said machine," and that it had been in such condition for several months to the knowledge of defendant, or that defendant could have known thereof by the exercise of ordinary care and diligence, but "negligently permitted and suffered the same to be and remain during all of said time in said defective, dangerous, and unsafe condition; that on said 12th day of December, 1900, while said machine was in said defective, dangerous, and unsafe condition as aforesaid, it was being operated by an inexperienced man, one Charles Bilderbach, who requested said plaintiff herein to set the screws on said machine, which said screws are used for the purpose of adjusting the table of said machine so that the shingles may be cut of the proper thickness, and, while said plaintiff was so engaged in setting the screws on said machine at said time, it became necessary for said plaintiff to push the carriage of said machine back and forth over said rapidly revolving saw, and while doing so the said appliance * * * dropped down at one end and came in contact with said saw and was torn from its place and struck plaintiff," inflicting serious injuries. As usual in cases of this character, there is little controversy as to the law in the abstract, but counsel differ widely as to the effect of the evidence and what particular principles of the law of negligence should be invoked.

1. The appellant earnestly insists, and his main point is, that the evidence shows without conflict that defendant was absolved from all blame for the accident for the all-sufficient reason that plaintiff was not in its employ, but was working for Ansel R. Thompson and Thomas Maddux, who it is alleged in the answer "were engaged in manufacturing shingles in said mill for said defendant under an agreement with defendant that defendant was to furnish the power and machinery and keep the machinery in repair, and said Thompson & Maddux were to receive a specified amount per 1,000 shingles for manufacturing the same for defendant with said machinery and from material furnished by defendant." In other words, it is contended that Thompson & Maddux were "independent contractors," and that the doctrine of respondeat superior does not apply to appellant. Respondent claims that the evidence leaves debatable the question whether there was such a contract, and that it therefore became a proper subject of consideration at the hands of the jury, and that this court cannot say that the finding adverse to appellant rests upon unsubstantial support. Does the evidence demand the conclusion that the relation of "master and servant," or employer and employé, existed between Thompson & Maddux on the one hand and respondent on the other? If so, the judgment cannot be unheld. Section 2009, Civ. Code, provides that: "A servant is one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter who is called the master." If any addition to the Code definition or any elucidation of it were needed, it could be supplied by quotation from many authorities, as the question has been often the subject of judicial cognizance. By this Code provision, as well as by the decisions, it is made clear that in determining whether Thompson & Maddux were independent contractors or fellow servants with respondents the vital inquiry is: Who had "entire control and direction" of respondent in the service he was performing? If there had been a written agreement between appellant and said Thompson & Maddux, or if there were no uncertainty as to the scope and terms of said agreement, a question of law would be presented, but it is insisted by respondent that, in view of the evidence, it was a question of fact under proper instructions to be submitted to the jury to determine whether respondent was the employé of one or the other. "Where an alleged contract rests entirely in parol, it is the province and duty of the jury to determine whether there is a contract, and to ascertain and fix its terms, unless these terms are precise and explicit and admit of one construction only." 11 Ency. of Plead. & Prac. 88. And, in aid of the effort to reach a satisfactory conclusion as to whether a party is an independent contractor or a fellow servant, it is, in the nature of things, impossible to formulate inflexible rules which will cover all conceivable circumstances that may

be received in evidence, but there are certain well-recognized guides of general application that point the way to a conclusion. For instance, it has been announced that an "independent contractor represents his employer only as to the results of the work, and not as to the means whereby it is to be accomplished." Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582. Again: "A contractor for certain work may at the same time be the servant of the same employer in regard to other work to be done by him, so as to render the latter liable for his acts in connection with such other work." 16 Am. & Eng. Ency. of Law, 187. Again: "If the employer has the right of control, it is immaterial whether he actually exercises it." Linnehan v. Rollins, 50 Am. Rep. 287, 137 Mass. 123. And: "A reservation by the employer of the right by himself or his agent to supervise the work merely to determine whether it is being done in conformity to the contract does not affect the independence of the relation." Callan v. Bull, 113 Cal. 593, 45 Pac. 1017. The fact that payment is made "by the job," or "according to the amount of the work done, does not make an employé an independent contractor, though it may be evidence that he is such." 16 Ency. of Law, p. 189.

But the ultimate standard by which all the evidence must be measured is that prescribed by the Code: Who has the undisputed and complete control of the servant? Appellant in the case at bar answers: Thompson & Maddux. That is its interpretation of the evidence, and in so many words it is so declared by some of the witnesses, but the jury had a right to consider all the facts and circumstances bearing upon the relation of the parties, and must it be affirmed as a matter of law that there is no warrant for the finding that Thompson & Maddux were fellow servants of respondent within the meaning of the Code? The declarations of certain witnesses for defendant undoubtedly did not carry conviction to the minds of the jury, and there were facts and circumstances considered more satisfactory and these led to a different conclusion. In his opinion denying the motion for a new trial, the learned judge of the lower court recites a large number of these circumstances which the jury had the right to consider in determining whether there was any such contract as claimed by appellant, among which are the following: The compensation of Thompson & Maddux was subject to change at any time and was frequently changed by the company. Whatever the agreement, it was for no definite term and could be terminated at any time by either party to it. The company owned the sawmill and the shingle machines, one of the machines being placed in the main part of the building and two in the addition which was built later. The same power ran the main mill and the shingle machines. The company furnished all the machinery, the power, the lights, made all important repairs, and furnished all the oil for the machinery. The material to be manufactured into shingles was the refuse from the main mill, carried down to the shingle machines by elevators, the material being taken from the same by the men in the employ of the company. The shingle machines were dependent entirely upon the main mill for material to be manufactured into shingles. Thompson was the principal man in the shingle department, looked after the work, but at times was called into the main mill and worked there when the shingle machines were idle, and when they were running he occasionally filed saws in the big mill, and he filed for the shake machine and he was paid therefor $1 a day, which he says he divided with Maddux. Maddux also did some filing in the main mill and they often worked at various jobs therein when the shingle mill was idle and the other men in the shingle mill did the same. One of the shingle sawyers worked for three days in the big shingle mill up the track for defendant, and at the end of the month he received his wages from the company in the same manner as when he was working all the time in the shingle department of the main mill. If they were short of stock, Thompson & Maddux complained to Howatt, the general foreman of defendant, and, if stock was accumulating, Howatt would not permit them to shut down. Howatt passed through the shingle department sometimes two or three times a day and frequently criticised the work of the men and occasionally gave them orders. On one occasion when Howatt was disabled, Thompson took his place as foreman of the main mill, and continued therein for a week or more. On the 15th of each month, when the company paid all its employés, the men in the shingle department lined up at the office precisely the same as the men in its employ did and were paid at the office window in turn by checks given by the company, or, if the amount was small, sometimes in cash. However, the evidence for defendant shows that this was charged upon the books of the company to Thompson & Maddux. The latter lined up as the other men at the same time and received their pay in the same manner. The names of all the men were on the pay roll kept by the company and opposite their names was a statement showing the amount due each for wages during the month and the amount due the company for bills incurred by them at the store or saloon or livery stable owned by the company. The men in the shingle mill signed the pay roll just as the other men did. Mrs. Ferguson, at whose place respondent and others boarded, applied at the office of the company and signed the roll as the others did and received her pay for food in the same way. On some occasions the company deducted from the pay of the men working in the shingle department the amount due for state and county poll taxes. The assessor had notified the company to keep out for him the money due from the men in its employ for poll taxes, but had never made such a request particularly as to the men working in the shingle department or for Thompson & Maddux.

To show how uncertain the contract was, even in Mr. Thompson's mind, we have in his cross-examination the statement: "I did enter into the contract with Mr. Sinclair alone, and, when Mr. Douglas took charge, he simply let the contract run along and we acted on it. That is the only contract that we have with the Pacific Lumber Company at the present time, and it was the only contract that we had at the time Giacomini was employed. Mr. Maddux, Mr. Sinclair, and myself were the only three present when the last contract was made. We didn't put it in writing. It never had been in writing. We simply manufactured our shingles for so much a 1,000. When times got harder, and we got our men cheaper, they cut us down. Then when it got hard to get men, we had to come to them to pay more. That is the way the contract ran. We never had it any other way. This contract was subject to change with the varying price of lumber and the varying demand for men. It was understood that the contract could be abrogated on either side at any time. If our work didn't prove satisfactory, they could, immediately come in and take their machinery and let us go." He went on further to state that he did not know just when the contract was made nor what price they were to receive for shingles. And altogether his testimony was so uncertain that it might justly carry very little if any weight with the jury. There was at least sufficient uncertainty to justify the submission to the jury of the question whether there existed between defendant and Thompson & Maddux such a contract as constituted the latter "independent contractors." It cannot be held, we think, that the probative force of the foregoing circumstances indicating the conduct of the parties, considered with the manner and appearance of the witnesses which cannot be disclosed by the record, is insufficient to justify the verdict.

Among the many cases in the books involving similar questions to those considered herein the following are instructive: Indiana Iron Co. v. Gray, 48 N. E. 803, 19 Ind. App. 565; Rummel v. Dilworth, 2 Atl. 355, 111 Pa. 343; King v. N. Y. C. & H. R. R. Co., 66 N. Y. 187, 23 Am. Rep. 37; Klages v. Gillette Herzoz Man. Co., 90 N. W. 1116, 86 Minn. 458; Gahagan v. Aerometer Co., 69 N. W. 914, 67 Minn. 252; Rait v. New Eng. Furniture & Carpet Co., 68 N. W. 729, 66 Minn. 76; New Albany Forge & Rolling Mill v. Cooper, 30 N. E. 295, 131 Ind. 363; Neimeyer v. Weyerhaueser, 64 N. W. 416, 95 Iowa, 497; Nyback v. Champagne Lumber Co., 109 Fed. 732, 48 C. C. A. 632; Carlson v. Stocking et al., 65 N. W. 59, 91 Wis. 432; Toomey v. Donovan, 33 N. E. 396, 158 Mass. 232; Smith v. Belshaw, 89 Cal. 427, 26 Pac. 834; Callan v. Bull, supra; Corletti v. S. P. Co., 136 Cal. 642, 69 Pac. 422; Shea v. Pacific Power Co., 145 Cal. 682, 79 Pac. 373.

In the Carlson Case, supra, it is held that "when, in an action for damages caused by the negligent opening of a dam for the purpose of driving logs, there is evidence that the person in charge of the drive was acting as defendant's agent and also evidence that he had full control of the drive and dam and that he employed the men and obtained the supplies, defendants merely paying him for driving their logs, it is for the jury to determine whether such person was an independent contractor or not." In the Toomey Case, as stated in the syllabus: "In an action by a workman in defendant's factory for personal injuries caused by a defective machine, it appeared that under a contract with defendants one T. had charge of the fitting room in the factory—in whose room plaintiff worked—and hired and paid the men who worked therein and was himself paid by the case for fitting stocks and that defendants furnished all the machinery and 'looked out' for the room. There was testimony that they were about the room often; that they kept the machinery so that it would be all right to do the work in any way, shape, and manner; that they had to pay for repairs, but T. had the right if there was any necessity for repairs to go to a certain person and have them made; that they relied on T. to examine the machinery and they had repairs made after notice from him; that they had the right and the opportunity to inspect the machinery and they never hired any one to clean the machines, but supposed T. would attend to that, though they had no agreement to that effect." It was held by the Supreme Court of Massachusetts that the court should have permitted plaintiff to go to the jury as to the common-law liability of defendants. It is, of course, not our province to pass upon the weight of the evidence or the credibility of the witnesses, nor are we concerned about the question whether the verdict is just or in accordance with the preponderance of the evidence. We hold simply that there is substantial support for the verdict, and it is therefore binding upon appeal.

2. Another point emphasized by appellant is that the court erred in giving of its own motion an instruction marked "A." The instruction, which is quite lengthy, defines a servant and an independent contractor, and directs the jury that "the question is to be determined by all the evidence bearing upon the point, as to the nature and terms of the contract between the parties as to the location and situation of the entire mill and machinery," etc., calling attention to the various features of the evidence, "with all the other evidence, facts, and circumstances in the case which will aid you in determining the true re-

lation between Thompson & Maddux and the defendant; that is, whether Thompson & Maddux were independent contractors within the law as I have defined it to you, or whether they were the agents or servants of the defendant within the meaning of the law as I have defined that relation to you." It probably was unnecessary for the court to detail the evidence which was to be considered, as the general direction in reference to all the evidence was ample; but the instruction is correct in its definition of the relations involved. It does not purport to pass upon the weight or effect of the evidence, and it is not apparent how it could have prejudiced the defendant. As it was proper for the jury to determine whether Thompson & Maddux were independent contractors or were servants of the defendant, the action of the court in calling attention specifically to the evidence which must be the basis of the finding cannot be successfully assailed.

3. Some minor points are made by appellant which hardly demand extended notice and which may be considered together. The rulings of the court during the progress of the trial, if erroneous at all, were without prejudice. The instructions refused, as far as correct and appropriate, were covered by those given. The point is urged here that the appliance of which complaint is made was not shown to be unsafe and insecure or dangerous and that the servant assumed the risk. The law applicable to this contention was properly presented by the instructions, but the jury on sufficient evidence found the facts to be in accordance with respondent's position. There is no doubt, as stated in Donnelly v. S. F. Bridge Co., 117 Cal. 417, 49 Pac. 559, that "the master must supply his employés with suitable appliances and a reasonably safe place in which to perform their tasks, and cannot relieve himself from responsibility by delegating to any servant a duty which rests upon him as master; but, where the overseer or foreman is negligent in any duty which does not devolve upon the master, then the master is not responsible for an injury resulting therefrom to another servant in the same general employment." The evidence here, however, shows that the machine originally furnished was unsafe and the appliance was put on to render it less dangerous. It was the duty of the master to see that this appliance was safely secured. There was evidence of negligence in that respect. The law also requires the master "to inspect the machinery and appliances furnished to his servant and this duty must be continuously fulfilled and positively performed." Dyas v. Southern Pacific Co., 140 Cal. 296, 73 Pac. 972. It cannot be said that respondent assumed the risk, as he was not at work upon this particular machine, but went there to adjust it at the request of an inexperienced workman and the respondent was ignorant of the manner in which the appliance was fastened to the machine. "Under such circumstances it is the duty of the master to warn the employé." Tedford v. Los Angeles Electric Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85. "To relieve the master, the employé must not only know of the defect, but also must know the dangers and risks attending the operation of the machines by reason of the defects." Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425. There was sufficient evidence, if believed by the jury, to uphold the contention of respondent in harmony with the foregoing principles of law. It may be conceded that the case is a close one, but an appellate court should not substitute its own judgment of the facts for that of the trial court or of a jury, nor should a verdict be lightly disturbed.

We are not prepared to say that there is an entire absence of evidence to support the verdict or that there was any prejudicial error committed. The judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

5 Cal. App. 215

## GERMAN SAVINGS & LOAN SOCIETY v. ALDRIDGE, City Treasurer, et al.

(Civ. 328.)

(Court of Appeal, Second District, California. March 18, 1907.)

1. MOTIONS—RES JUDICATA—PRELIMINARY INJUNCTION—APPLICATION FOR DISSOLUTION.

An order granting, after hearing, a preliminary injunction, is not res judicata on an application for the dissolution thereof on the grounds that it has been in force 12 months, that the applicant does not consent to its remaining longer in force, and that the cause has not been set for trial on its merits, as expressly authorized by Code Civ. Proc. § 527.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Motions, § 88.]

2. INJUNCTION—PRELIMINARY INJUNCTION—DISSOLUTION—GROUNDS—STATUTES.

Code Civ. Proc. § 527, providing that no preliminary injunction shall continue in force for more than 12 months, except by consent of the parties, or unless the cause be set for trial on its merits, applies to injunctions granted ex parte and those granted after a hearing, and the court may declare an injunction inoperative after 12 months on the party enjoined applying therefor and showing that he does not consent to its further continuance, and that the cause has not been set for trial on the merits.

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by the German Savings & Loan Society against Marion L. Aldridge, as city treasurer, and others. From an order dissolving a preliminary injunction, plaintiff appeals. Affirmed.

R. M. F. Soto, for appellant. Hunsaker & Britt, for respondents.

TAGGART, J. This is an appeal from an order dissolving a preliminary injunction.

The injunction was granted upon notice and service of an order to show cause regularly made. The order dissolving the injunction was also made upon motions separately filed by each of the defendants after hearing duly noticed. The sole ground of each of the motions was the delay in bringing on the cause for trial on its merits. The notices of motion specify, and the affidavits in support of them aver, that the injunction was granted prior to the trial of said action; that the same has continued in force for a longer period than 12 months from the time it was granted; that the parties to said action have not consented that the same shall continue in force for a longer period than "six months," in one case, and in the other "any period of time, or at all"; and that the said action has not been set for trial on its merits. Both notices and affidavits follow the language of the amendment of section 527 of the Code of Civil Procedure made in 1895.

Appellant contends that, the preliminary injunction having been granted after hearing, the court was without power to dissolve the same; that the matter was res adjudicata; that the only remedy was by appeal from the order granting the injunction; that, assuming the court had the power to dissolve, this could be exercised only upon new matter or evidence arising since the granting of the injunction; and that the amendment of section 527, Code Civ. Proc., must be limited in its application to a preliminary injunction granted ex parte, where no motion either to dissolve or modify such injunction has been made or denied. The determination of these contentions depends solely upon a construction of the amendment of section 527, and, so far as we are aware, it has not been construed by any appellate court. A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so, for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable. Davis v. Hart, 123 Cal. 387, 55 Pac. 1060. Section 527, Code Civ. Proc., as it originally stood, provided at what time a provisional injunction might be granted, and what was required to obtain it. By the amendment of 1895 a limit was fixed, beyond which a provisional injunction would not be operative, if granted before the actual trial of the cause wherein it was granted. This limitation was placed at 12 months from the time the injunction was granted. Two exceptions were made to the operation of the amendment; those cases in which the injunction is continued for a longer period by consent of the parties, and those in which the cause has been set for trial upon its merits before the period of limitation expires. It was not intended by the framers of the amendment to provide any remedy for the party against whom the injunction runs, and therefore the question of his having a remedy by appeal has no application. The matter adjudged by the court in making the order complained of is not res adjudicata. When the court made the order it did not review, reconsider, or pass upon the matters determined in granting the injunction. The expiration of the 12 months, the want of consent on the part of the defendants, and that the cause had not been set for trial on its merits, were all the matters before the court. There is nothing in the language of the amendment to justify any distinction between injunctions granted ex parte and those granted after a hearing of all the parties. The wrong to be remedied by the amendment was the abuse of provisional injunctions obtained before trial of the causes on their merits by using them, through delay of the trial, to serve the purpose of a final judgment. The remedy given, a limitation of the period of their effectiveness, was as much needed in cases of injunctions granted on hearing as in those granted on ex parte application. The period of 12 months having expired, and the case being neither tried nor set for trial on its merits, the injunction became inoperative, and, upon application to the court, the parties beneficially interested were entitled to have the court so declare.

There is no formal signed order dissolving the injunction in the record. The minute entry: "Motion to dissolve and vacate injunction. Present, Hunsaker & Britt and McKeeby & McKeeby. Motion granted"—is all that appears. It is not material whether this order be designated an order dissolving an injunction, or an order declaring the dissolution of an injunction by operation of law. The law having declared the writ to be inoperative after a certain time, upon certain conditions, it appears to us to be a proper exercise of the court's jurisdiction to ascertain and find the facts as to the conditions and declare by its order that the injunction is no longer in force, if the facts warrant such a declaration. The motion that may be made under this amendment is in some respects similar to the proceeding to declare the termination of a life estate, under section 1723, Code Civ. Proc. The only thing before the court is the ascertainment of the existence of the facts upon which the right depends. Matter of Tracey, 136 Cal. 385, 69 Pac. 20.

A mere declaration not in form of an order might not be appealable (Devlin v. Rydberg, 132 Cal. 324, 64 Pac. 396), but all parties here have treated the appeal from the order in question as proper, and it has been considered on its merits. The objection that the notice of appeal was not filed in time appears to have been withdrawn by stipulation.

Order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(5 Cal. App. 195)

## THOMPSON v. WHEELER. (Civ. 216.)

(Court of Appeal, Third District, California. March 16, 1907.)

APPEAL—REVIEW—ORDER GRANTING NEW TRIAL—PRESUMPTION.

The presumption is that an order granting a new trial was properly made, and, in the absence of a bill of exceptions showing what was used in the motion unless the record on appeal establishes the contrary, it will be conclusively presumed that the motion was in part based upon some ground upon which affidavits could be used, that affidavits were used, and justified the court in making the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3772-3776.]

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by Anna Thompson against C. M. Wheeler. From an order granting plaintiff a new trial on judgment for defendant, defendant appeals. Affirmed.

A. H. Carpenter, for appellant. Ashley & Neumiller, for respondent.

BURNETT, J. Defendant had judgment, but the trial court granted plaintiff's motion for a new trial. From this order the appeal was taken.

The record does not show what evidence was used upon the motion for a new trial, nor upon what ground the court based its order. The notice of motion is not disclosed. In reference to the matter all that the transcript reveals is: "Whereupon, within the time by law prescribed therefor, plaintiff filed with the clerk of said court and served upon defendant notice of her intention to move said court to vacate said decision and to grant plaintiff a new trial of said action"; and: "The court this day made an order that plaintiff's motion to vacate and set aside the decision rendered in said action, heretofore argued and submitted, be and the same is hereby granted, to which order the defendant duly excepted." In Skinner v. Horn, 144 Cal. 280, 77 Pac. 905, the Supreme Court, speaking through Mr. Justice Angellotti, said: "The presumption is that the order granting a new trial was properly made, and, in the absence of a bill of exceptions showing what was used on the motion, unless the record on appeal establishes the contrary, it will be conclusively presumed in favor of the order that the motion was in part based upon some ground upon which affidavits could be used, that affidavits were in fact used on the hearing, and also that such affidavits were sufficient to justify the court in the making of the order appealed from. If, therefore, the appellant fails to present a record which shows affirmatively that the lower court erred in granting a new trial, such failure will operate solely to his own disadvantage." In the same case, reported in 146 Cal. 62, 79 Pac. 597, in the opinion by the chief justice referring to the previous order of the Supreme Court denying the motion to amend the record, is found the following declaration: "We held that a party appealing from an order must bring up a record demonstrating conclusively that the lower court erred in its ruling or must fail in his appeal, and that an order granting a new trial must be affirmed when the record contains nothing but a statement on motion for a new trial, and fails to show that the motion was not based also upon one or more of the grounds which require affidavits for their support. * * * Non constat, therefore, that the order granting a new trial was not supported by affidavits disclosing newly discovered evidence, or some other of the first four grounds for the motion. Code Civ. Proc. § 657." The foregoing is decisive of this appeal.

Appellant's answer to this contention is that, "as the bill was prepared by her, the point, if well taken, would seem to be an attempt to take advantage of her own wrong." It is obvious, however, that it is not a question of morals, but of legal procedure. Besides, the present record might be sufficient to answer plaintiff's purpose if her motion had been denied, but it is not sufficient to show error of the court in granting the motion. And it is hardly to be expected that one litigant will be solicitous to perfect the record for the special benefit of his adversary.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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(5 Cal. App. 188)

## In re FAY'S ESTATE. (Civ. 324.)

(Court of Appeal, First District, California. March 14, 1907. Rehearing Denied April 11, 1907. Denied by Supreme Court May 13, 1907.)

PERPETUITIES—WILLS—SUSPENSION OF POWER OF ALIENATION—VALIDITY.

Civ. Code, § 715, prohibits the suspension of the absolute power of alienation for a longer period than the lives of persons in being, and section 716 provides that every future interest is void which may suspend the absolute power of alienation for a longer period than prescribed in the chapter on alienation. By a clause in his will, a testator devised his property in trust for 25 years, and directed that the net income should be divided among his children or their children, if they should have any, and, if either of testator's children should die without lawful children, then the survivor was to inherit their share, and, should all of the children die before the expiration of the trust, testator's sister or her children were to inherit the estate. *Held*, that as the clause suspended the power of alienation for a period of 25 years, even though testator's children should die before the expiration of such period, it was void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, §§ 49, 50.]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of John Fay, deceased. From the decree of final distribution, Mary J. Scott and others, contestants, appeal; John Fay and another, petitioners, being the respondents. Affirmed.

Louis S. Beedy, for appellants. James G. Maguire, for respondents.

COOPER, P. J. Appeal from decree of final distribution, and from an order denying appellants' motion for a new trial.

The will of deceased was duly admitted to probate, and bears date "May twenty-fifth, eighteen hundred and fifty-nine." It contains the following clause: "I will all my separate property and all my share of the community property of every description, name and nature both real and personal, to my brother, David Fay, and my son, John Fay, in trust for the benefit of my three children, Luke Fay, Mary Montealegre and John Fay. The said David Fay and John Fay, or either of them, to hold and manage said property for the space of twenty-five years from this date; they shall keep the property in repair, pay all expenses, and divide the income from said property monthly or quarterly between my children, Luke, May and John, or their children, if they should have any; if either of my children should die without lawful children of their body, then the survivor shall inherit their share; should all of my children die before the expiration of this trust without lawful children it is my wish that my sister, Mary J. Scott, or her children should inherit or have all of my share of the estate, David Fay or my son, John Fay, will act or manage the property without giving bonds." The court below found that Mary Montealegre (the only daughter of said deceased) died without lineal descendants prior to the death of deceased; that the provisions of the will above quoted are invalid, and the trust thereby attempted to be created is void for the reason that the absolute power of alienation of the property therein mentioned is thereby suspended for a longer period than during the continuance of the lives of persons in being at the creation of such limitation or condition, or at the death of said testator, capable of taking the same under said provisions, and for the reason that there were and are no persons in being by whom an absolute interest in possession can be conveyed; that the period of the said trust expired and ceased prior to the death of the testator; and that said trust clause is void for uncertainty.

The deceased left surviving him his wife and two sons, Luke Fay and John Fay, his only children. After the death of deceased, Bridget M. Fay, his widow, and the mother of Luke Fay and John Fay, conveyed all her title and interest in the estate to John Fay, and such conveyance was made pending the administration and prior to the decree of distribution. The property was distributed to the two sons, Luke Fay and John Fay. The contestants are Mary J. Scott, the sister of deceased, and her children, being the sister and her children named in the said trust clause of the will.

The main question in the case is as to the validity of the trust clause, and, if the clause is void, the decree should be affirmed. We are of opinion that the court correctly held the trust clause void. It provides for an absolute period of 25 years for its continuance, during which time the power of alienation is suspended. The testator had three children who were in being at the time he made the will, and he had the right to suspend the power of alienation during the continuance of their lives, but he did not limit or suspend the power of alienation during their lives only. He suspended it for 25 years. If they should all die before the expiration of the 25 years, he suspended the power of alienation still for 25 years. He directed the income to be paid to "their children if they should have any." Our Code expressly provides that the power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition. That every future interest is void in its creation which by any possibility may suspend the absolute power of alienation for a longer period than is prescribed in the chapter on alienation. Civ. Code, §§ 715, 716. The court has often discussed and upheld these sections, and it is only necessary to cite two of the leading cases. In re Walkerly, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97; Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70.

In view of what has been said the findings as to whether or not the property was community property, and the rulings in relation thereto, become immaterial. Whether the property was all community property, or all separate property, it vested in the widow of the deceased and his two sons. The widow having conveyed her portion to John Fay, the decree of distribution properly distributed that to him.

The decree and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

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5 Cal. App. 197

## SCHWIND v. FLORISTON PULP & PAPER CO. (Civ. 257.)

(Court of Appeal, Third District, California. March 16, 1907. Rehearing Denied by Supreme Court May 15, 1907.)

1. Master and Servant—Death of Servant—Fellow Servants.

Plaintiff's intestate, a minor, in defendant's employ, was killed between cars as he was crossing one of defendant's tracks in the factory yard, in the course of his employment. The cars on each side of the path used by intestate were a short distance apart, and defendant's yard foreman let down other cars against one of the cars divided by the crossing, and decedent, who was not seen by either the foreman or another employé, was caught between such cars. *Held*, that the foreman was decedent's fellow servant, for whose negligence, if any, defendant was not liable.

2. SAME—CONTRIBUTORY NEGLIGENCE.

There being a safe way for decedent around the end of the train of which he could have availed himself by walking the length of a car, in which situation he could have seen the approaching cars, he was himself negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 739, 740.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Joseph Schwind against the Floriston Pulp & Paper Company. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

Van Ness & Redman, for appellant. D. W. Burchard and G. W. Schell, for respondent.

BURNETT, J. The action is for damages brought by respondent for the death of his minor son.

The complaint alleges: That "on July 31, 1901, the said Joseph Schwind, minor son of the plaintiff herein, was in the employ of the defendant corporation in the electrical department thereof. That on said day, and at the times hereinafter mentioned, and for a long time prior thereto, the defendant operated and maintained a railroad track that was situated and placed parallel to and a short distance from the factory building owned and operated by it at Floriston. That upon said track, as aforesaid, the defendant at all of said times hereinbefore mentioned, operated cars propelled by steam for the purpose of transmitting and carrying freight to and from said factory. That near the center of said factory and fronting adjacent to said railroad tracks, as aforesaid, a door was placed and maintained by the defendant, through and by which employés and those having occasion to go to said factory gained admission thereto and exit therefrom. That a pathway existed leading from said entrance across the track at right angles to the public highways of said town of Floriston, which said pathway during all of said times was used with the full knowledge, consent, and direction of the defendant, its officers and agents. In the manipulation of the said railroad, it was the habit and custom of the defendant to so adjust its freight cars as to keep said pathway space open in order to enable the said path to be traveled. That on the 31st day of July, 1901, and about the hour of 4:30 o'clock p. m. of said day, and while the said Joseph Schwind, minor child of this plaintiff, was so employed by the defendant corporation, a superintendent directed the said Joseph Schwind to go on an errand which necessitated and required that the said Schwind should leave said building, cross said track, and go to another part of the said town of Floriston. That when the said Joseph Schwind, in pursuance of such direction, stepped out of the door of said factory, there was a freight train standing on said track, broken, so as to leave two box cars about four feet apart at the ends, in such a manner as to leave said pathway open for purposes aforesaid. That it was the custom and habit of said defendant at all said times to have said passage kept open and free in said manner as herein stated. That while the said Joseph Schwind, pursuant to said directions as aforesaid, was walking along the said trail and passageway, and at the moment that he was crossing between said cars so left open, the defendant negligently and without warning caused said cars to collide and thereby to mangle and kill the said Joseph Schwind. That the said Joseph Schwind was not guilty of any act that contributed to said injury. That the servants and employés of defendant in charge of said train caused to be precipitated against one of the box cars a freight car that was not in charge of any brakeman or other person, nor attached to any engine that could control the same, and no signal of any character was given to the said Joseph Schwind of the approach of said car in order to enable him to protect himself or escape from said injury." In the answer there is a specific denial of the foregoing allegations except as to the ownership and use of the railroad and the employment of the said Joseph Schwind, as to the existence of the door as alleged in the complaint, as to the allegation in regard to the freight train standing on the track and as to the train not being attached to any engine, but it was denied that the ends of the cars were more than two feet apart. The answer also alleges "the fact to be that the said minor attempted to pass between the ends of said cars knowing that the same might at any moment be brought together, and that, as was the fact and as he well knew, it was not necessary for him to cross said track between said cars; and knowing also, as was the fact, that at other places said track could be crossed where there were no cars and where said track could be crossed without any danger whatever"; and furthermore that "if the injury to and death of said minor was due to any negligence other than his own, it was the negligence of a person or persons employed by defendant in the same general business with said minor."

Counsel do not entirely agree in their statements of what was shown at the trial, but the evidence must be viewed, undoubtedly, in the most favorable light to sustain the verdict of the jury. The following statement of facts is deemed sufficient for the purposes of this opinion: The operation of the side tracks or switches is entirely under the control of the appellant. The location of the works is in a sort of a flat with precipitous mountains on each side, and the hotel and residence portions of the town are on one side of the tracks, and the works of the company are on the other or Truckee river side. All the operatives and employés live across the tracks from the mill, and in order to go to and from their work it is necessary for them to cross the line of the Central Pacific and the main switch. It was the custom of the company when cars were standing on the switch to leave an open space varying from 3 to 10 feet on the line of a trail that reached from the works across the two tracks, and up the mountain near the homes of the employés. Respondent contends that "a pair of stairs had been placed by the company on the precipitous bank of the track of the Central Pacific to enable the employés to cross said track, and this open space left between the cars was in apposition to such stairway." Appellant, however, declares that this was placed there by Hirschler, the yard foreman, of his own accord, and that the company "provided for the women a board walk with a hand rail upon it near the finishing room, where the women were employed, and for the men a trail leading down the embankment between the Truckee switch and the boiler house, and connecting at its upper end with a wooden bridge, from which a path ran up to the cottages on the hillside." However, this difference seems immaterial, and at any rate the employés generally in going to and coming from work used the trail and steps as claimed by respondent, and their use of the same must have been known and acquiesced in by the company. The course, by any other route, was more lengthy and circuitous. The duties of young Schwind called him to different portions of the lands of the company at irregular hours in the performance of his duty, although there is no evidence how he happened to be crossing the switch at the time of the accident, nor where he was going, nor by whom, if any one, that he was sent. The allegation of the complaint in that regard is unsupported; but this circumstance is of no consequence, as it is apparent that he was not a trespasser. On the day he was killed there is evidence that the cars were in their usual position at the noon hour, and that the employés, including young Schwind, going to and from lunch, passed between two box cars as customary; and that in the afternoon, probably about 3 o'clock, in attempting to pass between them again going towards the town, young Schwind was caught and killed. The freight cars were precipitated upon him without any warning or signal indicating their approach. There is a down grade of about 31 feet in 1,500 feet, the distance from the Floriston end of the switch to the crossing where young Schwind was killed. An employé of appellant, one Hirschler, who had charge and management of the cars, undertook to let down six empty box cars from the Truckee end of the switch immediately before the accident, that no one was assisting him, and the cars came together with such force as to drive the train on both sides of the crossing together, and impelling the cars on the opposite side of the crossing some distance. There was no engine used, as one was not needed; the practice being to let down by gravity the empty cars, and to send the engine down after they were loaded. Respondent claims that there were not enough men to hold the cars in check, and that appellant knew it was the custom and habit of Hirschler to attempt to let said cars down alone, and did not require him to use an adequate number of men to protect the lives of the employés. All the evidence, however, shows that Hirschler had under his direction quite a number whom he could have summoned to his assistance; but the truth is, Hirschler needed no assistance. It was an easy task to let down the cars and he had always accomplished it without any difficulty. In fact, he had managed a much larger number without assistance. There was no negligence exhibited in letting down the cars. It was necessary that they should come with some force in order to couple them with the cars below. If there was the omission of any duty in that behalf, it was in the failure to give notice or warning of the approach of the cars; but, before bringing the cars down, Hirschler sent "Norton to the head end to look out and see that nobody would get on the track." At the time of the accident Norton was standing on a car below the crossing, but he was leaning over the brakes and did not see young Schwind. Hirschler had left the box car on which he was standing, and was running down to see that the coupling was made, and was within five or six feet of Schwind when the latter was struck. It is obvious that, if the company was under legal obligation to give warning at the crossing of the approach of the cars, it furnished the men to do it. There were two men, Norton and a helper, who were in charge of the cars below; either might have stationed himself so as to command a view of the crossing, and thereby have given warning to Schwind of the approach of the cars. Even Hirschler could have run down to the crossing in advance of his cars, if the view was interrupted, to caution the deceased. But these men were all fellow employés of the deceased, and their negligence, or the negligence of any one of them, cannot be imputed to appellant. There could be no question about Norton and his helper. Respondent, however, somewhat mildly questions the proposition as applicable to Hirschler. The learned judge of the court below, though, instructed the jury that "under the law an employer is not responsible for the injuries or death of an employé, caused solely by the negligence or carelessness of a fellow employé. You are instructed that the deceased, Joseph Schwind, and Hirschler, defendant's yard foreman, were fellow employés; and, if you find from the evidence that the death of said Schwind was caused by the negligence or carelessness of Hirschler alone, your verdict must be for defendant." This seems to be in line with the decisions. In Congrave v. S. P. R. R. Co., 88 Cal. 360, 26 Pac. 175, it was held that a brakeman and conductor were co-employés of defendant. In the discussion it is said: "It is also clear that the death was caused by the negligence and breach of duty of the conductor in starting the train before schedule time. There is no averment that the defendant was negligent in the selection of the conductor" (and it may be remarked that no similar claim is made here). "And the general rule (whatever exceptions there may be to it) is well settled in England and the United States, and particularly in this state, that a master is not liable to his servant for damages sustained by the negligent act of a fellow servant, unless the master was negligent in the selection of the servant at fault."

In Trewatha v. Buchanan, etc., Co., 96 Cal. 494, 28 Pac. 571, 31 Pac. 561, it is stated in the syllabus that "an engineer employed to operate an engine and hoisting tackle, used upon and in connection with the main shaft of the mine, to hoist the rock and débris therefrom, and to raise and lower the miners, is a fellow servant with a workman in the mine." In Daves v. S. P. Co., 98 Cal. 19, 32 Pac. 646, it is stated that "the law recognizes no distinction growing out of the grades of employment of the respective employés, nor does it give effect to the circumstance that the fellow servant, through whose negligence the injury was received, was the superior of the plaintiff in the general service in which they were both employed." In Stevens v. Railroad Company, 100 Cal. 555, 35 Pac. 165, it is held that "a fireman and oiler and an engineer of a ferryboat are fellow servants employed 'in the same general business,' and the fact that the engineer employs and discharges the fireman and oilers does not alter the relation." In Livingston v. Kodiak Packing Co., 103 Cal. 258, 37 Pac. 149, a mate of a vessel, and a servant employed in the steward's department, are declared to be fellow servants. In Donovan v. Ferris, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25, it is held that "it is not the duty of a master to give personal warning of danger to persons employed in the business of blasting, and the employment of a competent servant to give them needed warning ends the responsibility of the master. Such a competent servant is not a vice principal, but a fellow servant of those to be warned by him." The cases of Brown v. Sennett, 68 Cal. 225, 9 Pac. 74, 58 Am. Rep. 8, Beeson v. Green Mountain Mining Co., 57 Cal. 20, and N. P. R. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755, are cited by respondents to the contrary. The facts in those cases distinguish them from the case at bar, and, besides, the first two have been modified and virtually overruled, and the decision of the United States Supreme Court has been shown to be inapplicable in this state by the Congrave Case, supra. It cannot be doubted that deceased and Hirschler were "employed by the same employer in the same general business," as provided by section 1970, Civ. Code, and the negligence of either towards the other could not be charged against the company. The "general business" of the company was the manufacture and sale of paper, and both contributed to the promotion of that business. It is of no consequence that they were engaged in different departments or that the grades of their employment were not the same. Neither had any control of the other nor could it be said that one represented the company in any different sense from the other. It is difficult to conceive what relation they sustained to each other if not that of fellow employés.

It is equally apparent, it seems to us, that the company was not guilty of any remissness in its conduct towards the deceased. No complaint is made of the "appliances" furnished. The cars and railroad track were properly constructed and equipped. The company furnished sufficient and capable men to manipulate the cars. The negligence causing the death of the deceased must have been that of himself or his fellow workmen. It is no answer to say that appellant did not furnish a safe crossing place for the employés. Any railroad crossing is not free from more or less peril. This was not more perilous than others. Besides, it was not the only one furnished by the company. Again, as already seen, there could scarcely have been any danger, and no accident would have befallen the deceased if he and the other employés who were operating the cars had exercised the care which ordinary prudence and discretion demand. Again, there is no issue raised as to the negligence of appellant in its failure to furnish a proper crossing. The gist of the charge is that the crossing was negligently closed, whereas it was the custom to have it kept open and free. Under the decisions, also, there would seem to be no escape from the conclusion that deceased was guilty of contributory negligence in attempting to cross the track as he did. We must assume that, on account of the box car near him, and the curve in the track, he could not see the approaching cars, and that he could not hear them on account of the noise of the machinery of the company's plant; but that would seem to be an additional reason why he should have exercised care. He certainly took desperate chances in acting as he did. If he had walked the length of a car towards Truckee, he could have passed around the end of the train, and he could without any difficulty have seen the approaching cars. In Memphis, etc., Co. v. Copeland, 61 Ala. 376, it is said: "The attempt thus to pass between the cars of a train, which he must have known was liable to be moved, cannot be classed as less than negligence. It borders on recklessness." To the same effect are Lewis v. Baltimore, etc., Co., 38 Md. 588, 17 Am. Rep. 521; Hudson v. Wabash, etc., Co., 123 Mo. 445, 27 S. W. 717; Lake Shore, etc., Co. v. Pinchin, 112 Ind. 592, 13 N. E. 677. In Studer v. S. P. Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39, our Supreme Court has said: "An attempt to pass between the cars of a train that is liable to move at any instant, without taking any precaution to avoid danger, is itself an act of negligence when decided by the standard of common prudence, and has been so held by courts whenever the occasion has been presented; and the act is equally negligent whether it is done at a street crossing or elsewhere." If the occurrence had taken place at an hour when most of the employés were accustomed to go to and from work, a different question might be presented. At those times it was the practice of the company not to move the cars in the vicinity of the crossing; but during working hours they were likely to be moved at any time. This the deceased knew, and he was, of course, charged with notice of the danger incident to a railroad crossing, and the duty of "one intending to cross to avail himself of every opportunity to look and listen for approaching trains." The increase of the peril by the narrowness of the opening between the cars made more urgent his duty to protect himself by resort to the palpable means at hand. However lamentable the unfortunate occurrence, in legal contemplation, it was the result of decedent's own negligence.

The judgment and order denying the motion for a new trial are reversed.

We concur: CHIPMAN, P. J.; HART, J.

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5 Cal. App. 191

### CALLOWAY v. ORO MINING CO. (Civ. 314.)

(Court of Appeal, Second District, California. March 15, 1907.)

1. Limitation of Actions—Computation of Limitations — Pleading — Amendment — New Cause of Action.

Where an action was brought on a claim against a husband and wife as their joint and several obligation, an amendment made more than two years after the maturity of the claim, alleging that the contract was made with the wife alone, did not change the cause of action so as to bar recovery by limitations; the time to which the statute ran being the filing of the original complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 543.]

2. Assignment — Action — Necessity for Proof of Assignment.

Where, in an action on an assigned claim, the assignment is a fact in issue, proof thereof is as essential as that of the indebtedness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 228.]

3. Same—Evidence.

Where a company's employés threatened to quit work for nonpayment of wages, but on defendants' promise to pay them did not do so, in an action against defendant by an alleged assignee of the claims, that parties claimed to be plaintiffs' assignors testified to the genuineness of their signatures upon an assignment claimed against the company did not tend to prove an assignment of their claim against defendant.

4. Courts—Jurisdiction—Amount in Controversy.

Where plaintiff sued in the superior court on a claim due him and upon several claims alleged to have been assigned to him, that recovery was defeated on the alleged assigned claims, leaving recovery on his claim less than $300, did not defeat the court's jurisdiction to award judgment; the amount claimed in the complaint being determinative of the question of jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 427.]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Charles Calloway against the Oro Mining Company and Florance A. Stough. From a judgment for plaintiff, and an order denying a new trial, defendant Stough appeals. Reversed and remanded.

C. H. Rippey and A. A. Haines, for appellant. F. P. Willard, for respondent.

ALLEN, P. J. Action for personal services of plaintiff and assignors. Judgment for plaintiff; new trial denied. Appeal by Florance A. Stough, one of the defendants. from the order denying a new trial.

It appears from the record that Mrs. Stough, the appellant, on July 16, 1902, was the owner of mining property in San Diego county which was subject to an executory contract of sale, under which the Oro Mining Company, a corporation, was in possession. Plaintiff and three others were engaged in work on the mine for the corporation, and, becoming dissatisfied by reason of default in the payment of their wages, determined to quit work and to institute proceedings to collect their unpaid wages. Mrs. Stough, being informed of this threatened action upon the part of the employés, authorized one Mullins, a stockholder in the corporation, to agree with the workmen that, if they would continue at work and keep the mine free from water, she would pay them their wages when she obtained possession of the mine. This promise and proposition Mullins communicated to the men, and they continued at work on the mine until November 7, 1902, at which date the appellant obtained possession of the mine. She, however, refused payment and the workmen all made out an account, which upon its face was a statement of wages due from the Oro Mining Company, a corporation, claimed to have been earned between April and December, 1902, being the aggregate of the wages due from the corporation before the agreement of appellant and that earned by them after such agreement. These statements of account all of the workmen, except plaintiff, assigned to plaintiff, who thereupon brought this action against the corporation, Mrs. Stough, her husband, and certain stockholders in the corporation. In the original complaint it was averred that the promise to pay for the labor after July was made by Mr. and Mrs. Stough. More than two years after the maturity of the claim, the complaint was amended by an allegation that the contract was with Mrs. Stough alone. Appellant makes the point that this amendment changed the cause of action, and, that more than two years having intervened between the maturity of the claim and the filing of the amended complaint, the statute of limitations barred recovery. The action, however, was upon the obligation which was sought to be enforced, and which, under the original complaint, was a joint and several obligation. There was no change in the cause of action by the filing of the amended complaint, the effect of which was to dismiss the action as against one of the defendants. The time to which the statute of limitations runs is the filing of the original complaint. Frost v. Witter, 132 Cal. 425, 64 Pac. 705, 84 Am. St. Rep. 53.

The evidence is ample to support every finding of the court, except that relating to the assignment to plaintiff by the other workmen of their claims. The allegations of the complaint, which are supported by the evidence, show that the contract between the workmen and Mrs. Stough, made by her agent Mullins, was an independent, original promise upon her part, disconnected from any obligation or prior employment of the corporation. From the time it was made until November 7th the men engaged in work were in the employ of Mrs. Stough. Whatever claim they had was one against her individually, and, under the allegations of the amended complaint, against her alone. The complaint averred an assignment in writing by the other workmen to plaintiff of their claims against Mrs. Stough. The court so finds; but there is no evidence in the record to support such finding. On the contrary, the only assignment offered in evidence was the assignment of a claim against the corporation and for services rendered such corporation during the time the men were in the employ of appellant. The assignment was a fact at issue and the proof thereof as essential as that of the indebtedness. Brown v. Curtis, 128 Cal. 196, 60 Pac. 773. The finding that the claim against Mrs. Stough was assigned in writing to the plaintiff before the commencement of the action has no support in the evidence; nor is there any evidence of an oral assignment. The fact that the parties who were claimed to be plaintiff's assignors were witnesses upon the trial and testified to the genuineness of their signatures upon the assignment claimed against the corporation does not tend to prove any assignment of their claim against appellant.

It is claimed by appellant, further, that, the evidence not warranting a judgment upon the assigned claims, the court was without jurisdiction to render judgment upon the original claim of plaintiff, in that the same was in amount less than $300. This cannot be maintained. The amount of the claim in the complaint is determinative of the question of jurisdiction, and that exceeded the $300. While it is within the power of this court to modify the judgment by affirming the same to the extent of the original claim, we are impressed from an examination of the record with the fact that there is a strong probability that evidence of an assignment may be supplied upon another trial, and that it is in the furtherance of justice that another trial of the action be had.

It is therefore ordered that the order denying a new trial is reversed and the cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

5 Cal. App. 185

## FORD v. FREEMAN et al. (Civ. 336.)

(Court of Appeal, First District, California. March 12, 1907.)

APPEAL—PARTIES ENTITLED TO NOTICE—ADVERSE PARTY.

Plaintiff, suing F., D., and C. on the theory that F. and D. held money in trust for themselves and for plaintiff and C., procured, on his application in which C. joined, the appointment of a receiver of the fund. F. and D. appealed from the order. *Held*, that C., being interested in the fund, was an adverse party within Code Civ. Proc. § 940, providing that notice of appeal must be served on the adverse party, and on the failure to serve the notice on him, the appeal must be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2137, 2138.]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by George K. Ford against Frank Freeman and others. From an order appointing a receiver, certain of the defendants appeal. Dismissed.

F. H. Gould, for appellants. Stanley Moore and L. A. Gibbons, for respondents. Geo. K. Ford, in pro. per.

BURNETT, J. The action is based upon an alleged trust agreement. By the complaint it appears that one of the defendants, Samuel C. Pierce, had a cause of action for damages against the Mountain Copper Company. He entered into an agreement with plaintiff, who is an attorney at law, whereby the latter was to furnish all the money necessary for the prosecution of said cause of action, and also to act as the attorney of the former in whatever proceeding was required, and it was agreed that Ford should receive for such services one-half of the amount recovered by suit, compromise or otherwise. Thereafter plaintiff entered into an agreement with Freeman, Cannon, and one Charles L. Donohoe, whereby the last three were to perform said services and pay all the costs, and the four, after deducting the costs, were to share equally the amount received, to wit, one-half of what was recovered. It was further agreed that defendants Freeman and Donohoe should secure from Pierce a new contract in pursuance of said arrangement. Accordingly, Pierce and Freeman entered into a written contract whereby Freeman was to represent him in the litigation, advancing all the costs and receiving for his services one-half of what should be recovered. Freeman agreed with plaintiff and defendants Cannon and Donohoe that he would receive said money in trust and the four would share it equally. Suit was brought on behalf of Pierce, and he recovered the sum of $15,000. The judgment was assigned to Freeman, who received it in trust for the parties named, Ford, Cannon, Freeman, and Donohoe. The money was afterwards paid to Freeman and Donohoe, who hold the greater portion of it in trust for plaintiff and defendants. Defendants Freeman, Donohoe, and Cannon each advanced certain costs and expenses in said action. Plaintiff demanded of them that they account to plaintiff for the moneys they and each of them received and paid out, but they refused to do so. There is also an allegation of the insolvency of Freeman and Donohoe. Plaintiff made application to have a receiver appointed "to take charge of the money or fund in the complaint in said cause described, during the pendency of this action * * * on the ground that the money or fund described in the complaint herein is liable to be lost, removed or materially injured." The application was heard upon the verified complaint and the affidavit of defendant Donohoe denying all the material allegations of the complaint. Defendant Cannon appeared upon the hearing of said motion and also requested the appointment of a receiver. It was contested by the other defendants, who have appealed from an order which was made appointing a receiver.

Cannon has moved to dismiss the appeal on the ground that no service was made upon him of the notice of appeal of the transcript, or of the appellants' points and authorities. It is admitted that he was not served, but it is claimed that he is not "an adverse party" within the meaning of section 940, Code of Civil Procedure, which provides that the notice of the appeal must be served "on the adverse party or his attorney." There can be no doubt that Cannon was a party to the proceeding. He was expressly made a defendant in the action and the notice of the motion for the appointment of a receiver was addressed to all the defendants and he appeared and participated in the hearing. It must be manifest that he is a party in the legal sense, which means that he has been made and become such in a mode prescribed by law, so that he is bound by the proceedings. Robinson v. Vanderberg Co., 37 Ind. 335; Basket v. Hassell, 107 U. S. 608, 2 Sup. Ct. 415, 27 L. Ed. 500. Whether he is an "adverse" party must be determined by an examination of the complaint and the proceedings culminating in the appointment of the receiver. "Whether a party to the action is adverse to the appellant must be determined by their relative positions on the record and the averments in their pleadings, rather than from the manner in which they may manifest their wishes at the trial, or from any presumption to be drawn from their relation to each other or to the subject-matter of the action in matters outside of the action." Harper v. Hildreth, 99 Cal. 268, 33 Pac. 1103. As to the meaning of the term "adverse" used in this connection there can be little doubt. In Senter v. De Bernal, 38 Cal. 640, it was declared: "Every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken is, we think, an 'adverse party' within the meaning of these provisions of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervenor. * * * Our Code allows any and every party who is aggrieved to appeal without joining any one else, no matter what may be the character of the judgment against him, whether joint or several; and, in this respect, works a change from the former practice, but he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal, if they have formally appeared in the action in the court below, or his appeal, as to those not served, will prove ineffectual, and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former also." To the same effect are Randall v. Hunter, 69 Cal. 80, 10 Pac. 130; Millikin v. Houghton, 75 Cal. 539, 17 Pac. 641; In re Castle Dome Mining, etc., Co., 79 Cal. 246, 21 Pac. 746; Lancaster v. Maxwell, 103 Cal. 67, 36 Pac. 951; Barnhart v. Edwards, 111 Cal. 428, 44 Pac. 160; Vincent v. Collins, 122 Cal. 387, 55 Pac. 129.

The appointment of a receiver is a matter in which defendant Cannon was interested equally with plaintiff. He was one of the beneficiaries of the trust fund which the receiver was authorized and directed to take into his possession and control. The reversal of the order appointing the receiver would affect his interest in the same manner as it would that of plaintiff. If Cannon is not an adverse party, there is no adverse party shown by the record. It seems to me, in view of the decisions, that the question is scarcely open to serious controversy.

There is no doubt that the matter is jurisdictional, and, while it is not clear that it was a proper case for the appointment of a receiver, we are precluded from considering that question in this proceeding.

The appeal is dismissed.

We concur: COOPER, P. J.; KERRIGAN, J.

5 Cal. App. 236

## SHIVELY v. EUREKA TELLURIUM GOLD MINING CO. et al. (Civ. 288.)

(Court of Appeal, Third District, California. March 19, 1907. Rehearing Denied by Supreme Court May 16, 1907.)

1. JUDGMENT — CONCLUSIVENESS — MATTERS CONCLUDED.

Code Civ. Proc. § 1908, subd. 2, provides that a judgment is, as to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action, litigating for the same thing, under the same title and in the same capacity, provided they have notice of the action. Section 1911 provides that that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto. An action having been brought against a corporation on notes executed by it for services rendered the corporation by its directors and money advanced it by them, judgment was rendered that the notes, having been issued by the directors to themselves, and not having been assigned in good faith, but for collection only, were void, and directing their cancellation. *Held*, that the judgment was not conclusive on an action brought upon quantum meruit for the services rendered and money loaned.

2. ACCOUNT STATED—IMPLIED ASSENT OF PARTY TO BE CHARGED.

Where an account against another is presented to him, and he makes no objection to it within a reasonable time, an account stated may be implied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account Stated, § 31.]

3. CORPORATIONS—DIRECTORS—DEALING WITH CORPORATION.

Directors of a corporation are entitled, as against the corporation, to money expended, and to the reasonable value of services performed in good faith for the use and benefit of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1334.]

4. SAME—ACTIONS AGAINST—EVIDENCE—SUFFICIENCY.

Evidence *held* to support a finding that an agreement did not provide that certain parties should at their own expense operate a mine of defendant corporation.

5. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action to recover the reasonable value of services rendered, it was not reversible error that the person performing the same was permitted, after testifying as to the services performed, to state their reasonable value, though he should have been more fully questioned as to his knowledge of their value before stating the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153, 4156.]

6. SAME.

In an action to recover the reasonable value of services rendered a corporation, it was not reversible error that a witness' testimony that he requested the directors to have accounts stated made of the indebtedness, of which a certain account stated was one, was not stricken out on the ground that an account stated was a conclusion of law, where that conclusion necessarily followed from the facts stated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4161.]

Appeal from Superior Court, Shasta County; John F. Ellison, Judge.

Action by Charles Shively against the Eureka Tellurium Gold Mining Company, defendant, and S. W. Powell, administrator, substituted for Sarah E. Northrup, deceased, intervener. From an order denying a new trial, defendant and intervener appeal. Affirmed.

Edward Sweeney and Robinson & Robinson, for appellant. Campbell, Metson & Campbell (S. D. Woods, of counsel), for intervener. Charles A. Garter and W. S. Tillotson, for respondent.

BURNETT, J. This case has been before the Supreme Court on a former appeal. It is reported in 129 Cal. 293, 61 Pac. 939, to which we refer for a statement of the issues presented by the pleadings. The case was reversed because of the insufficiency of the allegations of the complaint in intervention and of the corresponding finding to show a personal indebtedness of Ludlum and Swezey on account of the alleged assessment of their stock in the defendant corporation; but, in response to plaintiff's prayer that judgment be rendered for him on the findings, the Supreme Court declared: "The findings, however, would not justify a finding for the plaintiff. A fraudulent conspiracy is alleged in the complaint in intervention, and, in the absence of findings disposing of these issues, we would not be justified in rendering judgment for the plaintiff." The decision of the Supreme Court eliminated the question of the indebtedness of Ludlum and Swezey, two of plaintiff's assignors, to the corporation, and also determined the authority of the intervener to appear and defend for the corporation. Subsequently the intervener died, and her administrator, Powell, was substituted. Defendant corporation filed amended pleadings, and at the second trial the defendant and intervener stood on common ground. Plaintiff also withdrew from the consideration of the court the fourth cause of action, involving the sum of $8,973.63 for moneys advanced by Watson D. Swezey for the use and benefit of the corporation.

1. Among the allegations of the complaint in intervention and of the answer of the corporation, upon which great emphasis is placed, is "that prior to the commencement of this action on the —— day of ——, 1896, in an action brought in the superior court of said Shasta county by the plaintiff against the defendant upon the same alleged causes of action designated in plaintiff's amended complaint 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, a judgment was duly given and made upon the merits, fully settling and adjusting all

matters and things embraced in said alleged causes of action in favor of said defendant and against said plaintiff." In reference to this plea in bar, it is respondent's contention that it is not available, "because of a want of identity of parties and of the issues in the two actions, and because the matters actually adjudicated in the former action are not presented for adjudication in the present action." The court found in favor of respondent, holding that the parties and the issues were different; but it is apparent that, if either the parties or the issues were different, the finding must stand. The parties were the same, except that John J. Atherton, the owner of 50 shares of capital stock, was intervener in the former, and Mrs. B. C. Northrup, the owner of another 50 shares, was intervener in the present action. But appellant contends that they both appeared in the respective actions as intervening stockholders and defended for the corporation; and therefore they appeared in the same capacity and for the same purpose, and hence in legal contemplation both actions must be considered as between the same parties.

In Wickersham v. Crittenden, 110 Cal. 332, 42 Pac. 893, it is said: "That an action brought by a stockholder to recover money paid to the president of the corporation on account of salary is brought for the account of the corporation, and not for the individual benefit of the stockholder; and whatever would have estopped the corporation from recovering a judgment against its president is equally a defense against the stockholder." To the same effect are Fox v. Hale & Norcross Mining Co., 108 Cal. 475, 41 Pac. 328; Chetwood v. Cal. National Bank, 113 Cal. 414, 45 Pac. 704. Although the complaint in intervention does not purport to be for the benefit of the corporation, yet the cases cited seem to go to the extent of holding that the corporation is the real party in interest in each case. If so, there would necessarily be identity of parties; but this becomes immaterial, in view of the conclusion that is unavoidable upon the vital question as to whether the same matter was adjudicated and the same facts involved in the former action that arise in the action before us. The effect and scope of a judgment are so clearly set forth in the provisions of the Code of Civil Procedure as scarcely to need judicial explanation. The difficulty remains, however, of applying the law to the particular facts as they are developed in each case. Subdivision 2 of section 1908, Code Civ. Proc., is as follows: "In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding." As to how we shall view the judgment in section 1911, we have this rule provided: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

At the former trial, after the evidence was all introduced, as stated in the findings, "plaintiff moved the court to be allowed to dismiss said action on behalf of plaintiff, without prejudice, which motion was by the court allowed and granted, and neither plaintiff nor defendant introduced any evidence to sustain the allegations of the respective answers to intervener's complaint." Appellant insists that there was no judgment of dismissal; but that question is unimportant, because it was treated by all parties as a dismissal, and none of the allegations of the complaint as such was considered or determined by the court. However, notwithstanding the dismissal of plaintiff's action without objection, the court proceeded—no one contesting its right so to do—to hear and determine certain issues raised by the complaint in intervention and the answers of plaintiff and defendant thereto. The court, however, did not determine all these issues, and, as before seen, the only evidence offered was on behalf of the intervener. The court did determine that John J. Atherton was the owner of 50 shares of stock and was interested in the result of the action; that at all the times in the amended complaint mentioned, and long prior thereto, the directors of said corporation were W. D. Swezey, J. Scott Ludlum, Anna M. Ludlum, George C. Jones, and Peter Scherer; that the question and issue of the consideration of the promissory notes in the amended complaint mentioned was withdrawn from the consideration of the court, and no evidence introduced under the allegations thereof; that paragraphs 4, 5, and 6 of the complaint in intervention were withdrawn from consideration. Paragraph 4 related to the charge of conspiracy; paragraph 5 to fraudulent acts of Swezey and Ludlum in carrying out the conspiracy; and paragraph 6 charged that the latter had agreed to work and operate the mine at their own cost and expense. The foregoing paragraphs were substantially in the same language as the corresponding allegations in the present complaint in intervention. The court further found "that said Ludlum, Jones, and Swezey did by their own votes, as directors of said corporation, cause the notes mentioned in the amended complaint to be issued to themselves, and did take part in the proceedings authorizing said notes to be issued to them by said board of directors, and did each of them vote therefor, and as said directors did deal with themselves as individuals in issuing said notes, and each of them, save and except the notes mentioned in counts 1 and 10 of said amended complaint, which were issued to persons not directors of said corporation." And it was further found that said notes were not assigned in good faith and for a valuable consideration, but for convenience in collection, and as conclusions of law it was declared that said notes—except the two mentioned, and which, it may be remarked, are the basis for two of the counts in the present action, viz., the note to plaintiff for $75 and to one E. A. Reid for the sum of $35—"are illegal, null, and void. That the same be surrendered and canceled." How there can be any controversy as to what was adjudicated in that action seems almost incredible in view of the language used. The only question determined is that the notes, having been issued by the directors to themselves, were without validity, and were assigned for convenience of collection, and they were directed to be canceled, and the record shows that the notes were subsequently canceled; but the notes were simply written evidence of an indebtedness, and the effect of the judgment was to remove from consideration the written testimonial of the obligation of the corporation to the payees. The vital questions involved herein as to the existence of the indebtedness, whether the services were performed and the money advanced for the use and benefit of the corporation as set out in the complaint, and the defense of fraud and want of consideration as exhibited in the present complaint of intervention, were expressly left undetermined, and they were not affected in any way by the judgment aforesaid. The court found in the present action that: "All of the causes of action set forth in plaintiff's complaint in the said former action were founded upon the said promissory notes, while in the present action none of the causes of action are based or founded on any promissory note, except the first and second causes of action stated in the present complaint, which are the subject of subdivisions 1 and 2 of the paragraph. The third cause of action is upon an account stated. The fifth cause of action is upon quantum meruit for services rendered. The sixth cause of action is upon quantum meruit for money loaned and advanced, etc. The seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth causes of action are for moneys loaned, advanced, and expended for the use and benefit of the corporation defendant." The evidence supports these findings, and it must follow that the former judgment is no bar. Indeed, were it not for the character and ability of counsel who urge it, the contention of appellants to the contrary would scarcely merit the courtesy of serious attention. The decisions from our Supreme Court wherein are discussed the scope and effect of judgments and of the aforesaid provisions of the Code of Civil Procedure are quite numerous and are collated by counsel for the respective parties. Among them, as fairly illustrative of the principle involved, we cite the following: Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277, in which Mr. Justice Harrison, with usual perspicuity, states the rule in this manner: "The doctrine of res adjudicata, or estoppel by reason of a former judgment, rests upon the principle that a cause of action which has been once determined upon its merits by a competent tribunal, between parties over whom that tribunal had jurisdiction, cannot afterward be litigated by them in another proceeding, either in the same or a different tribunal, and it is immaterial whether such cause of action is of equitable or of legal cognizance, or whether the judgment was given in a common-law court or was rendered by a court of equity. * * * But, if the judgment in either tribunal is rendered for a reason or upon a ground not involving the merits of the controversy, no such effect can result." Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141; South San Bernardino Co. v. S. B. Nat. Bk., 127 Cal. 245, 59 Pac. 699; Beronio v. Ventura Co. Lumber Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118; Freeman v. Barnum, 131 Cal. 387, 63 Pac. 691, 82 Am. St. Rep. 355; Moore v. Russell, 133 Cal. 297, 65 Pac. 624, 85 Am. St. Rep. 166. It is manifest from the provisions of the Code and the foregoing decisions that a judgment is conclusive between the parties and privies only as to the facts actually considered and determined or which are necessarily involved in the judgment, and, unless those facts are controlling in a subsequent suit, the plea that the action is barred by the former judgment must be rejected.

Appellants seem to rely largely upon Woolverton v. Baker, 98 Cal. 628, 33 Pac. 731, and Bingham v. Kearney, 136 Cal. 175, 68 Pac. 597. In those cases there is some general language used apparently affording support to appellants' contention; but, of course, the facts of each case must be considered to determine what was really decided. The decision in the Woolverton Case, supra, is put upon the ground that the cause of action was the same in both actions; that the controlling question at issue determined in the former and involved in the subsequent proceeding was the title to the land, and, as stated in the syllabus, it is correctly held that: "In an action to compel a reconveyance of land alleged to have been conveyed to one of the defendants upon the sole consideration and condition that the grantee would apply a sufficient portion of the rents for her support and maintenance during life, on account of the alleged break of such condition, a judgment in a former action between the same parties, which sets up the same conveyance, and alleged that it had been made upon the sole consideration that the grantee should hold the same in trust for her, and that the rents, issues, and profits should be applied in providing for her support and maintenance during life, and that they had not been so applied, and sought a judgment that she was the owner of the premises, as against the defendants, and that the premises be reconveyed to her, in which action the court adjudged that the defendants as against the plaintiff were the owners of the land in fee simple, free and clear of any and all trusts, exceptions, limitations, and conditions set forth and alleged in said complaint, constitutes a complete defense and bar to the new action by way of estoppel." It would deprive a judgment of almost all significance to hold to the contrary.

The difference between the Bingham Case, supra, and the one at bar is apparent from the following statement of the court: "The former action was between the same parties. It involved the same subject-matter—the contract concerning the sale of land. The court in the former action had declared the contract valid, and that the defendant had the right to have it foreclosed and to be restored to the possession of the land. The present action is brought for the purpose of having the same contract rescinded, and to recover the payments made thereunder." It is true that into the second action the specific allegation of fraud for the first time was injected by the plaintiff, who was defendant in the first action; but this could not change the rule that, the validity of the contract having been determined, it could not again be brought to judgment by the same parties. We are satisfied that the claim of appellants in relation to the former judgment cannot be maintained.

2. Appellants attack the finding of the court upholding the allegations in the fourth count of the complaint in reference to the stated account of George C. Jones. There was evidence, however, to show that the account had been stated and agreed to by the parties; but the court found that subsequently to the statement of the account a payment was made which was not credited, "but that the said account stated was for services actually performed and for money actually advanced to the said defendant corporation, by the said George C. Jones, and when said sums were so advanced and said services so performed, and when said account was stated, neither the said George C. Jones or any of the persons alleged and complained of by the defendant and intervener, as confederates of the said George C. Jones, was a director of the said defendant corporation." Without setting out the evidence, it is sufficient to say that an examination of the record discloses support for this finding. No express agreement was required to be shown. It might be implied. Hendy v. March, 75 Cal. 566, 17 Pac. 702; Mayberry v. Cook, 121 Cal. 588, 54 Pac. 95.

3. Appellants also insist that the court erred in finding that Ludlum, Swezey, Anna Ludlum, and Jones were elected directors, for the reason that they were not elected at a regular meeting, and no notice was given of the said meeting. It is admitted that they were de facto officers; and, assuming for the sake of argument that they were irregularly elected, it cannot avail appellants, because the act of incurring a just indebtedness by persons who are de facto directors cannot be impeached by showing an irregularity in their election. Barrell v. Lakeview Land Co., 122 Cal. 129, 54 Pac. 594. In the Barrell Case also it is held that: "A corporation will not be permitted, after allowing a person to act as its secretary and causing him to authenticate its records, to object to the regularity of his appointment, or to repudiate an obligation signed by him as secretary under authority from its board of directors." It is claimed that the rule does not apply to money advanced by the directors. In the language of appellants: "De facto officers can bind the corporation so far as third persons are concerned, but they cannot recover upon any claim on their part." It seems, however, from the decisions, that the directors may bring and maintain actions in the form of quantum meruit against the corporation for money expended and services performed in good faith for the use and benefit of the corporation, although they may not execute or join in the execution of a promissory note to themselves which will bind the corporation. Seeley v. San Jose I. M. & L. Co., 59 Cal. 22; Santa Cruz R. R. Co. v. Spreckels, 65 Cal. 193, 3 Pac. 661, 802; Graves v. Mining Co., 81 Cal. 303, 22 Pac. 665; Pauly v. Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98. The rule is stated clearly in the syllabus of Schnittger v. Old Home Cons. Mg. Co. et al., 144 Cal. 603, 78 Pac. 9, as follows: "A director of a corporation, though bound to the utmost good faith, and forbidden to take part in any transaction concerning his trust in which he has an adverse interest, is not precluded from dealing directly with the corporation, and may become its creditor, and take from it a mortgage or other security, and may enforce it like any other creditor, subject always to severe scrutiny. A violation of his duty as a trustee may render the transaction voidable, but it is not ipso facto void. The mere fact that the creditor was a director of the corporation does not render the transaction fraudulent." If there should be any difference in this respect between de facto and de jure directors, it is sufficient to declare that there was some evidence to show the regularity of the election in question, and hence the trial court's determination that they were directors of the corporation is binding upon us.

4. The finding that "the escrow agreement between Watson D. Swezey and J. Scott Ludlum and the stockholders of the defendant did not provide that the said Ludlum and Swezey should at their own cost and expense operate the mine of defendant" is also vigorously assailed. It was contended at the trial that the agreement provided that they

should do this work at their own expense; but while Mr. Ludlum was on the stand he identified as the original agreement a document which contained no such provision. A similar provision was, however, afterwards attached and signed by Swezey; but, according to his testimony, it was not to be binding unless ratified and signed by Ludlum, which Swezey's deposition shows was never done. There is at least evidence to support this, as well as all other, findings of the court.

5. The claim of fraud and conspiracy was passed upon by the court and deliberately found against defendant and intervener. The same learned judge presided at the three trials to which reference has been made, and he had rather exceptional opportunities to weigh the evidence and determine the credibility of the witnesses. It is true, as suggested by appellants, that it is usually difficult to establish fraud clearly, and that positive and express proof is not required; but it must be remembered, also, that charges of this character are easily made, and they often have no foundation in fact. Surmise is not evidence, and something more than suspicion is required as the basis for judicial action. We have considered the circumstances declared by appellants to be badges of fraud, and we are satisfied that they do not present sufficient reason for disturbing the findings of the court against appellants.

6. During the progress of the trial, exceptions were taken by appellants to certain rulings of the court. Most of them present the same questions hereinbefore considered, and they do not require further notice. I think there is merit in some of the objections, however, but the rulings would not justify a reversal of the judgment. For instance, this question was asked Mr. Ludlum: "During the time you acted and performed services for the company, as you have testified, what was the reasonable value of those services? Mr. Woods: We object to that upon the ground that it is not shown that he knows." He ought to have been interrogated more fully as to his knowledge of the value of such services, but it is doubtful whether the objection raises the question of his competency to testify. Besides, it is a matter addressed largely to the discretion of the trial court, and we cannot say there is no justification for the inference that he had shown himself qualified.

Again, the same witness said: "I requested the board of directors on January 1, 1895, that they have stated accounts made of the indebtedness that was against the company at that time, of which this was one. Mr. Robinson: We move to strike this out, your honor, on the ground that an account stated is a conclusion of law. The Court: I will deny the motion." In my opinion, the motion should have been granted; but the ruling did no harm, as the conclusion must necessarily follow from the facts stated.

We find no prejudicial error, and the order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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150 Cal. 751

## UNION LUMBER CO. et al. v. SIMON et al.

(Civ. 169.)

(Court of Appeal, First District, California. March 13, 1906.)

1. Mechanics' Liens — Notice—Description of Property—Sufficiency.

Under Code Civ. Proc. § 4, providing that a person claiming a mechanic's lien shall file a notice describing the property, etc., the description of the property need only be such as will suffice for identification, and a false call or an inaccuracy in such description, will not defeat the lien, if the description be not in itself misleading or defective in some essential particular.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Mechanics' Liens, §§ 213–224.]

2. Same—Enforcement of Lien—Necessity of Following Description in Notice.

In an action for the enforcement of a mechanic's lien the plaintiff is not required to follow the description given in the notice, but if the statutory requirements have been satisfied, he may disregard any lack of accuracy or precision, and in his complaint may enlarge the description in such manner that the judgment will distinctly specify the land which is to be sold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 496.]

3. Same — Sufficiency of Description — Method of Determining.

Whether the description of the property affected by a mechanic's lien is sufficient for identification thereof, is a question of fact to be determined by the jury or the court upon a consideration of the circumstances of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 588.]

4. Same—Evidence.

Under Code Civ. Proc. § 4, requiring the filing of notices of mechanics' liens, evidence is admissible to determine the sufficiency of the notice as to description of the property, and such evidence will include the purpose for which the description is required, as well as the persons who are to be affected by it.

5. Same.

A notice of mechanic's lien described the property affected as a parcel of land situated in a certain city and county bounded by lines commencing at a point on the northerly line of A. street distant thereon 137 feet 6 inches from the westerly line of B. street; running thence westerly along the line of A. street; thence north, east, and south, to the place of beginning. *Held* that, as between the property owner and the claimant of the lien, this description was sufficiently definite, and not defective, because not specifying in which direction from the westerly line of B. street the land was located.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 214–224.]

6. Estoppel—Position in Judicial Proceeding.

Where, in a proceeding to enforce a mechanic's lien, the building contractor is a party, and admits the right of the lien claimant to the money due from the owner on the contract, the contractor is estopped from afterwards demanding the money from the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 165–169.]

7. SAME—LAND AFFECTED—EVIDENCE.

In a proceeding to enforce a mechanic's lien, evidence *held* sufficient to support a finding that all of the lot on which the building was situated was necessary for the convenient use and occupation of the building, and hence should be sold therewith.

8. TRIAL — FINDINGS—ISSUES—CONSOLIDATED ACTIONS.

Where a number of proceedings to enforce mechanics' liens against the same property were consolidated, they became in effect a single action, and all facts in issue were to be embodied in a single set of findings, so that there was no impropriety in making a finding that all of the land on which the building was situated, was necessary for its convenient use and occupation, though some of the complaints contained no allegation upon this issue.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the Union Lumber Company and others against Jules Simon and others. From a judgment for plaintiffs, the defendant named appeals. Affirmed.

Roger Johnson, for appellant. Pillsbury, Madison & Sutro, Barna McKinne, and J. S. Reid, for respondents.

HARRISON, P. J. Action for the foreclosure of mechanics' liens. Nine separate actions for the foreclosure of mechanics' liens upon certain property described in the complaint herein were brought against the defendant Simon, as the owner of the property, and the defendant Grant, as the contractor for the construction of the building for which the liens are claimed. The actions were afterwards consolidated into a single action under the above title, and, after such consolidation, the defendant Simon filed answers to the complaints of the several plaintiffs, and the defendant Grant filed an answer, admitting all of the allegations in the complaints. The cause was tried by the court, and judgment rendered in favor of the plaintiffs and against the defendants, declaring the amount of the unpaid portion of the contract price, together with the costs and attorney's fees in the action, to be a lien upon the property in favor of the plaintiffs according to the respective amount of their claims, and directing its sale in satisfaction thereof. From this judgment and from an order denying a new trial the defendant Simon has taken the present appeal.

The principal point urged in support of the appeal is that the notice of their claim of lien, which was filed in the recorder's office by several of the above claimants, was defective, in that it did not describe the property described in the complaint, and therefore that no lien was created thereon. The description of the property in the said notices of lien is as follows: "The lot or parcel of land situate in the city and county of San Francisco, state of California, bounded and described as follows, to wit: Commencing at a point on the northerly line of Sutter street distant thereon 137 feet and 6 inches from the westerly line of Scott street; running thence westerly along said line of Sutter street 106 feet and 8 inches; thence at right angles northerly 164 feet and 1 inch; thence at right angles easterly 106 feet and 8 inches; thence at right angles southerly 164 feet and 1 inch, to the point of commencement, and also the buildings on said land and the alterations and additions made thereto." In addition to this description the notice makes the further statement: "That Jules Simon, M. D., is the reputed owner and is, as claimant is informed and believes, the owner of the said land and said buildings, alterations, and additions thereto; that said lien is claimed for material furnished by said claimant to the person named W. E. Grant at various times between on or about the 10th day of June, 1902, and the 17th day of October, 1902, and while said Grant was engaged in constructing said building and making said alterations and additions thereto for said owner." The objection to the sufficiency of the description is that it does not specify in which direction from the westerly line of Scott street the lot of land is located, and that it cannot be determined therefrom whether its starting point is easterly or westerly therefrom. The requirement of the statute that the materialman or subcontractor who claims a mechanic's lien shall file a notice thereof in the recorder's office, has a two-fold purpose, in addition to that of fixing the time within which he must seek to enforce his lien, viz., to give constructive notice of the claim to all persons dealing with the property, and also to inform the owner of the amount of the claim, and thereby enable him to withhold from the contractor a sufficient amount of the contract price with which to satisfy the same. "The object of the law, so far as securing the validity of the lien against the owner is concerned, when a materialman seeks to avail himself of the advantages, is that by the notice the owner may keep back enough of the contract price to indemnify himself against the liability." De Witt v. Smith, 63 Mo. 263. The notice which the claimant is to file is also of a two-fold character. It must contain a statement of the facts which the statute prescribes for the creation of the lien, and it must also contain a description of the property to be charged with the lien. The statute is remedial, and is to be liberally construed with a view to effect its objects and to promote justice (Code Civ. Proc. § 4); and as the persons for whose benefit it is enacted are not presumed to be versed in accuracy of expression the notices to be given by them are to be construed more with reference to their substance than their form (Corbett v. Chambers, 109 Cal. 178, 41 Pac. 873). Whatever the statute has made essential to the creation of the lien must be fully and correctly stated (Wagner v. Hansen, 103 Cal. 104, 37 Pac. 195; Santa Monica Co. v. Hege, 119 Cal. 376, 51 Pac. 555); but the description of the property to be charged with the lien is required to be only such as will be "sufficient for identification." The same fullness and precision of description is not required in the lien statement as in the case of a conveyance or a judgment. Nystrom v. London, etc., Mortgage Co., 47 Minn. 31, 49 N. W. 394. A false call or an inaccuracy in describing the property will not defeat the lien if the description be not in itself misleading, or defective in some essential particular. Willamette Company v. Kremer, 94 Cal. 205, 29 Pac. 633. In an action for the enforcement of the lien the plaintiff is not required to follow the terms of the description which are given in the notice; but, if the statutory requirement has been satisfied, may within those terms disregard any lack of accuracy or precision, and in his complaint may enlarge the description in such manner that the judgment will distinctly specify the land which is to be sold. Duffy v. McManus, 3 E. D. Smith, 657; Willamette Co. v. Kremer, supra; Corbett v. Chambers, supra. Whether the description in any particular case is sufficient for identification is a question of fact to be determined by the jury or the court upon a consideration of the circumstances of that case. Phillips on Mechanics' Liens, § 384. This provision of the statute implies that evidence may be received for the purpose of determining its sufficiency (Best v. Wohlford, 144 Cal. 733, 78 Pac. 293), and such evidence will include the purpose for which the description is required as well as the persons who are to be affected by it. A more precise and specific description is required for the purpose of giving constructive notice to persons who may deal with the property or become purchasers or incumbrancers of the same (Montrose v. Connor, 8 Cal. 344; Rall Bros. v. McCrary, 45 Mo. App. 365; Hardware Co. v. McCarty, 10 Colo. App. 200, 50 Pac. 744) than would be required in a case where only the owner and other lien claimants are interested (Martin v. Simmons, 11 Colo. 411, 18 Pac. 535; Putnam v. Ross, 46 Mo. 337). Mr. Phillips says (section 379): "If there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is great reluctance to set aside a mechanic's claim merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise. If the description identifies the property by reference to the facts, that is, if it points clearly to a piece of property and there is no other one that will answer the description, it is sufficient." Among the identifying facts which are held competent to be considered for determining its sufficiency are references to adjoining properties, a description of the building which has been constructed, the fact that the land upon which it is erected is the only property of the owner in that locality. Tibbetts v. Moore, 23 Cal. 208; Knabb's Appeal, 10 Pa. 186, 51 Am. Dec. 472; Kennedy v. House, 41 Pa. 39, 80 Am. Dec. 594; McClintock v. Rush, 63 Pa. 203; Rall Bros. v. McCrary, 45 Mo. App. 365; Russell v. Haydon, 40 Minn. 88, 41 N. W. 456; Lombard v. Johnson, 76 Ill. 599. In view of these principles, it must be held that the finding of the superior court that the description of the property in the plaintiff's notice of its claim of lien was sufficient must be sustained. The controversy herein does not affect the rights of any outside person, only the rights of the lien claimants and the owner are involved; and, unless the description was such as to mislead the owner, any mere lack of accuracy therein is not available as a defense. The notice does not give a specific description of other property than that sought to be charged with the lien as described in the complaint, as was the case in Fernandez v. Burleson, 110 Cal. 164, 42 Pac. 566, 52 Am. St. Rep. 75, and its terms are not such as to make it impossible to locate the property with such aids as are competent for that purpose. Cleverly v. Moseley, 148 Mass. 280, 19 N. E. 394. Its sole defect consists in the uncertainty of the starting point for its boundary; but, under the other facts set forth in the notice, and the evidence given in connection therewith, this uncertainty disappears.

The property described in the notice is a rectangular lot of land situate on the northerly side of Sutter street, with a frontage thereon of 106 feet and 8 inches, and a depth of 164 feet and 1 inch. It is stated in the notice to be the lot upon which the defendant Grant between the months of June and October in the year 1902 was engaged in constructing a building for the defendant Simon, and for the construction of which the plaintiffs furnished to Grant the materials for which the liens are claimed; and that the defendant Simon was the owner of the said lot of land and of the buildings. It was shown at the trial that in May, 1902, the defendant Simon as owner, and the defendant Grant as contractor, entered into a contract, which was filed for record in the recorder's office, for the construction of a three-story frame hospital building, 68 feet wide by 108 feet deep, to be erected upon a lot of land of the aforesaid dimensions, situate on the north side of Sutter street, 137½ feet from the northwest corner of Scott and Sutter streets, and that on January 3, 1903, the defendant Simon filed in the recorder's office his verified notice, stating that the said contract with Grant had been completed and the work accepted by him, and that the property on which said building is situated is a lot of land situate on the north side of Sutter street, 137½ feet west of Scott street, and thence running westerly along said line of Sutter street 106 feet and 8 inches, with a depth northerly of 164 feet and 1 inch. Scott street was shown to be 68 feet in width, and to assume that the starting point of the description is east of Scott street would locate a large portion of the lot within the lines of Scott street. It was also shown that the said building is the only one ever constructed by the defendant Grant for the defendant Simon, and the latter defendant testified that he never owned any other real estate in the city and county of San Francisco. These facts sufficiently identified the property described in the notices of lien with that described in the complaint. The description in the notice is the same as that in the contract between Simon and Grant; and, in his notice of completion and acceptance, Simon states that the building is situate on the land which is above described in the complaint, and he testified that this is the only real estate which he ever owned in San Francisco. It is manifest, therefore, that he had no difficulty in identifying the property sought to be charged by the lien, and that he was in no respect misled by the description. In Rall Bros. v. McCrary, 45 Mo. App. 365, a case which involved only the rights of the lien claimant against the owner, the statute authorized a lien upon the building and the land upon which it is situated to the extent of one acre. In the claim of lien the property was described as "a frame barn and one acre upon which it is situate, being erected upon a tract of 64 acres" (describing the quarter section). To the objection that the description failed to specify the particular acre, the court said (page 371): "The owner of the particular tract of land described in the lien paper on which the barn was standing, for the improvement of which the materialman furnished the lumber, must be presumed to be familiar with, not only the boundaries of his land, but the building thereon situate which he had erected or improved by the use of the material furnished. The description of the land, and the other facts stated in the lien paper, were certainly ample for the purposes of enabling the defendants or their intestate to locate and identify the acre of land which it was sought to charge with the lien." See, also, Oster v. Rebeneau, 46 Mo. 595; Seaton v. Hixon, 35 Kan. 663, 12 Pac. 22.

The appellant suffers no hardship from the judgment herein. By his contract for the construction of the building he was under obligation to pay to the contractor the amount of the contract price therefor, and whether he pays it to the contractor or to the plaintiffs as creditors of the contractor is immaterial to him if he is protected against any further liability therefor. The contractor is, however, a defendant herein, and, having admitted in his answer the rights of the plaintiffs to the money due from the appellant on the contract, is estopped from again demanding the same. The liability of the appellant for the costs of the action and the attorney's fees is the result of his own conduct. At the commencement of the action he could have tendered and paid into court the amount then unpaid of his liability to the contractor, and thereby discharged himself of further liability; but instead thereof, he contested the right, not only of the lien claimants, but also of the contractor to any portion of said unpaid amount, and necessitated the litigation which followed. The court, therefore, did not err in requiring the payment of the costs and attorney's fees in addition to the amount which he had agreed to pay to the contractor. De Camp Lumber Co. v. Tollhurst, 99 Cal. 631, 34 Pac. 438.

The court found that the building covers a large portion of the lot, and that all of the lot is necessary for the convenient use and occupation of the building, and directed a sale of the entire lot for the satisfaction of the liens. It is urged by the appellant that, as there was no evidence showing the particular part of the land which was covered by the building, the above finding is not sustained by the evidence. It appeared from the evidence that the building was constructed for a hospital, and that by the plans and specifications for its construction its dimensions are 68 feet in width and 108 feet in depth; that it contained "over 40 bedrooms for patients, and also operating rooms, sterilizing rooms, washrooms, bathrooms, nurses' dormitories, dining rooms, and nurses' classrooms." Although the bill of exceptions does not show the particular portion of the lot upon which the building stands, it may be assumed that this appeared from the plans and specifications which were before the court; and as the character of the building, as well as its dimensions and the purpose for which it was to be used, were also in evidence, the court could determine without any further evidence that the convenient use of a hospital building would require more than the mere ground which is covered by the building, and, in determining the amount of additional land required for such purpose, could exercise its own judgment as upon a matter of general knowledge. We cannot say from anything that appears in the record that the court committed any error in the extent of land which it deemed essential for the convenient use and occupation of the building. The further objection that the finding was erroneous, for the reason that in some of the complaints there was no averment upon that issue, is without merit. Upon the consolidation of the several actions there was presented only a single action by the respective plaintiffs against the defendants, and the decision thereon was to be made as if the cause of action had been presented in a single complaint, and was to be embodied in a single set of findings in which all facts in issue in the consolidated action were to be incorporated. Willamette

Co. v. College Co., 94 Cal. 229, 29 Pac. 629. This issue affected the rights of each of the plaintiffs, and its presentation in any of the original complaints became in issue in the consolidated action, and the finding and judgment thereon operated in favor of all of the plaintiffs in the same manner as if they had originally joined as plaintiffs in bringing the action with this averment in their complaint.

The objection to the judgment upon the ground that it creates a personal liability against the appellant is not sustained by the record.

The judgment and order denying a new trial are affirmed.

We concur: COOPER, J.; HALL, J.

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150 Cal. 751

## UNION LUMBER CO. et al. v. SIMON et al.

(S. F. 4,126.)

(Supreme Court of California. April 2, 1907.)

MECHANICS' LIENS—ENFORCEMENT—COSTS—ATTORNEY'S FEES.

The court, in a suit to enforce a mechanic's lien, cannot allow to a successful lien claimant attorney's fees; the statute allowing as a part of the costs attorney's fees to successful lien claimants being unconstitutional.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 653.]

Henshaw and McFarland, JJ., dissenting in part.

In Bank. Application for rehearing, pending in District Court of Appeal, transferred by order of April 23, 1906, to the Supreme Court. Opinion (89 Pac. 1077) modified, and judgment below modified.

Roger Johnson, for appellants. Pillsbury, Madison & Sutro, Barna McKinne, and F. S. Wyatt, for respondents.

PER CURIAM. This case was decided in the District Court of Appeal for the First District, within the 60 days next preceding April 18, 1906, and found its way to this court by reason of the general order made April 23, 1906, transferring all causes in which applications for rehearing were then pending. Since the decision by the court of appeal, this court has decided, in Builders' Supply Depot et al. v. Dennis O'Connor (Cal.) 88 Pac. 982, that our statutory provision as to the allowance of attorney's fees in this class of actions is unconstitutional and void. It follows that, in so far as the judgment allows attorney's fees, it is erroneous. We do not agree to that part of the opinion of Justice Harrison intimating that a notice of lien, sufficient as to the owner, may be void as to third persons without knowledge of the extrinsic facts. In our opinion the notice of lien, as a whole, contains sufficient matter of description to make it good in that respect as to all persons. In all other respects we find that the opinion of the district court of appeal is a correct exposition of the law applicable, and to that extent the same is adopted as the opinion of this court.

The judgment is modified by striking therefrom all allowances for attorney's fees, and, as so modified, is affirmed.

HENSHAW, J. I dissent. In eight of the claims of lien the description of the property affected was as follows: "Commencing at a point on the northerly line of Sutter street distant thereon 137 feet and 6 inches from the westerly line of Scott street, running thence westerly," etc. Here is admittedly a patent ambiguity in the attempt to fix the point of commencement. Conceding that the place for fixing the point of commencement is the intersection of the northerly line of Sutter street with the westerly line of Scott street, it cannot be declared whether the true point of commencement is distant 137 feet and 6 inches easterly or westerly on the northerly line of Sutter street. There are thus certainly two points of commencement which equally answer the call in the description. This is conceded in the opinion of the appellate court which is by this court adopted, which declares that the difficulty in the description is the "uncertainty" as to the point of commencement. It has always been a fundamental rule of construction that such a patent ambiguity appearing upon the face of the instrument cannot be explained or aided by parol evidence. Thus, in Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33, the description in the deed applied equally to certain lots which the grantor did own, as well as to certain lots which he did not own. This court in bank declared: "The map referred to in the deed from Carney to Rosaria Bernal must be considered as incorporated in it. The deed therefore shows upon its face that there are two lots to which the description equally applies. From the deed itself it cannot be ascertained which lot was intended to be conveyed, and as the ambiguity is patent, resort cannot be had to parol. Our conclusion is that the deed in question is void for uncertainty of description." To like effect is People v. Klumpke, 41 Cal. 264. The general principle is likewise declared in Phillips on Mechanics' Liens, § 385, to the following effect: "A description containing a patent ambiguity will not, however, be referred to a jury, but be declared by the court to be void for uncertainty." Moreover, to aid and perfect this description it is necessary to take evidence as to the direction of an ungiven course; that is to say, it is necessary to show that the point of commencement was westerly along the line of Sutter street from its westerly intersection with Scott street. But this again is evidence which this court has distinctly declared cannot be received. Thus, in Best v. Wohlford, 144 Cal. 733, 78 Pac. 293, it is said: "If a monument is given as the starting point, evidence may be given to show its location. But if the direction of the course from that monument is not given, evidence will not be received to show what direction was intended."

In my judgment, if the description above given can be upheld as sufficient, it can be upon no other theory than that any description which in any way, and by any sort of evidence, can be made to apply to any piece of land, is sufficient for identification, and this, notwithstanding the command of the statute that the description in the claim of lien must in and of itself be sufficient for identification. Logically, therefore, if the description here in question is to be held sufficient, it must be said, and by this court should be said, that a description as being the land of John Smith in the city and county of San Francisco, complies with the statute if it can be shown that John Smith owned any land in San Francisco, that any structure was erected upon that land, and that the lien claimant furnished labor or material for the purposes of that structure. This may be the meaning of section 1187 of the Code of Civil Procedure, though I cannot bring myself to believe that it is. But if it is, considering the importance of the question and the very numerous cases that arise under this statute, this court should so declare.

I concur: McFARLAND, J.

150 Cal. 673

## KATAOKA v. HANSELMAN. (L. A. 1,666.)

(Supreme Court of California. March 15, 1907.)

1. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE—TRIAL BY COURT—REOPENING CASE FOR FURTHER EVIDENCE.

Motions to reopen a case for further evidence and for a new trial were properly refused, where the alleged new evidence was merely cumulative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 889; vol. 37, New Trial, §§ 218–220.]

2. APPEAL—REVIEW—DISCRETION OF LOWER COURT—NEW TRIAL—REOPENING CASE.

Where motions for a new trial and to reopen a case for further evidence were submitted to the court upon conflicting evidence, he acts within his discretion in denying them, and his decision will not be interfered with on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3851, 3864.]

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by T. Kataoka against J. W. Hanselman. From a judgment granting insufficient relief to plaintiff, he appeals. Affirmed.

John W. Kemp, for appellant. Davis, Rush & Willis, for respondent.

GRAY, P. J. The justices of the District Court of Appeal of the Second Appellate District, to which this cause had been appealed, not being able to unanimously agree in a judgment, filed their opinions, and the cause was transferred to this court. In the district court a majority of the justices concurred in the following opinion: "The suit was brought on a contract between the defendant and plaintiff set out in the complaint, by the terms of which the plaintiff agreed, in effect, to cultivate certain lands of the defendant planted to beets and load the beets into wagon as instructed by the latter or his agents, at the agreed price of $1 per ton for the beets taken from land yielding 17 tons or more per acre, and $1.25 per ton for beets taken from land yielding or producing less than 17 tons," etc.

The following clauses bearing upon the questions involved in the case are contained in the agreement:

"The party of the first part agrees that all land planted and handled by them and described as follows:

| | | |
|---|---|---|
| No. 1 | .85 | acres |
| No. 2 | 1.10 | acres |
| No. 3 | .15 | acres |
| | | acres |

containing in all 2.10 acres, more or less. is to be cared for by the party of the second part, T. Kataoka."

"Payments are to be made three times in order of the described and as follows, if required by party of the second part, at the rate of four dollars ($4.00) per acre after thinning is done, and after the field is laid by, that is, when the beets have been hoed not less than two times, and are free from weeds, an additional two dollars ($2.00) per acre will be made, the balance remaining due to be paid after all work is finished in accordance with this agreement."

It may be assumed that the decimal points in the former of the two paragraphs quoted were inadvertently inserted, and that the number of acres intended to be described was 210.

It is further alleged that the plaintiff has duly performed all the conditions of the contract, and that upon its completion there was due to him the sum of $3.431.87, of which amount there has been paid to him the sum of $2,904.25, leaving due the sum of $527.12. The defendant in his answer denies that upon the completion of the contract there was due to the plaintiff any sum greater than $2,934.25, of which amount it is alleged he had paid the sum of $2,904.25, leaving due to the plaintiff the sum of $30 only, which, he alleges, he tendered to the plaintiff. This allegation and denial constitutes the only issue in the case, and on this issue the court finds for the defendant. Judgment was entered accordingly, from which, and an order denying his motion for a new trial, plaintiff appeals.

After both sides had rested, and the case was closed, and judgment ordered for the plaintiff for the sum of $30, a motion was made by the plaintiff on affidavit to reopen the case for the purpose of introducing the additional evidence therein referred to; but this motion was denied by the court, and thereupon its findings of fact and judgment were filed. The grounds urged by the plaintiff for reversal are: That the court erred in denying the plaintiff's motion to reopen the case, and in refusing to grant a new trial upon the ground of newly discovered evidence; and that the finding of the court upon the issue involved is not sustained by the evidence.

As to the last ground stated, it is sufficient to say that the evidence taken at the trial is conflicting, with the large preponderance thereof going to support the decision of the trial court.

The motion to reopen the case for further evidence was made several months after the case had been tried and decided. The showing made consisted of several affidavits filed by plaintiff and several affidavits filed on the part of the defendant in rebuttal. There was no objection made to the filing or consideration of these affidavits in rebuttal. The evidence given on this motion was just as conflicting in its nature, and was exactly of the same general character, and directed to the same proposition, as had been the evidence taken upon the trial. It was affirmed on the one side, and denied under oath on the other, that an agreement had been made between the parties that the acreage grown to beets was 166. It was shown by plaintiff that after the trial he had another engineer measure the beet ground, and that this measurement showed that the previous measurement by defendant's engineer was wrong, and that there was considerably above 166 acres grown to beets. On the other hand, several disinterested witnesses gave their affidavits to the effect that plaintiff's engineer had included in his measurement "many acres" that were not grown to beets. The motion to reopen, as well as the motion for a new trial, being submitted to the court upon this conflicting evidence, of course he would not grant either motion, unless he believed the affidavits of the plaintiff to be true. We must presume, in support of the action of the court, that he did not so believe them, and, as the whole matter was within his discretion, he being the judge of the value and effect of the evidence, we are not authorized to interfere with his decision.

Moreover, the alleged new evidence was merely cumulative, and for that reason also the reopening, rehearing, and retrial were properly refused. Patterson v. San Francisco, etc., Co., 147 Cal. 178, 81 Pac. 531.

The judgment and order appealed from are affirmed.

I concur: ALLEN, J.

McFARLAND, J. After a full consideration of the case here, we are satisfied with the foregoing opinion, and with the conclusions therein reached, and for the reasons therein given, the judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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150 Cal. 667

## PAXTON v. PAXTON et al. (four cases). (S. F. 4,625, 4,626, 4,599, 4,600.)

(Supreme Court of California. March 15, 1907. Rehearing Denied April 10, 1907.)

1. Parent and Child—Duty to Support—Enforcement.

Civ. Code, § 206, provides that it is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work to maintain such person to the extent of their ability. *Held*, that such section imposed a legal obligation on parents to support an invalid adult child, which was enforceable by suit in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, § 35.]

2. Same — Judgment—Modification—Reservation.

In a suit by an invalid adult child against his parents for maintenance, as authorized by Civ. Code, § 206, it is competent for the court to reserve power in the decree to alter the same as the subsequent change in circumstances of the parties may require.

3. Same—Suit Money—Counsel Fees.

In a suit by an adult invalid child against his parents for maintenance, as authorized by Civ. Code, § 206, the court had power to make preliminary orders requiring the parents to pay suit money, counsel fees, and maintenance pendente lite.

4. Same—Excessiveness.

In a suit by an adult invalid child against his parents for maintenance, an order directing defendants to pay complainant pendente lite $50 per month for maintenance, $10 for costs, and $150 for counsel fees, did not impose an excessive allowance, where the parents' financial ability was established.

5. Same—Evidence—Admissibility.

In a suit by an adult invalid child against his parents for maintenance, evidence of the latter's ability to contribute to complainant's support was admissible on a preliminary application for maintenance, costs, and counsel fees pendente lite.

6. Venue — Change—Application—Joinder of Defendants.

Where a suit by an adult invalid child against his parents for maintenance was brought in the county where the mother resided, and she did not join in the father's application for a change of venue to the county where he resided, his application was properly denied.

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Suits by John A. Paxton against Blitz W. Paxton and another, and by Roma Paxton against the same defendants. From an order allowing support and counsel fees pendente lite, and denying defendant Blitz W. Paxton's motion for a change of venue, he appeals. Affirmed.

James W. Oates (John M. Burnett, of counsel), for appellant. Charles F. Hanlon, for respondent.

McFARLAND, J. These four appeals arise out of two actions commenced in the superior court—one by John A. Paxton against his father, Blitz W. Paxton, and his mother, Bessie E. Paxton, for maintenance, under section 206 of the Civil Code; and the other a similar action brought by Roma Paxton against the same defendants, who were also her parents. In each of the cases the court made an order allowing small amounts of money for support, counsel fees, etc., pendente lite, and from each of these orders the defendant Blitz W. Paxton appeals. In each of said actions said defendant made a motion for a change of venue from the superior court of the city and county of San Francisco, in which the action was begun, to the superior court of the county of Sonoma, which is alleged to be the county of said defendant's residence. The motion in each case was denied, and from the denial of the motion in each case said defendant appeals. And these four appeals are presented by one transcript, under stipulation of counsel. As respondents do not object to any one of these appeals as not taken from an appealable order, we have assumed that the appeals are all properly taken.

As the two actions are substantially the same, we will direct our attention particularly to the one brought by John A. Paxton. It was averred in the complaint in this action that the plaintiff, John A. Paxton, is the son of the defendant; that he arrived at the age of majority on August 20, 1904, and "ever since has been and now is an adult person, and a poor person, who is unable to maintain himself by work"; that he is an invalid and totally blind and his sight has been permanently lost and cannot be cured; and that by reason of his being an invalid and totally blind he is unable to work or render any service by which he could support himself. It is further averred that each of the defendants is able financially to contribute to his support, the details of this personal ability being stated; that he demanded of each of them that they support plaintiff, and they refused to do so; that a certain sum of money monthly would be a reasonable amount for his maintenance; and that plaintiff was totally unable to proceed with the litigation unless paid certain sums of money pendente lite for support, counsel fees, etc. The prayer is for a temporary allowance of money pendente lite, and that each of the defendants support plaintiff to the extent of the ability of each as long as he shall live and continue unable to support himself by work, and for such other relief, etc. The complaint fully brings plaintiff within the provision of section 206 of the Civil Code, which is as follows: "Sec. 206. Reciprocal Duties of Parents and Children in Maintaining Each Other. It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding." After the commencement of the action, on application of plaintiff, the court made an order that defendants show cause on a named day why an order should not be made that defendants pay plaintiff certain money pendente lite. Defendant Blitz made various objections to the hearing of this application, but they were overruled, and, after a hearing, the court ordered said defendant Blitz to pay plaintiff, pendente lite, $50 per month for maintenance, $10 for costs, and $150 for counsel fees. Defendant demurred to the complaint, and his main objection to said pendente lite order is that the complaint does not state a cause of action, and the court had no jurisdiction to entertain it; and, if that be so, of course, the preliminary order appealed from was unwarranted. The most important question in the case is, therefore, whether such an alleged cause of action as is set forth in the complaint can be maintained in this state.

It will be observed that section 206, Civ. Code, does not provide any procedure or machinery for enforcing its provisions, and no special procedure is prescribed elsewhere. On account of this absence of procedure, appellant contends that there is no method by which section 206 can be judicially enforced. According to this contention, said section is merely an ornamental enunciation of a moral principle which ought to be observed by good people under the circumstances referred to in the section, but is not a law in the sense of a rule of action which such people are legally bound to obey. We do not think that this conclusion is maintainable. It may be admitted that where a statute creates a right, and also prescribes a particular remedy or procedure for its enforcement, such procedure can alone be invoked for such enforcement; but that is as far as the rule goes. In such case the special procedure may be considered as part of the right, limiting and conditioning it; but, where the right is given by statute without any prescribed remedy, it may be enforced by any appropriate method recognized by the general law of procedure. This principle is crystallized in section 1428, Civ. Code, which provides that "an obligation arising from operation of law may be enforced in the manner provided by law, or by civil action, or proceeding." And a suit in equity is peculiarly an appropriate remedy for the enforcement of the duty imposed by said section. This principle was declared in the case of Livingston v. Superior Court, 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175. An equitable action was there held to be the appropriate remedy for the enforcement of the right of a husband, under section 176, Civ. Code, to be supported by his wife, and so far as the remedy is concerned there is no distinction between that case and the case at bar. If an equitable action lies in the one case, it certainly does in the other, for section 206 and section 176 are alike in this respect, that each enjoins a legal duty, but provides no procedure for its enforcement. In the Livingston Case, the court, having referred to the case of Galland v. Galland, 38 Cal. 265, which we also cite on this question, says: "There is no reason why we should not adhere to the doctrine announced in Galland v. Galland, supra. It is in accord with the general principle that where a right exists, and there is no adequate legal remedy, equity will take jurisdiction." The court further says: "Counsel have not pointed out by what ordinary action the obligation could be enforced, and I know of none. In what action, at law, could the court ascertain and determine what monthly allowance should be made for the future support of the husband, and enter a judgment awarding an execution each month for the amount?" It is true that courts have not generally undertaken to enforce the obligation of parents to maintain their infant children. Indeed, in England, under the common law, the maintenance of minor children was considered merely a moral obligation not enforceable at law. It was generally there held that an action against the parent for necessaries furnished the child could not be maintained. This view has also been taken in some American decisions; although in others, the other, and we think the better rule has been declared that an action for necessaries against a parent is maintainable. See Tiffany's Persons and Domestic Relations, pp. 230, 234. It is probable that these later decisions rest on the proposition that the obligation is only a moral one; but that this moral obligation is a good consideration for the furnishing of necessaries, and a sufficient foundation for an action to recover for necessaries which have been actually furnished, although no sufficient foundation for a decree for future maintenance. But in the case at bar we are not concerned with moral obligations. Statutory law does not deal with mere moral obligations. When it declares a duty or a right, it means a legal duty or right. Section 206 is a part of the substantive law of the land, and establishes and declares a legal duty of the parents to maintain their children who are within its provisions, and establishes the right in such children to have such maintenance. As the duty runs to the children, the latter are the persons to whom the right imposed by the duty accrues, and they are the proper parties to an action to enforce such right and compel the performance of such duty. We do not see that any controlling difficulty arises out of the suggestion of appellant that after the entry of such a judgment as is contemplated in this case, and after the time for appeal shall have expired, a change of circumstances might occur by the plaintiff becoming financially able to care for himself, or the defendant becoming financially unable to comply with the judgment, and yet the judgment must stand as originally rendered. A court of equity has wide power as to the forms of its judgments, and in a case like the one at bar there could be no valid objection to the reservation in the judgment of the power to modify it, in the event that changed conditions in the future should justly demand a modification. And with respect to judgments enforcing duties and rights growing out of the domestic relations, the very nature of the judgment requires that there should be a reserved power to meet future exigencies. Our conclusion is that the duty and right established by section 206 of the Civil Code may be enforced by an action in equity like the one at bar, and that in such action a court of equity has full jurisdiction to pronounce a judgment such as is prayed for in the complaint.

As we have occupied considerable space in discussing the main and most important point in the case, we will very briefly notice the other contentions of appellant. The court having, as we have seen, jurisdiction to enforce the provisions of section 206, it had power to make all orders necessary for that purpose, including the orders for suit money, counsel fees, and maintenance pendente lite; and the amounts allowed for such purposes were not excessive.

There was sufficient evidence to sustain the finding of appellant's financial ability to comply with the preliminary order to pay money pendente lite, and with any reasonable final judgment that may be made; and the evidence introduced by respondent showed such ability was not erroneously admitted.

The motions for a change of venue were properly denied, as the defendant Bessie, whose residence was in the county where the action was commenced, was a proper party, and she did not join in the motion.

The plea in abatement on the ground of the pendency of another action was not maintainable.

There are no other points in the case which are tenable, or which call for special notice. The points above noticed are the same as those arising in the case of Roma Paxton v. Blitz and Bessie Paxton; the only difference in the two cases being in the reasons given by Roma why she is unable to support herself, although she also fully brings herself in that regard within the provisions of said section 206.

All and each of the four orders appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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150 Cal. 723

## HIPWELL et al. v. PIONEER INV. & TRUST CO. (L. A. 1,684.)

(Supreme Court of California. March 28, 1907.)

PRINCIPAL AND AGENT—COMPENSATION OF AGENT.

Under a contract reciting that whereas defendant, in addition to its other business, was desirous of establishing a real estate department for the purpose of carrying on and conducting a general real estate, rental, collection, and insurance business, and plaintiffs were desirous of managing and conducting said department for and in conjunction with defendant, defendant agreed to furnish an office and pay all expenses for the proper conduct of said real estate business in a business like manner, and to pay and allow plaintiffs as their compensation for conducting such real estate brokerage business one-half of all commissions, fees, charges or gross profits of all and every character accruing from sales made or other business pertaining or incident to said real estate department, negotiated by plaintiffs, through or in connection with conducting and handling said real estate agency business, and plaintiffs agreed to devote all their time to such business, and providing that it was further agreed that the business of said real estate department should consist in buying, selling, owning, handling, or otherwise dealing in real estate, as a real estate agent or broker, acting as a general insurance agent, and acting as agent in renting real estate and collecting rentals, and further providing that the profits from which plaintiffs should receive their share should include profits from the transaction of the business whether it be brought in or negotiated by plaintiffs or by any of the officers of defendant, plaintiffs are not entitled to half the profits on the purchase and sale by defendant with its money of land, though plaintiffs personally superintended the subdivision of the tract into lots, and the grading and sidewalking of the streets, and defendant sought and obtained the consent of plaintiffs to the employment of outside brokers to negotiate the sales.

Shaw and Sloss, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by R. J. Hipwell and another against the Pioneer Investment & Trust Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

Hunsaker & Britt, for appellants. John S. Chapman, John D. Pope, and Tom C. Thornton, for respondent.

BEATTY, C. J. In October, 1892, the parties to this action entered into a contract in writing as follows:

"This agreement made and entered into this 16th day of October, 1902, by and between the Pioneer Investment & Trust Company, a corporation, party of the first part, and R. J. Hipwell and T. R. Grandstaff, parties of the second part, witnesseth:

"That, whereas said party of the first part is desirous of establishing in connection with its stock and bond brokerage, corporate agency and promotion business, a real estate department, for the purpose of carrying on and conducting, in the city of Los Angeles and elsewhere, a general real estate, rental, collection and insurance business; and, whereas, the parties of the second part are desirous of taking charge of and managing and conducting said real estate department for and on behalf of and in conjunction with the party of the first part:

"Now, therefore, the party of the first part agrees to furnish and equip a suitable room, in connection with its general offices in said city of Los Angeles for the use of said parties of the second part in conducting said real estate business, and it is also agreed that said party of the first part pay all reasonable expenses of maintaining the same, such as rent, telephone, stationery and advertising and make all other outlays necessary or incident to the proper conduct of said real estate business in a businesslike manner.

"The party of the first part further agrees that it will pay and allow said parties of the second part, jointly, as their compensation, and in full for their services for conducting and managing such real estate brokerage business, one-half of all commissions, fees, charges or gross profits, of all and every character accruing from sales made or other business pertaining or incident to said real estate department, negotiated by said parties of the second part or either of them, through or in connection with conducting and handling said general real estate agency business.

"The parties of the second part agree that they will faithfully devote their whole time during reasonable business hours, and will exert their best endeavors toward conducting the affairs of said real estate department in a businesslike manner and for the best mutual interests of all parties hereto, and they further agree that they will accept, in full payment for their said services the said one-half of the gross receipts of all said business negotiated, handled and conducted by them as hereinbefore expressed.

"It is further agreed that the business of said real estate department shall consist in buying, selling, owning, handling or otherwise dealing in real estate or real property or interests therein, as a real estate agent or broker; acting as a general insurance agent in negotiating and placing fire insurance on all and every character of property either as broker for insurance companies or representative of other agents for such companies; acting as agent for owners of real property in renting or leasing same and collecting and accounting for the rentals or other profits thereof; and said business of said department shall in no wise be construed to include the stock, bond, brokerage or other business of said party of the first part and the proportion of profit accruing to the parties of the second part shall bear no relation thereto.

"It is further agreed that all the business of said real estate department shall be conducted in, by and under the name of the party of the first part as a corporation, and that the parties of the second part shall act in all things pertaining to conducting said real estate department, by, through and with the general direction of the officers of the party of the first part.

"It is further agreed that all profits accruing from such business, so handled or negotiated by the parties of the second part, and all record of business pertaining thereto shall be reported as soon as practicable to the secretary or other authorized officer of said party of the first part, and the record thereof kept, and all moneys or property incident thereto handled, in pursuance of the by-laws and authorized orders of the board of directors of said party of the first part.

"It is further agreed that the profits from which said parties of the second part shall receive their share or division, as aforesaid, shall include profits arising from the transaction of the business of said department, whether the same be brought in or negotiated by said parties of the second part or by any of the officers of the party of the first part.

"The life of this contract shall be one year from date subject to revocation or amendment by said parties hereto.

"In witness whereof," etc.

Pursuant to said contract, a "real estate department" of defendant's business was established and put in charge of the plaintiffs, but it does not appear that they transacted any business except that out of which this litigation has arisen. Very soon after the date of the contract, they negotiated for the purchase by defendant of a tract of land in the city of Los Angeles, which was surveyed, subdivided into lots, and mapped as the "Hollenbeck Heights tract." The plaintiff Hipwell took actual charge on the ground of the work of surveying, grading of streets, and sidewalking said tract, and had personal supervision and charge of the grading outfit and of the working force during those necessary preliminaries to the marketing of the lots. When the lots were put upon the market, defendant sought and obtained from plaintiffs permission for the employment of outside brokers, and the allowance of commissions to them on such sales as they should make. All but 11 of the lots were sold for about $12,267. They had cost, including purchase price of the tract and expense of subdividing, grading, etc., about $8,639, so that the profits of the speculation amounted to $3,628. Plaintiffs asserted a claim under the contract to one-half of these profits. Defendant denied their claim to a share of the profits of the speculation, contending that under the contract they were entitled to no more than one-half of the commissions on the sales that had been made. As a result of this difference, defendant, on the 1st of February, 1903, terminated the contract, and plaintiffs commenced the present suit for an accounting of the profits of the transaction here detailed, and for a recovery of the one-half which they contend they are entitled to under the terms of the agreement as above set forth. Defendant answered, defending the action upon its construction of the contract, and the superior court, upon findings of fact which are substantially embodied in the foregoing statement, sustained the defense, giving judgment to the plaintiffs for only a small balance found due for commissions, without costs. The appeal is from the judgment alone, and presents the single question of the true construction of the written agreement.

Looking alone to the terms of the writing, its meaning cannot be said to be entirely clear, but the weight of the argument, I think, is very decidely in favor of the construction placed upon it by the superior court. The "general real estate, rental, collection and insurance business," to be added as a department to the established business of the defendant, does not, ex vi termini, imply, and certainly does not express, anything more than the usual brokerage business conducted by real estate and insurance agents, and we find in a subsequent clause that the business is expressly designated as "such real estate brokerage business" in immediate connection with the stipulation fixing the compensation of the plaintiffs for their services, which is to be "one-half of all commissions, fees, charges, or" (not and) "gross profits of all and every character arising from the sales," etc. Here, it will be seen, commissions, fees, and charges, according to the grammatical construction of the sentence, are made the equivalent of gross profits, and those words have no application to the selling price of lands, or to the difference between the purchase price and the selling price.

But counsel for appellants strongly insist that in another and subsequent clause of the agreement the parties have given, as they had a right to do, a definition to the purpose and scope of their contract, which, so far as it is unambiguous, the court is bound to accept. The legal proposition is conceded, but it is denied by respondent that the definition in question is unambiguous or at all in conflict with what appears in the previous clause. The language of the clause here referred to is: "It is further agreed that the business of said real estate department shall consist in buying, selling, owning, handling, or otherwise dealing in real estate, or real property, or interests therein, *as a real estate agent or broker*," etc. I have italicized those parts of this clause to which the respective parties attach peculiar importance. Respondent contends that the words "as real estate agent or broker" qualify everything that go before, while the argument on the other side is that it would be absurd to connect them with the word "owning," for the reason that there can be no such thing as owning property in the capacity of broker. It cannot be denied that grammatically the last words of the clause do qualify all that precedes them, and it is equally undeniable that to allow them that effect as to the word "owning" is to produce a legal absurdity. The result, however, is simply to add an ambiguity to what is otherwise clear, and this requires the rejection of the ambiguity. But even if the word "owning" should be taken by itself, detached from its context, it is clear that all the other words, "buying, selling," etc., are qualified by the words "as a real estate agent and broker," and this renders the word "owning" entirely meaningless, for the mere owning of property is not a business, or any part of a business. Especially it is not a business involving fees, charges, commissions, or profits gross or net. Nothing is to be gained, I think, by further attempts at mere verbal analysis of this clause of the agreement. There is, in my opinion, a more conclusive argument against the construction contended for by appellants in the fact that the agreement is perfectly silent as to the manner in which funds are to be provided for the purchase of property by the department. If, as contended, it was the understanding that, in addition to its brokerage and agency business, the department was to engage in the purchase and sale of real property on its own account, it seems incredible that parties stipulating so carefully, and with such redundancy of words regarding other matters, and so explicitly enumerating the various items of office expenses to be borne by defendant, should have omitted to make any provision for raising or advancing the funds necessary to effect the contemplated purchases. Upon this point I have not failed to consider the argument of counsel that the advance of the necessary funds for this purpose by the defendant is stipulated in the general words of the third clause of the contract: "And make all other outlays necessary or incident to the proper conduct of the said real estate business in a businesslike manner." I think, however, that these words, taken in the connection in which they occur, and with the qualification which they contain, cannot be held to refer to anything except the expenses of conducting the business of the office. They are to be construed according to the maxim, "Noscitur a sociis," and cannot be extended so as to comprehend an obligation on the part of defendant to provide all the purchase money for contemplated purchases of property to be improved and sold on speculation.

Another argument in favor of appellants' contention is based upon the frequent occurrence of the word "profits" in the agreement; the argument being that it is a word fitly used in reference to the excess of the selling price of land or other commodity over cost, but is not properly descriptive of the earnings of a broker in the form of commissions, fees, etc. It seems a sufficient answer to this argument to say that in a contract like this the fees and commissions of the brokers, being the profits of the business, are properly so designated.

It is further contended, and must be conceded, that in construing a contract, the situation of the parties—the surrounding circumstances—must be considered, and it is claimed that the court cannot put itself in the position of these parties without taking judicial notice that by the prevailing custom a general real estate business, especially in Los Angeles for several years prior to October, 1902, has comprehended not only agency or brokerage in the purchase and sale of lands, but purchase and sale on account of the broker or firm of brokers. Without deciding the legal proposition involved in this argument, it may be conceded for the purposes of this decision that the parties to this agreement were well informed of the custom said to have been prevalent among real estate brokers in Los Angeles of combining with their brokerage business ventures on their own account. But, on this supposition, it seems all the more strange that, if they expected to conform to the custom, they should have omitted all provision for the contribution of the purchase money necessary in such ventures. If they knew that they could combine speculation with agency, they knew equally well that they could confine themselves to agency, and from the terms of their agreement it would seem that they did so.

The contention of appellants that it is altogether unreasonable to suppose that they would have entered into this agreement to give their whole time to the business of the department for one-half of the commissions, when they could have gone into business by themselves and retained the whole of the commissions, rests upon the assumption that they could foresee the failure of the projected brokerage business which they had in contemplation. No doubt they expected success where they encountered only failure. Perhaps they were without the necessary means to provide an office and pay the expenses involved in what appears to have been an experiment to last for a year—the business to be continued or abandoned according to the results. If they had made the experiment upon their own resources, their small gains might have been a considerable loss. Conducted as it was, in connection with the defendant, the only business the department ever did (so far as appears) was the negotiation of the purchase and sale of this Hollenbeck Heights tract—property purchased and improved by the defendant with its own funds and at its own risk. It does not seem to be a valid ground of complaint on the part of the plaintiffs that the defendant gave them the only opportunity they had to make any earnings at all during the 14 weeks the business continued. The only remaining argument in support of the appeal which seems of sufficient importance to demand particular consideration is based upon the merely probative facts found by the court that the plaintiff Hipwell personally superintended the subdivision of the tract and the grading and sidewalking of the streets, and that the defendant sought and obtained the consent of the plaintiffs to the employment of outside brokers to negotiate sales. This it is contended shows the practical construction of the contract by the parties, and that they understood that the profits of the speculation were to be shared equally between them. But the court does not so find, and its conclusion as to the proper construction of the agreement cannot be set aside on the strength of these findings, unless they are absolutely and fatally inconsistent with that conclusion. No such inconsistency is apparent. Assuming the contract to have been confined to a brokerage business, there is nothing inconsistent in the fact that the defendant, on the suggestion of plaintiffs, should have bought the Hollenbeck tract and prepared it for sale at its own expense and risk. Nothing in the contract excluded it from engaging in such a venture, and nothing in the contract required it to share the gains of the speculation, any more than it requires the plaintiffs to bear a share of the loss. That Hipwell should have superintended the subdivision of the tract, the grading, etc., is not surprising, if his department was to have commissions on the sale of the lots, especially considering that the department had nothing to do until the subdivision, grading, etc., was complete, and these lots in a condition to be put upon the market. And, if he did superintend the preparation of the lots for sale upon an understanding, tacit or otherwise, that the department was to negotiate the sales, it was natural that defendant should ask the consent of plaintiffs to the employment of outside brokers, and the payment to them of a portion of the commissions. In view of these considerations, it cannot be held that there is any fatal inconsistency between these probative facts and the conclusion of the superior court that the contract of the parties did not cover the profit of the Hollenbeck tract venture.

The judgment of the superior court is affirmed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; LORIGAN, J.

We dissent: SHAW, J.; SLOSS, J.

150 Cal. 731

## WILSON v. SOUTHERN PAC. R. CO. (L. A. 1,704.)

(Supreme Court of California. April 1, 1907.)

JUDGMENT—RES JUDICATA.

In an action against a railroad to recover money paid for land, part of a government grant where the plaintiff contended that it had been finally determined that patent should not issue to the railroad, a decision of the Supreme Court of the United States involving other lands identically situated is binding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1242–1247.]

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Phillip L. Wilson against the Southern Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Singer, Jr., and Guy Shoup, for appellant. Frederick W. Houser and Camp & Lissner, for respondent.

HENSHAW, J. This is an action by plaintiff to recover from defendant moneys paid on account of the purchase of lands. In its nature it is like the cases of the Southern Pacific R. R. Co. v. Lipman, 83 Pac. 445, 148 Cal. 480, and Wilson v. Southern Pacific R. R. Co., 135 Cal. 421, 67 Pac. 688, where the facts will be found sufficiently stated.

In this case plaintiff contends that it has been finally determined that patent shall not issue to the defendant, and that, therefore, he is entitled to his recovery. This contention he charges in two counts, the first based upon decisions of the Supreme Court of the United States; the second upon the fact that patent has actually issued to him.

The first of these propositions is the only one that requires consideration. The court found that it had been finally adjudicated and decided that patent was not to issue to the defendant. Its conclusion was based upon the decision of the Supreme Court of the United States in Southern Pacific R. R. Co. v. U. S., 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355. By appellant it is contended that, while it is true that a part of the land in controversy in that case was within the indemnity limits of the branch line grant to the Southern Pacific, there was no discussion whatever of the question whether lands within the indemnity limits of a railroad grant, which were reserved at the time of the grant but subsequently restored to the public domain, could, after such restoration, be selected by the railroad company in lieu of losses within the primary limits; that such was what was actually done in the case at bar and the right of the railroad company so to do, and the investment of title in the railroad after so doing, are matters which have never been adjudicated against appellant's contention, and certainly not by the decision in the 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355.

It is true that the question as to the precise lands here in controversy has never been decided, but, as was said in S. P. R. R. Co. v. Painter, 113 Cal. 247, 45 Pac. 320, such a determination as to the precise lands in controversy is not necessary, if there be a determination touching lands in all respects of like character. In S. P. R. R. Co. v. U. S., 189 U. S. 447, 23 Sup. Ct. 567, 47 L. Ed. 896, some of the lands were within the indemnity limits of the same branch line grant involved in the case at bar. They were within the place limits of the Texas Pacific grant, which grant was expressly given the same precedence that was accorded to the Atlantic & Pacific grant under the act of 1866. It would seem, therefore, that the situation of the lands was identical with that here presented, and it seems so to have been regarded by the Supreme Court of the United States. The right to make a selection of indemnity lands within the forfeited place limits of the primary grant to the Texas Pacific Company was presented and argued. The Supreme Court said: "The Texas Pacific grant was declared forfeited by Act February 28, 1885.

c. 265 (23 Stat. 337), and this forfeiture inured to the benefit of the United States. United States v. Southern P. R. Co., 146 U. S. 570, 36 L. Ed. 1091, 13 Sup. Ct. 152. It is argued, further, however, that, if the Southern Pacific did not get the lands in question under its primary grant, it may take a part of them as indemnity lands. It is said that the company has a right to take them for that purpose if the status of the lands at the time of the selection permits it. Ryan v. Central P. R. Co., 99 U. S. 282, 25 L. Ed. 305. That contention seems to have been disposed by Southern P. R. Co. v. U. S., 168 U. S. 1, 47, 66, 42 L. Ed. 355, 376, 382, 18 Sup. Ct. 18, and the practice of the Land Department for many years has been inconsistent with it. Southern P. R. Co. v. Moore, 11 Land Dec. Dep. Int. 534; Moore v. Kellogg, 17 Land Dec. Dep. Int. 391; Smead v. Southern P. R. Co., 29 Land Dec. Dep. Int. 135. When it is decided that the company got no title to the land within its 20-mile limit, it would be contrary to the intimations of the cases to allow it to take the adjoining strip outside under a claim of indemnity. See Bardon v. Northern P. R. Co., 145 U. S. 535, 545, 36 L. Ed. 806, 811, 12 Sup. Ct. 856; Clark v. Herington, 186 U. S. 206, 46 L. Ed. 1128, 22 Sup. Ct. 872. It is not clear that the language of the statute does not forbid it."

We can construe this language in no other way than as an adjudication by the highest authority upon the interpretation to be given to its decision in the 168th volume of its reports, and, as the question relates to the public domain and the construction of acts of Congress, the decisions of that court are, it is unnecessary to say, binding authority upon this.

For which reason the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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(150 Cal. 764)

## BLOOD v. LA SERENA LAND & WATER CO. et al. (L. A. 1,580.)

(Supreme Court of California. April 2, 1907.)

1. APPEAL — GROUNDS OF REVIEW — MOTION FOR NEW TRIAL — SUFFICIENCY OF STATEMENT.

Code Civ. Proc. § 661, provides that, where a motion for a new trial is made on the minutes, the record on appeal consists of the judgment roll, "and a statement to be subsequently prepared, with a copy of the order," and that "the statement shall only contain the grounds argued before the court for a new trial and so much of the evidence * * * as shall be necessary." *Held* that, where the order denying motions for a new trial on the minutes of the court recited that the motions were submitted "without argument," the statement could not contain any ground of motion for a new trial, nor any evidence applicable thereto, and there was nothing to review in denial of the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2945.]

2. SET-OFF AND COUNTERCLAIM — SUBJECT-MATTER — CORPORATIONS — LIABILITY FOR CORPORATE DEBTS.

In an action by one stockholder who is a judgment creditor of a corporation, primarily against other stockholders to recover from them amounts due the corporation on subscriptions to stock, although the corporation was made a party to the action, the individual defendants cannot set off against their indebtedness the unpaid subscription for stock which the plaintiff owed the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, §§ 76, 77, 81.]

3. CORPORATIONS—STOCKHOLDERS' LIABILITY—SEVERAL LIABILITY.

A creditor of a corporation, in a suit against stockholders to recover unpaid subscriptions to stock, is not limited in his recovery to the amount represented by the proportion which the defendants' unpaid subscription bears to all unpaid subscriptions, since their liability is several, and not joint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 981.]

On Rehearing.

4. APPEAL—RECORD—SCOPE AND CONTENTS.

A statement on motion for a new trial, although not sufficient for the purpose of reviewing the orders denying a new trial, may be considered on appeals from the judgment under Code Civ. Proc. § 950, providing that any statement settled after decision of a motion for a new trial made upon the minutes of the court is to be used on appeal from a judgment.

In Bank. Appeal from Superior Court, Santa Barbara County; Felix W. Ewing, Judge.

Action by James A. Blood, Sr., against the La Serena Land & Water Company and others. From a judgment for plaintiff, the defendants, except McDuffie and Wells, appeal. Affirmed.

Richards & Carrier and Booth & Bertnett, for appellants. W. S. Day, for respondent.

SLOSS, J. The plaintiff, a judgment creditor of La Serena Land & Water Company, a corporation, brought this action against the corporation and certain holders of its capital stock to recover from the individual defendants the unpaid subscriptions on their stock, and to apply the same in satisfaction of his judgment. The plaintiff had brought an action against the corporation to foreclose a mortgage, and obtained a decree of foreclosure. See Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; Id., 134 Cal. 361, 66 Pac. 317. The mortgaged property sold for an amount less than was due on the mortgage, resulting in the docketing of a deficiency judgment against the corporation for $22,105.97. The present action was dismissed as to the defendant Wells. The court found that the defendant McDuffie had, prior to the commencement of the suit, assigned his stock to the plaintiff. Judgment went against the corporation and the remaining four defendants, James L. and Martha S. Barker, James W. Orr, and R. W Evans. Said defendants moved for a new trial, which was denied, and now appeal from the order denying their motions and from the judgment.

The only ground urged in support of the appeals from the order denying the new trial is the insufficiency of the evidence to sustain certain findings. The respondent contends that there is no sufficient record on which to review the action of the lower court in refusing a new trial. This contention, we think, must be sustained. The transcript contains merely (in addition to the judgment roll) a statement of the case and the order of the court denying the motions. The statement, which contains no copy of the notices of intention to move for a new trial, was settled March 12, 1904, and filed March 14, 1904. The order denying the motions for a new trial was made and entered February 5, 1904, more than a month before the settlement or the filing of the statement. It is obvious, therefore, that the motions for new trial must have been made on the minutes of the court, since such motions, if made upon affidavits, upon a bill of exceptions, or upon a statement of the case, cannot be heard until "after the affidavits, bill of exceptions, or statement, as the case may be, are filed." Code Civ. Proc. § 660. Where the motion is made on the minutes of the court, the record on appeal consists of the judgment roll, "and a statement to be subsequently prepared, with a copy of the order." Code Civ. Proc. § 661. The same section provides that, in cases of such motions, "the statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as shall be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement." The evident intent of this provision is that, where there is an appeal from an order granting or denying a motion for new trial made on the minutes of the court, the review by the appellate court shall extend only to the matters presented and argued to the lower court in support of the motion. Other grounds are not to be regarded as justifying or requiring the granting of such motion. And there is good reason for this limitation. Where a party moves for a new trial without having first prepared and presented a record, whether by way of affidavits, bill of exceptions, or statement, it is only fair to the court which is asked to grant a new trial upon its recollection of the proceedings that its attention be specifically directed to the matters in which error is claimed to have been committed. But whether the provision of section 661 is founded in good reason or bad, its language is clear and unambiguous. The statement is to contain only the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain those grounds. Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012. Everything else is to be excluded from the statement. If other matter should happen to be incorporated, it is surplusage, and must be disregarded. It follows that, where a motion for new trial, made on the minutes of the court, is submitted without any ground being argued, and is denied, there is nothing which can properly be incorporated in a statement, and nothing on which the appellate court can base a review of the order made. It is true that, where specifications of error or of insufficiency of evidence are set out in the statement, it will be presumed that they were in fact argued. Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66. But no such presumption can be indulged where the record affirmatively shows that the fact is otherwise. In the present case the order denying the motions for new trial (which is, under Code Civ. Proc. § 661, a part of the record on appeal) recites that the motions were submitted "without argument." In the face of this, we cannot presume that any of the grounds were argued. The statement, therefore, could not properly contain any ground of motion for new trial, nor any evidence applicable to any ground. There is nothing before the court on which to review the ruling of the trial court in denying the motion, and its order must be sustained without an examination of the evidence.

Being limited, therefore, to a consideration of the appeals from the judgment, we are to determine whether the findings made by the court support the judgment. The essential facts found are the following: The corporation was organized in 1887, with a capital stock of 300 shares, of the par value of $500 per share. Of this number 210 shares were subscribed and outstanding. On these it is found that only 50 per cent. of the subscription price had been paid. At the time of the commencement of the action, plaintiff was the owner of 130 shares, on which there is due for unpaid subscriptions $32,500, and the four individual defendants against whom judgment went were the owners of 42 shares, on which there is due for unpaid subscriptions $10,500. The remaining 38 shares were held by parties not before the court. The findings show the judgment against the corporation above referred to, and declare that said corporation ever since the date of the judgment against it has been insolvent, and that it had no assets other than the property sold under foreclosure and the unpaid subscriptions of its stockholders. As conclusion of law, the court found "that the plaintiff, being himself a debtor of said corporation, should contribute ratably with the defendants James L. Barker, Martha S. Barker, James W. Orr, and R. W. Evans toward the discharge of his said demand against said corporation; and the defendants James L. Barker, James W. Orr, Martha S. Barker, and R. W. Evans must each contribute proportionately with the plaintiff toward the discharge of the plaintiff's demand against the corporation." Judgment was entered against the corporation and the said individual defendants in accordance with said conclusion of law.

The jurisdiction of a court of equity, at the instance of a creditor or creditors of an insolvent corporation, to compel its stockholders to pay their subscriptions in order to satisfy the corporate debts, is well established. Harmon v. Page, 62 Cal. 448; Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; Walter v. Merced Academy Ass'n, 126 Cal. 582, 59 Pac. 136; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319. The only question in this case is how far the plaintiff's right of recovery is affected by the fact that he himself is a stockholder of the corporation, and is indebted to it for unpaid subscriptions. It is contended by the appellants that, inasmuch as plaintiff's liability for unpaid subscriptions exceeded the amount of his claim against the corporation, such liability should be set off against his claim, and no recovery be allowed at all; but this position, we think, cannot be sustained. While the corporation is a party defendant to the suit, it is not an indispensable party (Potter v. Dear, 95 Cal. 578, 30 Pac. 777), and the action is primarily against the defendant stockholders to recover from them amounts due the corporation which are properly applicable to the payment of the debts of the corporation. Such individual defendants do not stand in the position of the corporation itself, and should not be permitted to set off against their indebtedness claims due from the plaintiff to the corporation. It has been held in other jurisdictions that a creditor of a corporation who is himself a stockholder, and therefore liable for unpaid subscriptions, may, without fully paying his own subscription, maintain an action against other delinquent stockholders to enforce payment of a judgment obtained by him against the corporation. Bissit v. Kentucky River Navigation Co. (C. C.) 15 Fed. 353; Wilson v. Kiesel, 35 Pac. 488, 9 Utah, 397. No decision to the contrary has been called to our attention, and we think these cases declare the proper rule. The plaintiff, as a creditor, is entitled to look for the satisfaction of his debt to the fund composed of the unpaid subscriptions of the stockholders. As a stockholder owing a subscription, he is bound to apply this subscription toward the satisfaction of the debts of the corporation; but there is no reason why, merely because he unites in his own person the two characters of creditor and stockholder, he should, as stockholder, be compelled to bear the entire burden of satisfying his own claim, for which other stockholders are equally liable. The just and equitable rule appears to us to be that declared in Bissit v. Kentucky River Navigation Co., and Wilson v. Kiesel, supra, i. e., that in such case the plaintiff stockholder must contribute ratably with the defendant stockholders toward the liquidation of his demand against the corporation. This was the principle applied by the trial court as enunciated in the conclusion of law above quoted. Under it the court ascertained the total amount of the plaintiff's claim, and apportioned the payment of that claim among the plaintiff and the defendants in proportion to the amounts respectively due from them for unpaid subscriptions.

It is contended by the appellants that, if such rule of contribution be proper, it should only be applied as among all of the stockholders, not merely among those who are parties to the action; that the plaintiff is entitled to recover from the defendants, not the proportion which their unpaid subscriptions bear to the sum of his and theirs, but only the proportion which their unpaid subscriptions bear to the total unpaid subscriptions owed by all stockholders of the corporation. We think, however, that this view is inconsistent with the rule declared in Baines v. Babcock, supra, and the cases following it. In Baines v. Babcock it was held, following the decision in Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885, that in a suit to enforce the payment of such subscriptions it is not necessary to join all of the stockholders. The following language from the opinion in Hatch v. Dana was quoted: "The liability of a stockholder for the capital stock of a company is several and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers, and in equity his liability does not cease to be several." The same rule was applied in Walter v. Merced Academy Ass'n, supra. See, also, Welch v. Sargent, 127 Cal. 72, 80, 59 Pac. 319. Under these cases a creditor is not limited in his recovery to the amount represented by the proportion which the defendants' unpaid subscription bears to all unpaid subscriptions. He may sue any one stockholder and recover from him his total debt, provided it does not exceed the amount of the defendants' liability for subscription. We cannot see why a different rule should be applied when the plaintiff himself is a stockholder. The fact that he himself is indebted for unpaid subscriptions merely furnishes a reason for equitably adjusting the liabilities of the parties before the court. The purpose of the action is not to wind up the affairs of the corporation and adjust the rights of all the stockholders. Hatch v. Dana, supra. It is merely to subject to the payment of the plaintiff's demand the amount owed to the corporation by the defendants before the court. As between them and the plaintiff it appears that there are equities which require the plaintiff to meet the payment of a portion of his demand. The argument that it is unjust to compel the defendants to pay an amount which might have been recovered from other stockholders, if they had been made parties, applies with equal force to the case where the plaintiff is a stranger to the corporation, as where he is himself a stockholder. The liability of the defendants being several, the court properly adjusted the equities as between the parties before it.

It may be observed, further, that the defendants made no motion to have the remaining stockholders brought in. On the face of plaintiff's complaint it did not appear that he was a stockholder. He brought his action against certain stockholders as, under the doctrine of Baines v. Babcock, and similar cases, he had a right to do. The defendants set up, by way of defense, the fact that he as a stockholder was also indebted to the corporation. If the presence of the other stockholders was necessary to a complete adjudication of the rights of the parties, and a determination of the amount ultimately due from each, the defendants should have taken steps to have had such other stockholders brought in. Hatch v. Dana, supra.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

PER CURIAM. In their petition for rehearing, the appellants urge that the statement on motion for new trial may be considered by this court on the appeals from the judgment, even though such statement cannot be resorted to for the purpose of reviewing the orders denying a new trial. Code Civ. Proc. § 950; Wall v. Mines, 128 Cal. 136, 60 Pac. 682; Kelly v. Ning Yung Ass'n, 138 Cal. 602, 72 Pac. 148; Vinson v. Los Angeles Pac. R. R. Co., 141 Cal. 151, 74 Pac. 757. Some of these appeals from the judgment were taken within 60 days after the rendition of the judgment, and, as to them, the statement may be used for the purpose of determining the sufficiency of the evidence. Code Civ. Proc. § 939; Pease v. Fink (Cal. App.) 85 Pac. 657. Recognizing the soundness of this position of the appellants, which was not advanced when the appeals were submitted, we have carefully examined the evidence shown in the statement. This examination satisfies us that the findings complained of are fully supported by the evidence.

In view of this conclusion, there is no good reason for further considering the case, and the petition for rehearing is denied.

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150 Cal. 701

## HUTSON et al. v. SOUTHERN CALIFORNIA RY. CO. (L. A. 1,491.)

(Supreme Court of California. March 25, 1907. Rehearing Denied April 23, 1907.)

1. Railroads—Negligence—Crossing Accidents — Contributory Negligence — Submission to Jury.

In an action against a railroad for injuries received in a collision at a crossing between the wagon wherein plaintiffs were riding and defendant's train, evidence *held* to justify the submission to the jury of the question of plaintiffs' contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1166.]

2. Same—Care Required of Person Crossing Track.

One approaching a railroad crossing is not authorized to assume that the persons operating a train will not in any way be negligent in its operation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1071–1074.]

3. Negligence — Instructions — Burden of Proof.

In an action for injuries through negligence, an instruction that the burden of proving contributory negligence to the jury's satisfaction by a preponderance of the evidence, etc., rested on defendant, was subject to criticism as tending to make the jury believe that something more than the weight of the evidence or preponderance of probability was required.

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Lucian Shaw, Judge.

Action by Albert Hutson and another against the Southern California Railway Company. Judgment for plaintiffs and defendant appeals. Reversed.

Rehearing denied; Beatty, C. J., and Shaw, J., dissenting.

J. N. Norton, E. W. Camp, Paul Burks, and E. E. Millikin, for appellant. J. H. Merriam and Hunsaker & Britt, for respondents.

PER CURIAM. When this case was in department, in the opinion there rendered it was said:

"This is an action for damages, wherein plaintiffs charge that, by the negligent operation of defendant's train, they were struck by it while crossing the track of defendant, and sustained the injuries for which the damages were sought. Plaintiffs were riding in a heavy wood wagon drawn by two horses, and were approaching the crossing at which there were two tracks, the tracks of the Terminal Railway and the tracks of the defendant's railway. They had passed over the track of the Terminal Road, and their horses were about to step onto defendant's track, when they discovered that the locomotive of a south-bound freight train on defendant's track was approaching within 150 feet of the crossing. Plaintiff Albert Hutson, who was driving, then made an effort to stop his horses, but did not apply the brake, and immediately thereafter urged his horses forward and across the track. The older boy of the two children who were in the wagon with him ran to the rear end of the vehicle and jumped out, and the father tossed the other boy to the ground. The engine collided with the rear half of the wagon, and both the plaintiffs were thrown to the ground and injured. The negligence of the defendant, as alleged, consisted in its failure to give any warning of the approach of the train by blowing the whistle or ringing the bell, and it was further charged that the train approached the crossing at a negligently high rate of speed. This speed was estimated by the various witnesses at from 16 to 20 miles an hour. The view of plaintiffs approaching the crossing was obstructed, though there was a place of safety near the track where plaintiffs could have stopped the team and had a clear view. It was first urged by appellant that, as matter of law, plaintiffs were guilty of such contributory negligence as to preclude recovery; but upon a review of the whole evidence we think that this question was fairly submissible to the jury.

"The court, however, erred in certain instructions given to the jury, and these errors demand a new trial of the case. The court instructed the jury as follows: '(6) You are instructed that the plaintiffs had a right to drive in the road or street where they were and to cross the defendant's track, and they are not chargeable with contributory negligence in endeavoring to cross the track, provided they adopted all reasonable precautions against injury from moving trains, and they are not chargeable with contributory negligence, unless they failed to take such precautions. In determining whether the plaintiffs took all reasonable precautions, the jury should consider the situation of the crossing and the circumstances attending the accident, bearing in mind that the plaintiffs had a right to rely on the performance by the defendant's employés of every act imposed by law upon them when approaching a crossing with their train. The plaintiffs, and each of them, were authorized to assume that the men in charge of the train would approach the crossing with due care, without running at an excessive or unreasonable rate of speed, and would cause the bell on the engine to be rung and kept ringing for the distance of 80 rods before reaching the crossing. The acts and conduct of the plaintiffs, and each of them, in looking out and listening for the approach of the train are therefore to be considered in connection with the assumption, which they had the right to make, that care in the management of the train would be exercised in the manner just indicated.'

"It is not the law of this state that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the states, but it is opposed to the law as laid down in the decisions of this state and of the Supreme Court of the United States. Such a rule would abrogate the doctrine of contributory negligence in all such cases, and in the early case of Meeks v. Southern Pacific R. R. Co., 52 Cal. 604, this court said: 'The 486th section of the Civil Code, providing that a railroad corporation shall be liable for all damages sustained by any person and caused by the locomotive of the corporation when a bell is not sounded or a whistle blown as directed by that section, does not abrogate the doctrine of contributory negligence, or operate to give a right of action where the negligence of the plaintiff * * * materially and proximately contributed to the injury.' In Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651, this precise question was involved; this court saying: 'The only answer to this is that defendants' employés did not ring the bell or sound the whistle, and that the fireman was not at his place on the left side of the engine. The argument, of course, is that if the signals had been given plaintiff might have heard, and, not hearing them, he had the right to assume when he was about to make the crossing that the train had not then reached the whistling post, 1,325 feet above, and that the fireman might have seen him in time to have prevented the accident had he been on the lookout. It may be admitted that all this was culpable negligence on the part of defendants' employés. The defense of contributory negligence implies that defendant may have been guilty of such negligence as would justify a recovery by the plaintiff if he were not also in fault. This is no argument, therefore, against the position of the defendant.' In Green v. Southern California Ry. Co., 138 Cal. 1, 70 Pac. 926, the rule of law laid down in Herbert v. Southern Pacific Co. is reaffirmed; the chief justice placing his concurring opinion upon this precise ground. The same doctrine is also announced in Pepper v. Southern Pac. Co., 105 Cal. 398, 38 Pac. 974, and in Bilton v. S. P. Co., 83 Pac. 440, 148 Cal. 443. The rule is simply this: That a railroad crossing, from its very nature, is always a place of danger, and a traveler has no right to omit any of the care which the law demands of him, upon the assumption that due care will be exercised in the operation of the train. Says the Circuit Court of Appeals, in Erie Railway Co. v. Kane, 118 Fed. 234, 55 C. C. A. 129: 'Again, counsel for defendant in error urges that it was not negligence for decedent to be there, because he was not bound to anticipate Bowker's negligence through which the collision came about. It is never negligence, they say, for one not to anticipate negligence in anybody else. There is, however, no such general rule of law or prudent conduct. There are instances where as a matter of law it is negligence not to anticipate negligence in others. As, for instance, it is well settled in the federal courts that it is negligence for a highway traveler not to anticipate failure on the part of an engineer to give appropriate signals of approach of his train to a highway crossing. He has no right not to look or listen because he has heard no such signals.' This is in accord with the doctrine of the Supreme Court of the United States, as laid down in Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542, where it is said: 'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employés in these particulars was no excuse for negligence on her part. She was bound to listen or look before attempting to cross the railroad track in order to avoid an approaching train and, not to walk carelessly into a place of danger.'"

The foregoing language is adopted and adhered to. In contemplation of the new trial which must be ordered, it should be said that instruction 7, as given by the court, contains the same error of law as that in the instruction just discussed. Additionally, it dangerously approaches the forbidden territory of instructions upon the facts. The court also instructed the jury that: "As said above, the burden of proof of such contributory negligence rests upon the defendant, unless it proves the same *to your satisfaction* by a preponderance of the evidence," etc. It would be better to omit the words here italicized. In a civil case it is the weight of evidence or preponderance of probability which is sufficient to establish a fact. Murphy v. Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365. As given, the instruction might tend to confuse a jury into believing that something more than this was required.

For the foregoing reasons, the judgment and order appealed from are reversed.

**SHAW, J.** (dissenting). The opinion of the court in this case did not come to my knowledge until several days after it was filed. I deem it proper at this time to state the reasons for my belief that it is erroneous.

The statement of facts in the opinion is both incomplete and incorrect. In this court those facts which the evidence fairly tends to prove in support of the verdict must be taken as true. The plaintiffs, at a point 50 feet from the tracks of the Terminal Road, stopped the wagon and looked and listened for a train. It was the best place from which to view the tracks of the two railroads for that purpose. A man passing them from the opposite direction told them no train was in sight. When on the farther side of the tracks he could see the track, in the direction from which the train was coming, for a much longer distance than it could be seen from where the plaintiffs stopped. Albert Hutson, who was driving, continued to look and listen after they again started, but neither saw nor heard the train until the wagon was on the Terminal track and within a few feet of the defendant's track and on a grade descending toward it. The train was then only about 150 feet distant. He could not safely stop on that track, on which another train might be coming. The emergency was sudden, and the danger great, and he could not be charged with negligence, as matter of law, under those circumstances, for any ordinary conduct. Harrington v. Los Angeles Ry. Co., 140 Cal. 521, 522, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. In the necessary haste, he concluded to attempt crossing before the train reached the place, whipped his horses, and almost succeeded in his design. To have used the brake after whipping the horses would have been sheer folly. No bell was rung. No whistle was sounded. The train was coming at the unprecedented speed of 45 miles an hour. The statement that its speed was from 16 to 20 miles an hour is not justified by the evidence, as we must view it; nor can it be said to be sustained by a preponderance.

With regard to the supposed faulty instruction, for the giving of which the judgment is reversed, the court has curiously misconceived its subject, its effect, and its purpose. The law on the subject of the negligence of one about to cross the track of a steam railroad naturally falls into two divisions; one relating to his rights, the other to his duties. Both are equally clear and well settled. His duty is to look and listen for trains, and to stop for that purpose, if stopping is necessary to do it effectively. His right is to expect and assume that due care will be used in the operation of trains, and that signals required by law will be given; but, the lack of such care, the failure to give the legal signals, will not excuse him from the duty to stop, look, and listen, nor remove the effect of contributory negligence in barring his recovery, if he fails in his own duty. It is not necessary for the court to state the whole law in every instruction. It is practically impossible to state it in every sentence; and the division into paragraphs is a mere method of separating the sentences and subdivisions of a general subject. It is perfectly proper for the court to divide the general subject of the law of the case, and treat the respective divisions in separate paragraphs. This the court did in the present instance, treating chiefly of the rights of the plaintiffs in the instruction in question, and of their duty to be careful themselves in numerous other instructions asked by the defendant. This instruction tells the jury that, in judging whether or not the plaintiffs were guilty of contributory negligence, they should consider the fact that plaintiffs had the right to assume and rely upon the exercise of due care by the trainmen, in giving the required signals, and not running at excessive speed. Many decisions of this court support this proposition, as the following extracts will show: "Plaintiff was authorized to assume that all other persons using the street would do so with due care. It cannot be imputed as negligence that he did not anticipate culpable negligence on the part of the employés of the defendant." Strong v. S. P. R. R. Co., 61 Cal. 328. "The plaintiff had the right to assume that the required statutory signals would be given by the defendant." Orcutt

v. Pacific C. R. Co., 85 Cal. 299, 24 Pac. 661. "The plaintiff here was exercising an undoubted right, and she was authorized to assume that all other persons using the street would act with due care. It cannot be imputed as negligence that she did not anticipate culpable negligence on the part of the defendant." Robinson v. W. P. R. R. Co., 48 Cal. 421. "Ordinarily, the person operating the car has the right to assume that the one so approaching is able to and will care for himself, by taking all necessary precautions to observe the approach of the car, and that he will not place himself on its track at such a time as to be injured thereby." Harrington v. Los Angeles Ry. Co., 140 Cal. 520, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. "The deceased had a right to rely upon the usual and required signal of bell ringing when a car is approaching." Driscoll v. Cable R. R. Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203. The same rule has been stated in an endless number of decisions of other states, as well as in many decisions of this state where the right of railway employés to rely on the exercise of due care by others was involved. Solen v. Virginia, etc., Ry. Co., 13 Nev. 106; Grippen v. N. Y. Cent. R. Co., 40 N. Y. 42; Phil., etc., R. R. Co. v. Hummell, 44 Pa. 379, 84 Am. Dec. 457; Newson v. N. Y. Cent. R. Co.. 29 N. Y. 390; Tabor v. M. V. R. R. Co., 46 Mo. 353, 2 Am. Rep. 517; Tex. & Pac. Ry. Co. v. Cody, 166 U. S. 613, 17 Sup. Ct. 703, 41 L. Ed. 1132; 2 Thomp. on Neg. § 1582; Shearman & R. on Neg. § 473; 41 Am. Dig. cc. 2775-2784; 37 Am. Dig. c. 448; Green v. Los A., etc., Ry. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68; Lambert v. S. P. R. R. Co., 79 Pac. 873, 146 Cal. 231. Many other citations could be given to the same effect.

The duty of the plaintiffs to exercise due care in looking and listening, and the fact that this duty rested on them, regardless of any failure of the trainmen to use due care or give signals, is a qualification of the rule stated in the instruction and established by the above authorities. The jury were fully instructed on this point. They were informed that, in ascertaining whether or not a train was coming, the plaintiffs were required to exercise "such care as a person of ordinary prudence would exercise under the circumstances"; that they must "make use of all their senses" in so doing; that they "must use vigilantly the senses of sight and hearing," and, if it was necessary to stop in order to hear well, then they must stop for that purpose; that any neglect on their part in these particulars would bar a recovery, if it contributed to the injury, notwithstanding the negligence of the defendant may have caused it. And with regard to the effect of their rights aforesaid upon their own duty, the court instructed the jury that, while travelers in a vehicle approaching a railroad crossing "have a right to rely upon the presumption that railway employés engaged in running trains toward such crossing will use precautions to prevent collisions, yet that such travelers have no right, on that account, to relax in any way the vigilance required of them by law in such circumstances and at such a place. They are under the duty of both listening and looking, and of listening and looking at points and places and in such circumstances that the listening and looking will give them protection." If the instruction quoted in the main opinion is subject to criticism on the ground that it does not state with sufficient clearness the duty of the plaintiff as a qualification of the rule regarding their rights, it is supplemented and fully cured in that respect by the instruction last quoted, which states clearly both the right and the duty of plaintiffs and the fact that negligence of the defendant does not excuse the plaintiffs from exercising due care. The true rule regarding this qualification is well stated in the main opinion to be that "a traveler has no right to omit any of the care which the law demands of him upon the assumption that due care will be exercised in the operation of the train." The authorities cited in the opinion fully sustain in this statement of the qualification; but the extracts given omit the context, and are consequently misleading, so far as they seem to lend support to the idea that it is not the law that the traveler, while not omitting the care due from him, may rely on the performance of duty by the defendant, so long as due care on his part does not disclose to him its failure to do so. The cases do not so declare. If the instruction declared erroneous had stated that the plaintiffs had the right to omit any of the care which the law demanded of them, because of their reliance on the care of the defendant, the criticisms would have been deserved; but it does nothing of the sort and, in view of the explicit instructions to the contrary, it could not have been so understood by the jury.

The criticism of the instruction that contributory negligence is to be proven by the defendant by a preponderance of the evidence and to the satisfaction of the jury is not warranted. The instruction is based on the rules of evidence as laid down by the positive mandate of the Code of Civil Procedure. It is conceded that the burden is on the defendant, and that a preponderance is necessary; but it is suggested that the jury need not be satisfied of the fact. The Code declares that they must be satisfied. "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict." Code Civ. Proc. § 1835. The court seems to have feared that the words, "to your satisfaction," might be understood by the jury to mean "beyond a reasonable doubt"; but the jury must be presumed to understand words according to their ordinary meaning.

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## TINGLEY v. TIMES MIRROR CO. (L. A. 1,656.)

(Supreme Court of California. April 1, 1907. Rehearing Denied May 1, 1907.)

1. PLEADING — AMENDMENT OF COMPLAINT — TIME FOR AMENDMENT.

Under Code Civ. Proc. § 472, providing that any pleading may be amended once by a party as of course at any time before answer or demurrer filed, or after demurrer and before trial of the issues of law thereon, the plaintiff has a right to amend his complaint as of course only while an issue of law on a demurrer is undetermined, or up to the time an answer is filed in case of no demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 594, 595.]

2. SAME—AMENDMENT OF ANSWER—TIME FOR AMENDMENT AS OF COURSE.

Under Code Civ. Proc. § 472, providing that any pleading may be amended once by a party as of course at any time before answer or demurrer filed, or after demurrer and before trial of the issues of law thereon, a defendant has a right to amend his answer as of course only during the time that a demurrer to the answer is undetermined, or up to the time when the right to demur expires.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 594, 595.]

3. SAME — LEAVE TO AMEND — DISCRETION OF COURT.

Under Code Civ. Proc. § 473, providing that the court may in furtherance of justice allow amendments to any pleading upon such terms as may be proper, where, after a jury was impaneled, a defendant asked leave to file an amended answer which set up, with other matter, pleas in abatement on the ground that plaintiff's husband was not joined as a party and that plaintiff had no legal capacity to sue, but made no showing as to why those pleas were not set up in the original answer, and the amended answer with the pleas in abatement eliminated therefrom was subsequently permitted to be filed, the refusal of leave to file as originally offered was not an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 601.]

4. SAME — WAIVER OF OBJECTION TO COMPLAINT.

Under Code Civ. Proc. § 430, providing that the defendant may demur when it appears on the face thereof that the plaintiff has not legal capacity to sue, and section 433 providing that when the matter does not appear on the face of the complaint objection may be taken by answer, and section 434 providing that if no objection be taken either by demurrer or answer the defendant must be deemed to have waived it, if a complaint does not show there is a defect of parties or that the plaintiff has not capacity to sue, and no objections are raised in the original answer, though not waived absolutely they are to that extent waived, so that in the absence of a showing of excuse refusal of leave to amend was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 783.]

5. LIBEL — ACTIONS — COMPLAINT — EXEMPLARY DAMAGES—SUFFICIENCY OF ALLEGATION.

Where a complaint for libel alleged that defendant wickedly and maliciously, with intent and design to injure, disgrace, and defame plaintiff and to bring her into public discredit and obloquy, printed and published the defamatory article set forth, and that said publication was false, malicious, and defamatory, the allegations are sufficient to support a claim for exemplary damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 350.]

6. SAME.

Under Civ. Code, § 3294, providing that the malice essential to recovery of exemplary damages may be either express or implied, when a publication actionable per se is set forth in a complaint for libel, the law presumes malice in fact from its publication, and in the absence of evidence rebutting this presumed malice plaintiff is entitled to an award of exemplary damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 329.]

7. SAME—EVIDENCE—ADMISSIBILITY.

In an action for actual and exemplary damages for libel, evidence of prior and subsequent publication of articles similar in character to the article complained of are admissible to show malice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 287, 288.]

8. SAME — SUSCEPTIBILITY TO MENTAL SUFFERING.

In an action for libel, where the plaintiff's testimony in chief was that she had a large acquaintance throughout the United States and foreign countries, and that she suffered very much mentally in consequence of the article complained of, cross-examination as to her family ties, past history, and occupation, public controversies with certain ministers, prior attacks on her and the institution of which she was the head by other newspapers, and habeas corpus proceedings involving the right to the custody of two minor children who were in the institution under her supervision, is not admissible for the purpose of determining her susceptibility to mental suffering.

9. SAME—PECUNIARY CONDITION OF DEFENDANT.

In a action for libel, where exemplary damages are claimed, evidence of the value of defendant's property is admissible, whether the defendant is a corporation or an individual.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 303, 305.]

10. SAME — EVIDENCE — ADMISSIBILITY — MALICE.

In an action for libel, evidence as to certain slanderous portions of an article being eliminated by the city editor before publication is not admissible to show want of malice.

11. TRIAL—CONDUCT OF TRIAL—REMARKS OF JUDGE.

In an action for libel, where defendant's attorney objected to conduct of plaintiff's counsel as being prejudicial to defendant and known to counsel to be improper, the court was warranted in rebuking defendant's counsel by saying, "That is not a remark you should make; it is improper language."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 316.]

12. APPEAL — REVIEW — HARMLESS ERROR — CONDUCT OF COUNSEL—COMMENTS.

In an action for libel, counsel for plaintiff called the attention of the court to an article in the defendant newspaper relating to the case then pending, and requested that the jury be interrogated as to whether they had read it, so as to ascertain if it had had the effect on them which he believed was intended by defendant. On objection to the remarks, the court instructed the jury not to heed any remark of counsel, nor any expression of belief as to any matter which might transpire on the trial outside of the courtroom. Subsequently plaintiff's counsel stated that he wanted to know whether defendant had succeeded in getting to the jury information that ought not to go to it. *Held,* that the misconduct was not so prejudicial as to warrant a reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4135.]

13. LIBEL — ACTIONS — PLEADING — ANSWER—JUSTIFICATION.

In an action for libel, where a subdivision of the answer setting up an alleged plea in mitigation for the publication of the article complained of stated other matters and alleged facts relative to plaintiff's mistreatment of a certain person, but there was no allegation that the statements in the alleged libelous article were true and nothing was alleged meeting the sting of the libel, it is not a sufficient plea in justification to admit evidence offered by defendant as to the treatment of the person mentioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 219, 249½.]

14. SAME.

A plea in justification in an action for libel to be sufficient must be as broad as the charge attempted to be justified, and, while it need not justify every word, it must meet the substantial imputations as the ordinary reader would understand it to be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 219.]

15. SAME—MITIGATION.

In order to constitute a good plea in mitigation in an action for libel, it is necessary to allege and prove that, prior to the publication, the pleader had knowledge of the facts set up in mitigation, or had ascertained them after due investigation and believed them to be true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 162, 227.]

16. SAME.

In an action for libel, a plea in mitigation which merely states that there were rumors of the matter set up in mitigation, but does not allege that defendant had any knowledge of them, or that he investigated and believed them, or had even heard of them, prior to the publication of the article complained of, is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 162, 227.]

17. WITNESSES—COMPETENCY—REPUTATION OF PARTIES—KNOWLEDGE OF FACTS.

Depositions as to the reputation of a plaintiff in an action for libel are not admissible unless they show that the witness knows the general reputation of the plaintiff in the community in which she lives and as to the traits in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 83.]

18. SAME.

A witness cannot testify as to the reputation of any one unless he is a member of the community in which the person lives.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 83.]

19. TRIAL—CONDUCT OF COUNSEL—ACTION OF COURT.

In an action for libel, where counsel for defendant in his argument to the jury erroneously insisted that certain issues were before the jury for consideration, the court may specifically instruct that those issues should not be considered by them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 478.]

20. LIBEL — ACTIONS — EVIDENCE — JUSTIFICATION.

In an action for libel, where no particular justification is pleaded to which testimony is offered can be addressed, it is properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 249½.]

In Bank. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Katherine Tingley against the Times Mirror Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See 77 Pac. 918.

Eugene Daney and Hunsaker & Britt, for appellant. J. W. McKinley, W. R. Andrews, and A. B. Hotchkiss (F. R. Kellogg and J. E. Wadham, of counsel), for respondent.

LORIGAN, J. This action was brought to recover damages for libel. The complaint alleged that plaintiff was a resident of the county of San Diego, and the head of an institution known as the "Universal Brotherhood Headquarters, Loma Homestead," at Point Loma in said county; that the defendant corporation was the owner and publisher of the "Los Angeles Daily Times," a newspaper of general circulation; that on October 28, 1901, the defendant "wickedly and maliciously and with intent and design to injure, disgrace, and defame this plaintiff and to bring her into public discredit and obloquy," published in said paper of and concerning plaintiff the following "false, libelous, malicious, and defamatory article, to wit:

"Outrages at Point Loma.

"Exposed by an 'Escape' from Tingley. Startling Tales told in this City. Women and Children starved and treated like Convicts. Thrilling Rescue.

"Mrs. M. Leavitt, of No. 418 West Fourth street, a believer in what she terms 'the true school of theosophy,' who has recently removed to this city from San Diego, the capital city of theosophists, has some startling things to tell concerning the practices of Catherine Tingley, and her associates, who conduct the Universal Brotherhood Homestead on Point Loma. Mrs. Leavitt seems to be thoroughly informed on two of the latest outrages perpetrated at the spookery, the cases of Mrs. Neirsheimer and Mrs. Hollbrook, both well-to-do Eastern women. Mrs. Hollbrook, the wife of a railroad man and Freemason of the East, has been rescued from the roost on Point Loma by her husband with the aid of an officer and a gun, and now hovers at the point of death from the abuse she says she received while confined in the 'Homestead.' During the daytime she was worked in the field like a convict, forced to plant trees, hoe corn and perform all sorts of hard labor and at night she was shut up in a cell and guarded as if she were a raving maniac. When her husband found what a trap she had fallen into he hurried here and took her out by force.

"The other case on which Mrs. Leavitt is posted is that of Mrs. Neirsheimer, who has been forcibly separated from her husband, who is also in the Tingley clutches, and is not allowed to speak to him. She is forced to live alone in a little tent in the grounds that surround the crazy institution. Armed men guard this place of horror, and, Mrs. Leavitt says, solitary confinement, hard labor and starvation are resorted to by the Tingley managers as punishments upon those who disobey their iron rules.

"The woman who gives out this information is a personal friend of, and has talked with, Mrs. Hollbrook, the victim whose health has been forever destroyed by the ordeals she passed through while imprisoned on Point Loma.

"Mrs. Leavitt claims that through a strong hypnotic power Catherine Tingley works her will on sensible people. The Universal Brotherhood, or in other words, Catherine Tingley, is an offshoot of the theosophic society, which became disjointed some four or five years ago. Mrs. Tingley was formerly—the theosophists say, a common, dollar-taking spirit medium.

"She couldn't agree with the theosophists, so she branched off and set up her trap on Point Loma. She distributes literature throughout the East, and even in foreign countries, saying the Universal Brotherhood Homestead, located in the most beautiful spot on earth, offers to those who wish to retire into a quiet thoughtful life, a home in which they may live peacefully and an atmosphere of soul study and pure thought.

"Only people with money happen to get these pamphlets, says Mrs. Leavitt. When people answer her enticing advertisements in person Mrs. Tingley exerts her influence over such as are spookily inclined; and the almost incredible things which have taken place prove that once in the lair it is almost impossible to escape.

"Mrs. Leavitt says there is nothing taught at Point Loma but insane ceremonies; that the girls who are placed there to be educated are put to work at the most menial tasks, each one kept separate in a guarded cell and forbidden to speak to anybody else, and that the poor little children are quartered in a miserable building some distance from the main institution, and are continually on the verge of starvation—for Mrs. Tingley openly states that children are fed too much for their spiritual good, and must eat but little, so they will be more ethereal. Mrs. Leavitt says she knows personally of a case where both parents and children are victims, and the children have been taken away to the child pen and are never allowed to communicate in any way with mother or father. For, says Mrs. Tingley, they will grow up purer if away from bodily and affectionate influence of the parents.

"The children are never allowed to speak to anybody except when they are selling trinkets to the visitors who come to the gates. The young lady prisoners make fancy work, which they sell to the strangers. Purple robes are worn by the women, and a sort of khaki uniform by the men.

"On certain occasions a midnight pilgrimage is made by both men and women to a spot on the peninsula, which is termed sacred ground. They go in their nightrobes, each holding a torch.

"Before she had gotten well into the scheme, Mrs. Hollbrook says she saw that it was a fake, but having no idea of the horror of it she decided to go into the Homestead for awhile that she might expose the character of the crazy institution. Whether she will live to carry out the good work is doubtful. She can tell things, her friends say, more shocking than anything known yet.

"Mrs. Leavitt alleges that gross immoralities are practiced at Point Loma by some of the disciples of spookism as it is there exemplified, and that such things should not be tolerated in a civilized community."

It is then alleged that said publication was false, malicious, and defamatory; that plaintiff was not and had not been guilty of any of the matters so charged; and that all and every portion of said article charging plaintiff with improper practices, fraud, and immorality were false, malicious, libelous, and untrue, closing with a prayer for damages in the sum of $50,000. A demurrer to the complaint having been overruled, defendant on March 29, 1902, filed an answer. No demurrer to the answer was filed by plaintiff. Thereafter the case was set down for trial on December 16, 1902. On December 15, 1902, the day before the trial was to commence, defendant, without leave of the court, served upon plaintiff and filed an amended answer. When the case was called for trial on the 16th, the plaintiff moved the court to strike out the amended answer of the defendant filed the day before, on the ground that it had been filed without leave of court, or authority of law, and changed the issues made in the action by introducing pleas in abatement. These pleas in abatement were relative to the coverture of plaintiff and nonjoinder of her husband as a plaintiff in the action. The court granted the motion, defendant reserved an exception, and the trial of the cause was then proceeded with. After a jury had been impaneled defendant moved the court to be permitted to file the same answer as had been previously stricken out, which motion was denied. Defendant then eliminated from said answer the pleas in abatement, and, with the consent of plaintiff, the answer as so amended was filed, and the cause was thereupon tried under the issues made by the complaint and this amended answer. The amended answer of defendant set up as the main defense a plea in justification as to the greater portion of the charges in the publication, by alleging that these portions of the charges were true; as to other portions of the charges it set up no defense whatever, and as to one of the charges alleged facts purporting to state a plea in mitigation of damages. It is unnecessary to particularly detail these defenses. The court in its instructions took up all the charges made by defendant and claimed by plaintiff to have been libelous, and which defendant alleged in its answer was true, and instructed the jury that, practically as to all of them, there was no legal proof of their truth, and that the jury should regard them as false. The correctness of this instruction is not questioned on this appeal. Neither as to these charges upon which the jury were so specifically instructed, nor as to any other issue in the case, is it claimed that the evidence was insufficient to sustain them or the verdict. No point is at all made as to the sufficiency of the evidence. The trial of the cause resulted in a verdict in favor of plaintiff for $7,500. A motion of defendant for a new trial was denied, and this appeal is from the judgment entered on the verdict and the order denying the motion for a new trial; the record on these appeals consisting of the judgment roll and certain bills of exceptions.

In support of its appeals and as grounds for reversal it is insisted by appellant, first, that the court erred in striking defendant's amended answer from the files and in refusing it permission to refile the same until certain defenses had been eliminated therefrom; second, that the court erred in the admission and exclusion of evidence; third, that the action of the court and of counsel for plaintiff during the progress of the trial constituted misconduct and error prejudicial to the defendant; fourth, error in giving instructions to the jury and in the general hostile tenor of the court's charge; lastly, refusal of the court to give a certain instruction requested by defendant. The general points urged for a reversal are based (aside from questions relative to instructions) upon a vast number of exceptions grouped and classified under 20 heads in the brief of counsel for appellant. Under these circumstances we shall take up such as we deem merit special consideration.

1. As to the action of the court in striking out the amended answer of defendant. It is insisted by appellant that it had an absolute right to file said amended answer when it did, without leave of the court, and this claim is based upon section 472 of the Code of Civil Procedure, which provides that: "Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer, and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading." The precise point made by appellant has not heretofore been passed on by this court, and we are aided none by a consideration of the authorities cited by appellant from other jurisdictions, because, as we read these authorities, they deal with statutory provisions relating to amendments either giving an absolute right to amend, by express language, at any time, or providing that the amendment may be made at any time before trial. But under a most liberal construction of our statutory provision no such right is conferred. In fact, it is insisted by respondent that under the section the only right conferred is the right to amend the complaint before answer or demurrer is filed thereto, or while the issue raised by demurrer to it is undetermined. The obvious purpose of the section, however, negatives such a strict construction, even if the language used might warrant it. The provision is in aid and furtherance of the right of parties litigant to amend all pleadings with a view of presenting for trial the real merits of a controversy—assertive and defensive—and to that end it should be liberally construed. It would be eminently unjust, except where no other conclusion was warranted, to hold that it was the purpose of the section to confer a right upon the plaintiff to amend his pleadings, which was denied a defendant. But while the section is to be construed liberally, as conferring an equal right to amend upon both parties as to all pleadings, still, its terms are not to be enlarged by such construction so as to confer greater rights upon one in that respect than are accorded to the other, or to work a hardship on either party, or to interfere with the progress of a trial after the issues of fact have been made. This right to amend, while applying to the pleadings of both parties, has its limitation as to the time within which either may exercise it under the section, and such time is not extended in behalf of the defendant beyond final joinder on the issues of fact in the case. Appellant claims that it had a right to amend at any time before trial because plaintiff did not demur to the answer. Its position is that the terms of the section providing that "any pleading" may be amended at any time "before answer or demurrer filed" must be construed as extending the period for filing an amended answer up to the time of the trial, unless the plaintiff demurs to the original answer, and the demurrer is disposed of. Under this theory of appellant the right of defendant to amend is curtailed, or extended, as the plaintiff elects to demur or not to demur; that notwithstanding the answer is unassailable, plaintiff must still file a frivolous demurrer to it, and have such demurrer determined, in order to preclude defendant from amending. Certainly the Legislature never contemplated such an idle act. In providing that a pleading might be amended "before demurrer filed," it was intended to give the right to amend, within the legal time the adverse party had within which to demur, without waiting to have the defect in the pleading pointed out on demurrer, or without taking the hazard that his adversary would not demur, and so preclude him from amending as of course under the section. It was not intended to confer a special right on a defendant to amend because plaintiff had not gone through the idle ceremony

of demurring to an apparently good and sufficient answer. The construction which, in our judgment, is to be given to the section, and which commends itself as a reasonable and consistent one, is that the right of plaintiff to amend his complaint as of course is extended only up to the time when the answer of defendant is filed, or if a demurrer is interposed by defendant, only while the issue of law raised thereby is undetermined. If the defendant answers without demurring, or if his demurrer to the complaint is overruled, the right of plaintiff under the section to amend as of course is gone. The right of defendant to amend can be exercised only during the time that a demurrer to the answer if interposed by plaintiff is undetermined, or should the plaintiff not demur, then the defendant is concluded from amending as of course, under the section, by the expiration of the time within which such demurrer might have been interposed. When the demurrer of the plaintiff to the answer is overruled, or the time has expired within which the plaintiff might have demurred to the answer, the issues of fact are then fully joined, and the right of defendant to amend under the section, as of course, is gone.

This we think is the reasonable construction to be placed on the section. Under this construction equal rights to amend are given to both parties. Each has a right to amend while the issue of law raised by demurrer to his pleading is undetermined. Where a demurrer is not interposed, the right of plaintiff to amend is concluded by the answer of defendant, and the right of defendant is concluded by the expiration of time within which plaintiff might have demurred to the answer. This construction is likewise fair and just to all parties and works no injury or hardship, which might in many instances otherwise follow if the construction contended for by appellant that he had an absolute right to amend his answer at any time before trial was to obtain. If this were true, then by filing his amended answer on the morning of the trial, after the case had been at issue for months, and when plaintiff was prepared for trial, and ready with his witnesses to proceed, defendant could compel plaintiff either to proceed with the case under new issues he was not prepared to try, or compel him to obtain a continuance of the cause, possibly at great expense. No relief could be granted plaintiff for the loss incurred by him under such circumstances. No terms could be imposed upon the defendant, though the filing of his amended answer at that time worked a continuance, because if, as contended by appellant, he had an absolute right to file his amended answer at that time, he was entitled to do so no matter what hardship was worked to his adversary, and as his right was absolute no terms or conditions could be imposed by the court on its exercise. It was never contemplated by the section that the right of defendant to amend should be extended so as to make such results possible. If the Legislature had intended that the defendant should have the right to amend at any time after issue of fact joined, and thus extend him a larger right than was accorded plaintiff, and one which might be exercised to plaintiff's injury, it would have been very easy to have said so instead of providing that amendments should be made "before answer or demurrer filed." Appellant does not claim that any express language of the section supports his contention. He claims from the language which is used that it was the intention of the Legislature to confer the right as he asserts it. The matter, therefore, resolves itself into a question of construction, and we think that the construction placed by the trial court on the section was clearly in accord with the intention of the Legislature, namely, that the time within which defendant might amend his answer, as of course, should not extend beyond the time when the issues of fact were definitely fixed by the expiration of the time within which the plaintiff could demur to the answer, but did not. This is not only a reasonable and fair construction, but is one which creates no hardship, because, even after issue joined, the trial court under section 473 of the Code of Civil Procedure is authorized to permit amendments to the pleadings in furtherance of justice.

2. Now as to the contention that the court erred in refusing to grant the subsequent motion of defendant to be permitted to file this same amended answer with the pleas in abatement set up therein. This the court refused, but as it allowed the defendant thereafter to file the amended answer with all the defenses, other than these pleas contained therein, and the defendant did so, the question is limited to whether it was error to refuse leave to interpose it with these pleas included. There were two of these pleas set up in the amended answer, and they had reference to the coverture of plaintiff. In the first it was alleged that at all of the times mentioned in the complaint plaintiff was and is yet a married woman, the wife of Philo B. Tingley, who is not joined with plaintiff as a party to the action, and in the second it was alleged that plaintiff had no legal capacity to bring or maintain the action for the same reason. We do not think the court erred in denying the application of defendant to be permitted to file its amended answer containing these pleas. The application for leave to do so was not made until after the trial had commenced, and was made under the provisions of section 473 of the Code of Civil Procedure investing the court with discretion to allow amendments to any pleadings, in furtherance of justice. These pleas which defendant sought to avail itself of by amendment were dilatory pleas—pleas in abatement—and such pleas have never been favored in law. They did not concern the merits of the action, but were interposed to

defeat its maintenance. Such pleas do not commend themselves, when application is made to amend a pleading so as to assert them, with the same favor as do amendments interposing defenses which go to the merits of the controversy. This disfavor in which they were held at common law is reflected in the provisions of our Code relative to their interposition, where it is provided that, unless they are asserted at the earliest opportunity, they are waived, and the Code declares what shall be the earliest opportunity. If there is a defect in parties plaintiff apparent upon the face of the complaint, or if it appear therefrom that plaintiff has not the legal capacity to sue, the objection on either of these grounds must be taken by demurrer, or is waived. If these matters do not appear on the face of the complaint, any objection or defense as to them must be taken advantage of by answer, or is deemed to be waived. Code Civ. Proc. §§ 430, 433, 434. Now the earliest opportunity available to the defendant, as these objections could not be argued on the face of the complaint, was to take advantage of them in the original answer, which it did not do; hence they were to that extent waived. It is insisted by respondent that this failure to set up these defenses in the original answer of defendant was a waiver of them "once for all," and that defendant could not be permitted to assert them by amended answer. We are not inclined to hold to that extent. As they were, however, apparently entirely waived by failure to set them up in the original answer, the court was not required, in the face of that waiver, to permit defendant subsequently to assert them, without some showing tending to relieve it from the effect of the waiver, and nothing was offered for that purpose. There was no showing whatever upon the subject. As far as the record is concerned there is nothing to show but that when the original answer was filed the defendant knew of the facts set up in their pleas, and deliberately waived asserting them. There is nothing to show that the defendant had acquired information of the facts subsequent to the filing of the original answer, or, if it then knew of them, its failure to interpose them was inadvertent. Having waived these defenses originally, and no showing being made to the court of any facts warranting relief from such waiver, and an application to amend in the respect sought being made after the trial had commenced, it cannot be said that there was any abuse of the discretion of the court in denying defendant's application to amend.

3. The next point made is that the court erred in admitting evidence in support of the claim of plaintiff for exemplary damages. In this regard it is insisted that the allegations of the complaint were not sufficient to support a claim for damages of that character, because there is no distinct averment of express malice—malice in fact—influencing defendant in making the publication. It is alleged, however, in the complaint that the defendant "wickedly and maliciously, and with intent and design to injure, disgrace, and defame plaintiff, and to bring her into public discredit and obloquy, printed and published" the article complained of, and "that said publication was false, malicious, and defamatory." We think the above allegation with reference to the character and nature of the publication, coupled with the further allegation declaratory of the purpose of the publisher in making it, amounts to more than a mere allegation of malice in law—a wrongful act done intentionally without just cause or excuse—which is essential to support every action for libel. The allegation that the publication was "wickedly" and "maliciously" made by defendant with "intent and design" to injure the reputation of plaintiff by the publication of the defamatory matter concerning her charges a malevolent disposition of mind towards plaintiff, inspiring and actuating the publication. It clearly declares an actual intent to defame amounting to malice in fact, which furnishes a basis for the imposition of exemplary damages as contradistinguished from malice in law, which will support a verdict for compensatory damages only. But, in addition to this, while it is the rule in this state that exemplary damages for libel can only be recovered on proof of malice in fact, such malice may be either actual or presumed, and may be proven by the article published itself. The article complained of by plaintiff is set forth fully in the complaint and is libelous per se. It imputes to the plaintiff fraudulent conduct, acts of cruelty, gross immoralities, and dishonest practices, which, if true, would bring her into public contempt and disgrace. When such a publication actionable per se, is set forth in the complaint, under the rule obtaining in this state it is not necessary to charge that the publication was actuated by malice in fact on the part of the publisher. Where the publication is libelous per se, the law presumes malice in fact in its publication, and, in the absence of evidence on the part of the defendant rebutting this presumed malice, plaintiff is entitled to an award of exemplary damages. In this regard it is said by this court: "Exemplary damages may be recovered when malice on the part of the defendant is established as a fact, and by the express provisions of section 3294 of the Civil Code this malice may be 'actual or presumed.' We assume that the word 'actual,' as used in this section of the Code, means 'express.' In criminal law malice is an element of murder, and this malice may be either express or implied. It is implied when no considerable provocation for the killing appears, or when the circumstances of the killing show an abandoned and malignant heart. We are inclined to believe that the presumed malice of section 3294 closely assimilates to the implied malice of the criminal law. It is an inference of fact to be drawn from the libel-

ous character of the publication; and, if the article is libelous per se, we see no reason why the law should not declare that upon its introduction in evidence a prima facie case of malice in fact is established; for, even though it be presumed malice, it is malice in fact, and has all the dignity and gravity of express or actual malice, proven aliunde. We conclude that presumed malice is equally a question of fact with actual malice, and upon being established equally forms the foundation for the recovery of exemplary damages." Childers v. San José Mercury P. & P. Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392. Certainly under these authorities the allegations in the complaint were sufficient to warrant the introduction of evidence on the part of plaintiff to prove malice in fact, either actual or presumed, as a basis for an award of exemplary damages. The evidence admitted over defendant's objection were publications by defendant of a number of other articles relative to plaintiff of the same character as the article set forth in the complaint, and made prior and subsequent to its publication, and we are satisfied they were properly admitted.

4. It is contended that the court erred in prohibiting cross-examination of plaintiff as to her family ties, past history, and occupation; also as to public controversies engaged in by her with certain ministers involving the relative merits of theosophy and christianity; also concerning attacks made on her and the institution of which she was the official head, in newspapers other than that of defendant, and prior to the publication of the articles sued on; and relative to habeas corpus proceedings involving the right to the custody of two minor children who were in the institution at Point Loma under the supervision of plaintiff. There was no error committed by the court in its rulings in this respect. The plaintiff testified on her examination in chief simply that she was the official head of the Universal Brotherhood, residing at the Homestead at Point Loma, that she had a very large acquaintance and correspondence with persons throughout the United States and in foreign countries, and that she suffered very much mentally in consequence of the article published by defendant. It is quite apparent from this statement of her testimony on the direct examination that there was not even a remote reference made in it to any of the matters to which the cross-examination was directed. But it is said by appellant that, because the plaintiff testified that she suffered greatly mentally by the publication of the defamatory matter concerning her, this opened the door for inquiry by the defendant into her capacity for suffering and the sources whence the same came. The "sources whence the same came" have reference to the litigation, public controversies, and newspaper articles, other than the publication of defendant, concerning her engagement in, and knowledge of, which defendant sought to make inquires of plaintiff. Under no theory could any inquiry or evidence concerning them be permissible or admissible. Certainly the defendant in the presentation of its defense could not have introduced evidence upon these matters in mitigation of damages or for any other purpose. Such an offer could only be supported and sustained upon the theory that defendant had a right to show that, notwithstanding the publication made by it was libelous and otherwise calculated to cause mental anguish to plaintiff, still that she had been so involved in litigation and public controversies, and been so greatly libeled by other articles pubished in newspapers, that thereby her capacity for mental suffering had been so exhausted or repleted that when defendant made its libelous contribution the plaintiff could not have been affected by it, or if such capacity had not been exhausted that the jury by some psychological standard, not suggested by appellant, could measure the extent of the suffering of plaintiff by the libelous article of defendant, distinct from her suffering by reason of these other matters and libels, and make its award against defendant accordingly. In all the law relative to libel—text-book or decision—no authority is cited in support of the claim of defendant, and obviously none could be.

Neither was the defendant entitled to examine plaintiff as to her family ties, past history, and past occupation in aid of the same asserted purpose—to throw light upon her susceptibility to mental suffering. Certainly if the defendant did not have the right to cross-examine her as to these matters for that particular purpose, it had no right to examine her as to them at all, because plaintiff had not testified on any of these subjects in her direct examination. She had not testified why she had suffered greatly from the article published by defendant, nor testified that it was intensified because of her family ties, nor on account of her past or present mode of living or occupation. It is true that in Cahill v. Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88, cited by appellant, it is held that in an action of slander a married woman might testify to the number and respective ages of her children for the purpose of showing increased mental suffering by reason of the fact that the members of her family would suffer on account of the disgrace visited upon her by the slanderous charge, and as bearing on her right to enhanced damages therefor. But, as plaintiff did not testify as to any family ties on direct examination, the case cited furnished no authority for defendant to go into the subject on cross-examination. Neither did she testify as to her past history or past occupation. No such testimony would have been admitted on her part on any theory. She could not have related it for the purpose of showing that she was more sensitive to attack in newspapers and suffered greater mental anguish from them than the ordinary woman, and in the absence not only of any testimony by her on these subjects, but likewise the absence of any right on her part to offer it, certainly the defendant was not warranted in cross-examining her for the purpose of ascertaining it. As to the broad proposition that these inquiries were proper as bearing on the susceptibility of plaintiff to mental suffering, we think it absolutely untenable. We are not now considering the question of the right of a defendant to show the general reputation of a person suing to recover damages for libel, or his general bad reputation with reference to particular traits involved in the alleged libel. It is admitted that general bad character may be shown for the purpose of decreasing the damages, or entirely defeating their recovery. The inquiries and questions here, however, do not go to the subject of general reputation as bearing on the question of damages, but are directed toward developing the past history of the plaintiff, as a history, for the purpose of showing the degree of her susceptibility to suffering from the alleged libel, as one of the elements to be considered by the jury in support of her claim for damages. The theory of the defendant appears to be that, because a plaintiff testifies that a libelous article has caused him great mental suffering, the whole course of his past life—its entire history—is thereby subject to investigation; that the defendant may proceed to develop on cross-examination his whole career from infancy to the date of the alleged libel; inquire into the extent of his education, the environments of his youth and age, his habits, predilections, vocation, natural and moral instincts, his views upon religious, social, moral, or ethical questions, in fact, investigate his physical, social, and moral life for the purpose of having the jury determine to what extent he was capable of or susceptible to mental suffering from a given libelous publication. We have examined all the authorities which counsel for appellant have cited in support of this theory, and find not one which gives it the slightest countenance. They deal with the right to show general reputation. None of them sanction, or suggest even, the right to inquire into the past history of the plaintiff for the purpose of enlightening the jury as to her susceptibility to mental suffering. As to such susceptibility the question for the jury in this, as in any other similar case, is whether such a libelous publication as is complained of was such as would naturally occasion mental suffering to an ordinary person occupying the same position as plaintiff did at the time the libelous article was published. Individuals are of different temperaments, emotions, and susceptibilities. Whether one under given circumstances would be more susceptible to mental pain than another is purely a metaphysical question. In the administration of human justice there exist no psychological scales whereby capacity for mental pain can be measured. A life history itself could furnish no criterion, for a history which in one would render him acutely susceptible to mental suffering from defamatory accusation would with another produce no such result. The law will not permit the defendant, upon the theory of determining his susceptibility to suffering, to go into the life history of a plaintiff and present it in detail before a jury. Capacity for mental suffering cannot be determined from such a detailed history. It is too indefinite and uncertain; there are no scales of justice capable of measuring it, and practically it can only be determined by the jury from a consideration of the susceptibility, in general, of the average person to mental suffering.

5. It was not error for the court to admit evidence of the value of the property of defendant. Evidence of that character is admissible where exemplary damages are claimed, and we do not understand the rule is any different whether the defendant is a corporation or an individual. Barclay v. Copeland, 74 Cal. 5, 15 Pac. 307, 5 Am. St. Rep. 413; Greenberg v. Western Turf Ass'n, 140 Cal. 358, 73 Pac. 1050. We do not understand appellant to seriously question this rule, but only to insist that under the pleadings proof of exemplary damages were inadmissible. As we have already disposed of this point adversely to that contention, nothing need further be said on the subject.

6. Neither was it error to deny appellant the right insisted on of showing that certain matter derogatory to plaintiff was eliminated by the city editor of defendant from the article prepared by the reporter before its publication. The reporter testified that the matter eliminated from his report of the interview with Mrs. Leavitt reflected on the plaintiff and was derogatory of her. We think this was as far as appellant was entitled to go. The reporter testified to his entire interview with Mrs. Leavitt, upon whose statement the article was prepared, so the jury had the benefit of all she had to say relative to plaintiff, and could therefore judge of what was left out. Neither do we think that slanderous portions of a particular article which are eliminated before the article is published are ever admissible on the question of malice. It does not tend to show a want of malice that the publisher did not charge, in a slanderous article, as much derogatory matter as the article before publication originally contained.

7. It is claimed that there was prejudicial misconduct on the part of the attorney for plaintiff, and error committed by the court in rebuking counsel for defendant. This is predicated on proceedings occurring during the trial. On Monday, December 22, 1902, at 10 a. m., following an adjournment of court to that date and hour, counsel and the

jury being present, and the further trial of the cause being about to proceed, one of the counsel for plaintiff, Mr. Andrews, stated to the court that he desired to call the attention of the court to a partial report in the Los Angeles Times of proceedings supposed to have occurred during the session of the court on the preceding Saturday, and in that behalf stated that accommodations in court had been provided for the reporters of the various papers, including the Times' correspondent, and that while no objection could be conceived of their right to report the testimony which had been submitted to the jury by the court, he considered that they had transcended the bounds of propriety when they published matter which had not been read to the jury or which would probably be excluded by the court should it be presented; that without reading the publication he desired to call the attention of the court to part of the report in the Los Angeles Times, and to request the court to take such steps in the matter as it deemed appropriate under the circumstances. Counsel for defendant objected to the court taking up the matter at that time as not a proper proceeding; that if any offense had been committed it was not committed in the presence of the court, and the Code provided, under such circumstances, a method for presentation of the matter to the court, which was not being pursued. The court agreed with counsel for defendant, and suggested that if the counsel for plaintiff wished to pursue the matter he would give them an opportunity to present it during the noon recess; that he did not think it proper to take it up in the presence of the jury. Counsel for plaintiff then stated that he presented the matter, not to call the attention of the jury to the publication, but to request that the jury be interrogated as to whether or not they had read the publication, to ascertain if it has had the effect on the jury which he believed "was intended by the defendant." Exception was taken to these remarks by counsel for defendant as constituting misconduct. The court thereupon promptly instructed the jury that they were not to heed any remarks of counsel, nor any statements or expressions of belief as to any matter which might transpire on the trial outside of the courtroom; not to be influenced in the least degree by any remarks which counsel may make in argument, or by way of suggestion, or in any other way. Subsequently, during argument upon the right to interrogate the jury as to whether they had read the article purported to have been published, and in response to the objection of the attorneys for defendant that it was not proper to interrogate them as to whether they had violated their duty or not, counsel for plaintiff replied that he had not assumed any juryman had violated his duty; that he had no thought of that kind, but he simply "wanted to know whether or not defendant had succeeded in getting to the jury information that ought not to go to it." The jurors were then, by permission of the court, interrogated as to whether they had seen the published report referred to, and declared that they had not. After the first juror had been interrogated and had answered, Mr. Shortridge, one of the counsel for defendant, objected to the whole proceeding, and specially objected to the conduct of counsel "as misconduct which is calculated to be and is prejudicial to defendant and known to counsel to be improper." At the conclusion of his objection the court stated to him: "That is not a remark you should make, Mr. Shortridge. It is improper language." This statement of the proceedings presents the points made by appellant.

As to the rebuke of counsel by the court. It is couched in courteous language, and was warranted by the improper statement of counsel for defendant that the attorneys for plaintiff knew that they were guilty of misconduct in the proceeding they were taking. It is reprehensible for an attorney to pursue a course before a court with the knowledge that it is misconduct on his part to do so. There is no claim made here, and from the record none could be, but that counsel for plaintiff was proceeding in good faith, and with the sanction of the court, to ascertain solely whether the jurors had read the article in question; and, while the counsel for defendant had a right to object that their action in that regard constituted misconduct, he had no right to charge them with knowledge that the course they were pursuing was an improper one. In the heat of forensic controversy, arguments and objections made by the most courteous attorneys to meet points or rulings suddenly presented may unwittingly contain language or expressions which they would not contain if more deliberately presented. This probably was the case at bar, but this could only furnish an excuse for the use of the language. It could not affect the right of a court to rebuke counsel for indulging in it.

Now as to prejudicial misconduct on the part of counsel for plaintiff. This is based on the remarks of counsel in discussing the action to be taken by the court and the right of plaintiff to interrogate the jury on the publication. It is claimed that these remarks amounted to a statement that defendant was seeking to indirectly and improperly influence the jury through illegitimate channels, and that such remarks were calculated to and naturally did prejudice the jury against the defendant. Undoubtedly when conduct upon the part of counsel produces this result, or naturally or reasonably tends to do so, it will constitute misconduct warranting a new trial. The mere fact, however, that the action of counsel is improper will not suffice. It rarely occurs in any case, which is of moment and sharply contested, that counsel on both sides in their zeal and partisan devotion to their clients do not indulge in arguments, remarks, insinuations, or suggestions which find neither support in, nor are referable or applicable to, the testimony, or warranted by any fair theory upon which the case is being presented. If such impropriety of counsel always afforded ground for a new trial, there would be little prospect of any litigation becoming finally determined. It is only when the conduct of counsel consists of a willful or persistent effort to place before a jury clearly incompetent evidence, or the statements or remarks of counsel are of such a character as to manifest a design on his part to awake the resentment of the jury, to excite their prejudices or passions against the opposite party, or to enlist their sympathies in favor of his client or against the cause of his adversary, and the instructions of the court to the jury to disregard such offered evidence, or objectionable remarks of counsel, could not serve to remove the effect or cure the evil, that prejudicial error is committed. It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have. Conceding, as it must be conceded, that it was improper for counsel for plaintiff in addressing himself to the publication to have stated in the presence of the jury his belief as to the intention of defendant relative to it, or that it was the purpose of counsel to ascertain whether defendant had succeeded in getting information to the jury which should not go to it, still these remarks did not constitute that degree of impropriety that its effect must have been so indelibly impressed on the minds of the jury that the instruction of the court to disregard them was ineffectual. The publication had not been read by any members of the jury, nor were its contents declared to them during the proceeding relative to it; counsel in fact disclaiming any intention of doing so. No statement of fact concerning it was made by counsel. He stated only his purpose in calling the attention of the court to it, and expressed his opinion as to the object of the defendant in publishing it. There was nothing in the remarks of counsel so improper that the prompt action of the court in directing the jury not to heed or be influenced in any degree by them did not remove the effect, if any, which in the absence of such instructions might be claimed to have been prejudicial.

8. It is claimed that the court erred in excluding evidence offered by defendant as to the treatment of Mrs. Neirsheimer at the institution of plaintiff at Point Loma. She is mentioned in the published article complained of. The evidence was offered by defendant, and error in its exclusion is predicated, upon the theory that the answer pleaded justification of the alleged libel relative to the treatment of Mrs. Neirsheimer by plaintiff. But it is clearly apparent from an examination of the answer that no such plea was made. If anything, there was an attempt to set up a plea in mitigation as to this charge in the published article. The answer stating a separate defense in three subdivisions set forth that "defendant for further answer to plaintiff's complaint in mitigation for the publication of the article complained of alleges." In subdivision 2 the facts relative to Mrs. Neirsheimer are stated, being in effect that before the publication of said article her husband, an officer of the Universal Brotherhood residing at Point Loma Homestead, was under the influence and domination of the plaintiff; that Mrs. Neirsheimer was not a believer in the doctrines taught and the practices indulged in by said plaintiff and her said husband, and that Mrs. Neirsheimer, through the influence of plaintiff, was cut off from the usual and ordinary association and communication with her husband, was not allowed to eat at the same table with him, and that such was the husband's infatuation with the teaching and practices of plaintiff at said Homestead that he informed his wife that if she did not accept his beliefs and obey his orders he would drive her out in the world alone; that on account of the interference and influence of plaintiff over the husband Mrs. Neirsheimer saw him only on such occasions as pleased him to be seen by her; that she was falsely reported by plaintiff and Neirsheimer and his friends to be crazy and dangerous, and was secretly watched and spied on and accused of lying and duplicity; that other members of the Universal Brotherhood were by plaintiff, or at her instance, warned against having anything to do with Mrs. Neirsheimer. Then immediately follows this allegation: "That the foregoing facts before the publication of said article by the defendant had been communicated by said Mrs. Neirsheimer and others to divers and sundry persons in the city of San Diego, and that the same had become and were matters of public notoriety in said city of San Diego." The answer then proceeds in subdivision 3 to specifically set forth other charges made in the article published and pleaded in justification of their truth, but nothing is said as to the charge concerning Mrs. Neirsheimer.

In subdivision 2 of the answer just referred to charging the facts relative to Mrs. Neirsheimer there is no allegation that the matters charged in the libel were true. And from an examination of the facts alleged in the subdivision of the answer referred to it is apparent that they do not constitute a plea in justification. The sting of the libel relative to Mrs. Neirsheimer in the article published was that she was by plaintiff forcibly separated from her husband, who was in the clutches of plaintiff and was not allowed to speak to him; that she was forced to live alone in a little tent in the grounds that surrounded the crazy institution. The facts stated do not meet the gist of the libel. They do not amount to an allegation that in truth force of any kind was used by plaintiff; that Mrs. Neirsheimer was forced by plaintiff to live apart from her husband or forced to occupy a tent upon the grounds. Several facts are alleged of offenses other than the published article charged relative to Mrs. Neirsheimer, but nothing is alleged meeting the sting of the libel. It is laid down that, in order to constitute a sufficient plea in justification "the justification must always be as broad as the charge and of the very charge attempted to be justified." Townsend on Libel and Slander, § 212. This rule is too familiar to need further citation. While it is not necessary to justify every word of a defamatory charge, still the plea must meet the substantial imputation—the sting of the charge—as an ordinary reader of the article would understand it to have been made. This plea does not do so. As it was neither alleged directly, or in effect, that the charge relative to plaintiff's treatment of Mrs. Neirsheimer was true, the plea was insufficient as a justification and must be treated, as the answer declared it was interposed, as a plea in mitigation. But as a plea in mitigation it is radically insufficient. In order to have constituted a good plea in mitigation it was necessary for the defendant to have alleged and proven that it had knowledge of the facts set up in mitigation prior to the publication of the article from reliable sources, or had ascertained them after due investigation, and believed them to be true. Wilson v. Fitch, 41 Cal. 363; Barkly v. Copeland, 74 Cal. 3, 15 Pac. 307, 5 Am. St. Rep. 413; Edwards v. San José P. & P. Society, 99 Cal. 437, 34 Pac. 128, 37 Am. St. Rep. 70.

Now the only allegation in this plea is that which we have quoted above, namely, that Mrs. Neirsheimer and others had communicated the facts alleged in the subdivision of the answer in question to various persons in the city of San Diego, and that they were matters of public notoriety in that city. This did not constitute a good plea in mitigation. It is simply an allegation that there were rumors of the matters set up in the plea. But an allegation of rumors, or proof of them, would not constitute or support a plea in mitigation. Wilson v. Fitch, 41 Cal. 384; Edwards v. S. J. P. & P. S., 99 Cal. 437, 34 Pac. 128, 37 Am. St. Rep. 70. It is not alleged that defendant had any knowledge on any rumored matters, or that it ever investigated them, or if so that it believed them to be true and in good faith made the publication of them. In fact, it is not even alleged by the defendant that at the time of the publication it had ever heard of the rumors. Under the authorities, in the absence of such allegations no sufficient plea in mitigation is stated. As there was no plea in justification, and no sufficient plea in mitigation, the court properly excluded the evidence bearing on the facts set up in this subdivision of the answer.

9. No error was committed in the rulings of the court as to evidence of the general reputation of plaintiff. This was offered to be proven by the depositions of three witnesses taken on behalf of defendant—two in New York and one in Boston. The testimony of the New York witnesses was properly excluded, because they were not shown to have any knowledge of the general reputation of plaintiff in the community in which she resided in New York, nor did the questions indicate what, if any, kind of reputation was being inquired into, whether general reputation for traits of honesty and integrity, or specific traits involved in the action. "Whatever form of inquiry be adopted, the witness must first show his competency to testify by saying whether or not he knows the general reputation of the person whose character is in issue in the given community, and as to the trait or qualification in question." Ency. of Evidence, vol. 3, p. 44.

The testimony of the Boston witness, also taken by deposition, was properly excluded for the same, and another, reason. This party, in 1899, went to Newburyport, Mass., presumably from Arkansas, at the request of some friends, and stopped there a few days "to make inquiry as to her [plaintiff's] career there," and talked with some 20 persons about her. Over objection of plaintiff, and as the result of this inquiry, he testified as to the reputation of plaintiff. Such testimony was clearly inadmissible. As general reputation consists of the estimation in which one is held in the community in which he resides, it can only properly and safely be testified to by a member of the community; it is the opinion of a member of a community as to the estimation in which another, who moves in it, is held generally by that community. Such member has the means of knowing what that general reputation is, and can properly speak of it. It would be extremely dangerous to enlarge the rule, so as to permit a stranger to a community, entering into it with special bias against another (as this Boston witness showed he was against plaintiff), to testify as to his opinion of the reputation of that other, based upon an interview with a limited number of persons in the community, possibly equally as prejudiced with himself. Under such circumstances it could not be said that he was testifying from his knowledge of the general reputation of the party, or that he was expressing his own opinion on the subject. He would be but stating his conclusion from the statements of others, derived from specific inquiry—a conclusion which would amount to but hearsay evidence at most. State v. Forshner, 43 N. H. 89, 80 Am. Dec. 134; Douglass v. Tousey, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616.

10. As to the instructions. No particular

instruction of the court to the jury is specifically complained of. It is insisted, however, that the general tenor and temper of the charge of the court disclosed a bias in the mind of the court against the cause of defendant. It is not claimed that there is any particular instruction which supports this contention, but the claim is that, taking the trend of the instructions as a whole, it indicates it. We perceive no valid basis for this complaint. The instructions of the court were clear, concise, and correctly stated all the law applicable to the issues involved. It is true that in declaring what issues were before the jury the court also stated that certain other issues were not involved. Ordinarily it is sufficient for the court to instruct a jury as to the law applicable to the issues involved, but it by no means follows that a court is precluded from calling their attention to matters which are not involved, or that it is improper to do so. Excerpts in the transcript, from the argument of one of the counsel for defendant to the jury, show that he insisted that various issues were before the jury for consideration and determination, with which it is very clear they had nothing to do, and which were not involved in the case. The court instructed the jury specifically that these were not issues, and that they should not be considered in their deliberations. This was entirely proper.

11. There are other points made on this appeal, all relating to alleged errors on the part of the court in the exclusion of evidence offered on the part of defendant in support of the truth of the charges made. We do not think they merit particular discussion. We have examined them carefully, and are satisfied that the rulings of the court in rejecting the offered evidence were correct. Much of it was inadmissible, because there was no particular justification pleaded to which it could be addressed, and the rest of it was immaterial to any issue involved in the case.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; McFARLAND, J.; SLOSS, J.

150 Cal. 734

## SCHOONOVER v. BIRNBAUM. (L. A. 1,661.)

(Supreme Court of California. April 2, 1907.)

PARTITION—GROUNDS FOR POSTPONING SALE.

It is not ground for postponing sale in a partition suit brought by a trustee in bankruptcy, in which it is found that he is the owner of an undivided one-half interest, that an appeal by the bankrupt is pending from the judgment for the trustee in an action against the bankrupt to recover such interest.

In Bank. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Ralph W. Schoonover, trustee of the estate of Mary E. Birnbaum, bankrupt, against James Birnbaum. Decree for plaintiff. Defendant appeals. Affirmed.

See 83 Pac. 999.

B. F. Thomas, for appellant. Ralph W. Schoonover (Richards & Carrier, of counsel), for respondent.

SLOSS, J. The plaintiff is trustee of the estate of Mary E. Birnbaum, a bankrupt. Claiming, as such trustee, to own the undivided one-half of certain premises, he brought this action for partition. The defendant appeals from an interlocutory decree directing a sale of the premises.

The allegations of the complaint were all found by the court to be true. Taken alone, they were sufficient to justify the granting of the interlocutory decree, and the only question is whether the relief sought should have been withheld by reason of further findings in favor of affirmative allegations made by the answer. The answer alleged that, prior to the making of the order adjudging Mary E. Birnbaum a bankrupt, she and defendant were the owners of the premises in question as tenants in common; that, while they were such owners and in possession, said Mary E. Birnbaum executed and recorded a declaration of homestead upon said premises; that after the adjudication of bankruptcy, and before the commencement of this action, the plaintiff, as trustee, had commenced an action against said Mary E. Birnbaum to recover the undivided one-half of said premises; that in that action the plaintiff had recovered judgment, from which Mary E. Birnbaum had appealed, her appeal being, as alleged in the answer, still pending, and not likely to be determined within two years.

It is not claimed that these allegations constituted any defense to the action. The extent of appellant's contention is that the matter set up in his answer furnished ground for postponing a sale in the present suit until the action of the plaintiff against Mary E. Birnbaum should be finally determined. But we see no ground for upholding this view. The court found that plaintiff was the owner of an undivided interest in the property, and such ownership entitled him to partition. The findings as to the former suit, and the facts upon which it was based, are not inconsistent with the finding of plaintiff's ownership. At most the title was in dispute between plaintiff and a third party. It may be remarked, incidentally, that, since the making of the interlocutory decree here appealed from, this court has affirmed the judgment in the suit between plaintiff and Mary E. Birnbaum, holding that the latter's claim of homestead was invalid because attempted to be attached to an undivided interest. Schoonover v. Birnbaum, 83 Pac. 999, 148 Cal. 548. The fact that the plaintiff's claim of title was being litigated between himself and a third party had no bearing upon his right to the relief here sought. The pendency of such other action was not available as ground for a plea in abatement, since neither parties nor subject-matter were the same in the two actions. Heilbron v. Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183. Nor is there any force in the argument that the effect of the pending litigation would be to greatly lessen the price which the property would bring at partition sale. Whether litigation affecting the title of one co-tenant would have this effect is matter of conjecture; but, if it should have this result, all parties are fully protected without delaying the sale. No sale made would be valid until reported to and confirmed by the court (Code Civ. Proc. §§ 784 and 785), and if, for any reason, the price realized was so low as to justify the court in concluding that the sale had not been fair to all parties concerned, confirmation would be refused, and a resale ordered. Cf. Dunn v. Dunn, 137 Cal. 51, 69 Pac. 847.

In this discussion we have not noticed the allegations of defendant's answer, to the effect that, if there were a sale of the property prior to the final determination of the litigation between plaintiff and Mary E. Birnbaum, the property would bring no more than one-half of its actual value. The court made no finding on these allegations. We do not decide that, if findings had been made sustaining these averments, they would have furnished ground for postponing the sale; but, on this appeal, which is on the judgment roll alone, these allegations cannot, in the absence of a finding, be considered. The judgment will be affirmed if supported by findings actually made, and the want of a finding on an issue will be presumed, in the absence of a showing to the contrary, to be the result of a failure to offer any evidence in support of such issue. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Hawes v. Clark, 84 Cal. 272, 24 Pac. 116; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Dedmon v. Moffitt, 89 Cal. 211, 26 Pac. 800; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4; Stewart v. Hollingsworth, 129 Cal. 177, 61 Pac. 936.

The decree appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

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150 Cal. 776

## HAMLIN v. PACIFIC ELECTRIC RY. CO.

(L. A. 1,781.)

(Supreme Court of California. April 2, 1907.)

1. Street Railroads—Bicyclists—Care Required.

Though a bicyclist riding along a street railway track is bound to exercise such care to protect himself from injury as is appropriate to the case, a failure to maintain a constant watch and to listen for cars approaching in either direction is not negligence as a matter of law; he being required to use reasonable care in the exercise of his faculties, and whether he did so being a question of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 204, 255–257.]

2. Same—Collision—Contributory Negligence.

Where in daytime a bicyclist rode about a block and a half along a straight street car track, though there was ample room for him in the roadway, and was struck by a car, he was guilty of contributory negligence barring recovery, it appearing his failure to see or hear the car resulted from absolute inattention to his situation and surroundings, and through his failure to exercise any care whatever.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 204–209.]

3. Appeal—Review—Harmless Error—Instruction.

In an action for injury to a bicyclist struck by a street car, error in instructing as to the degree of care required of bicyclists riding along tracks was harmless, where the undisputed evidence showed he was guilty of contributory negligence, barring his right to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4035, 4036.]

4. Same—Burden of Showing Prejudice.

It is incumbent upon appellant to show, not only abstract error, but prejudicial error on the facts in evidence, and to avail himself of the point that an instruction was erroneous he must bring sufficient evidence to show that upon a proper instruction there might have been a finding for him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4047–4051.]

5. Trial—Instructions—Matter Covered by Other Instructions.

In an action for injury to a bicyclist struck by a street car, an instruction on the degree of care required of bicyclists riding along tracks was not erroneous for failing to instruct on the last clear doctrine, where it was covered in another part of the charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651–659.]

6. Street Railroads—Hypothetical Instruction.

It was not error in an action for injury to a bicyclist to instruct that if the motorman when about a block away saw the plaintiff riding between two tracks and far enough away from the track on which the car was running so that the car could have passed him safely, and that the motorman gave warning of the car's approach, and the front of the car did pass him and plaintiff then, either through excitement or otherwise, lost his balance, veered towards the car, and the rear step of the car struck him, and that the car was running on a straight track, the jury should find for defendant; there being evidence to sustain the hypothesis.

7. Trial—Refusal to Instruct—Inapplicability.

An instruction inapplicable to the facts presented is properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596–612.]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by B. W. Hamlin against the Pacific Electric Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. H. Ardis and Hendrick & Knott, for appellant. Bicknell, Gibson, Trask, Dunn & Crutcher (Norman S. Sterry, of counsel), for respondent.

SLOSS, J. This action was brought by the plaintiff to recover damages for personal injuries sustained by him. Plaintiff was riding on a bicycle along a street in the city of Los Angeles, when he was overtaken and struck by an electric car operated by the defendant. The verdict was in favor of the defendant, and plaintiff appeals from the judgment upon this verdict and from an order denying his motion for a new trial. The only points made by appellant are that the court erred in giving two instructions to the jury, and in refusing to give a third one upon the request of the plaintiff.

1. Complaint is made of the following instruction given by the court: "The tracks of a street railway company are in themselves a sign of danger, and one riding along or between the tracks of a street railway company must exercise his faculties of sight and hearing to watch and listen for cars going in either direction; *and if, by exercising his sight and hearing, he could see or hear the car approaching either in front or behind him and he fails to see or hear such car and is injured thereby, and his failure to see or to hear the car contributes in the slightest degree or in any manner whatever directly or proximately to the collision between himself and the car, then I charge you that he cannot recover for any injuries he may sustain by such a collision.*" No particular criticism is directed against the first part of the instruction. The contention is that the italicized portion is erroneous, in that it requires one riding along or between the tracks of a street railroad company to exercise more than reasonable care to avoid injury, and debars him from recovery if it was at all possible for him, under any circumstances, to have seen or heard an approaching car. In other words, the instruction, in effect, requires one upon the track to maintain a constant watch in every direction, and declares that if, by maintaining such watch, and at the same time using his faculty of hearing, he could have seen or heard an approaching car in time to avoid a collision, his failure to see or hear it is as a matter of law negligence. As a statement of an abstract legal proposition, we think this instruction laid down too stringent a rule as applied to the conduct of persons proceeding along a street railroad track. Generally, whether a party has been negligent is a question of fact depending upon a consideration of all the circumstances surrounding the case. And this, like other questions of fact, is to be determined by the jury under proper instructions from the court. "The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions can be rationally drawn from the evidence." Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651. There are, however, certain classes of cases which have occurred so frequently that a definite standard of care required in particular circumstances has been laid down by the courts, and in each of such classes there has been developed a rule declaring that a failure to comply with such standard is, as a matter of law, negligence. Thus it is well settled that the "railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and to listen for approaching trains." Herbert v. Southern Pacific Co., supra. "His failure to so act is negligence which, notwithstanding the negligence of the defendant, the law regards as such a contributory cause on his part as will make the injury his own misfortune, and relieve the other party from liability therefor." Glascock v. Central Pacific R. R. Co., 73 Cal. 137, 14 Pac. 518. It follows that, while as an ordinary rule the question of whether a party has or has not exercised due care should be left to the jury, yet, where the standard of conduct required of persons under given circumstances is so obvious as to be applicable to all persons under such circumstances, the court may properly instruct the jury that a failure to conform to that standard is in itself negligence. Undoubtedly the rule requiring a person about to step upon the track of a steam railroad to use his faculties in order to ascertain whether a train is approaching, where the use of such faculties would have revealed to him the approach of the train, applies with equal force to a person who has entered upon and is proceeding along that track. A failure to employ such precautions while in this position of danger is negligence. Holmes v. South Pac. Coast Ry. Co., 97 Cal. 161, 31 Pac. 834.

The situation as to street railroads differs so materially that the same rule should not be applied to one proceeding along the streets of a city upon or in proximity to the tracks of a street railroad company operating thereon. From the very nature of the operation of steam railroads, it is not to be expected that a train of great weight and propelled at a high rate of speed can be readily stopped in order to avoid collision with persons who may be upon its tracks. It is essential that any one seeking to use the space occupied by the tracks should give way to trains operated thereon. But in the case of street railroads in cities the use of the streets must to a certain extent be common to both the street railroad company and other persons having occasion to use the streets. Bailey v. Market Street Cable Railway Company, 110 Cal. 320, 42 Pac. 914. It is a matter of every day observation that the portion of the street occupied by street railroad tracks is continually used, and must be used, by other vehicles and by foot passengers. While the street car has, from the necessities of the case, a right of way upon the street superior to that of others, its better right is not exclusive. Bailey v. Market Street Ry. Co., supra. No doubt one who has entered upon the portion of the street occupied by the tracks of a street railroad company, and proceeding along said tracks, is bound to exercise such care to protect himself from injury as is appropriate to the case, but it cannot, as a matter of law, be said that a failure to maintain a constant watch and to listen for cars approaching in either direction is in itself negligence. Mahoney v. San Francisco, etc., Ry. Co., 110 Cal. 471, 42 Pac. 968. Manifestly it is impossible for one driving a vehicle along a street to look in both directions at once, and it should ordinarily be left to the jury to determine, under the circumstances of each particular case, what amount of vigilance was requisite in order to constitute due care.

But it is urged that the contrary has been definitely decided by this court in Everett v. L. A., etc., Ry. Co., 115 Cal. 105, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350, and that the rule as there declared supports the instruction given in the case at bar. There, as here, a bicycle rider upon the railroad track was struck by a car going in the same direction. It was held that there being nothing to prevent his seeing or hearing the car, if he had looked or listened for it, he was as matter of law guilty of contributory negligence. After referring to the rule, applicable to persons crossing the tracks of steam railway companies, requiring them to "listen and look to ascertain whether danger is threatened," the court says: "With greater reason does the principle of this rule apply to one who is traveling laterally along the route of a railroad, and knows that engines will soon follow. It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field, and he who deliberately does so will be presumed to assume the risk of the perils he may encounter." After citing cases in support of this rule, the court goes on to say: "Nor is there any distinction, in the application of this doctrine, between an electric or cable line operated upon the public streets of a city, and that of an ordinary steam railroad operated upon the right of way of the corporation. While the deceased had the undoubted right to a reasonable use of the public streets, notwithstanding its occupancy by defendant's tracks, he could not ignore or disregard the rights of the latter in the premises, nor neglect to take reasonable precautions for his own safety. If he chose to make use of the part of the street occupied by the tracks, it was his duty to look out for and endeavor to avoid the dangers incident to such use." In the Everett Case the court was not dealing with the correctness of an instruction purporting to declare a rule of law for the guidance of a jury. It was passing upon the question whether, on the undisputed facts shown by the evidence, it appeared so clearly that the person injured had taken no precautions whatever to insure his own safety that it could be said, as matter of law, that he had been guilty of negligence. In answering this question in the affirmative, language was used, which, while it was appropriate enough to the discussion of the particular facts presented, should not be taken as declaring a rule of law applicable to the cases of all persons proceeding along the tracks of a street railway company. This is pointed out in Clark v. Bennett, 123 Cal. 275, 55 Pac. 908, where McFarland, J., one of the justices participating in the decision of the Everett Case, says that "that case * * * came here upon an exception to a denial of the court below of a motion for a nonsuit, and no question was presented touching the giving or refusal of instructions." See, also, concurring opinion of Henshaw, J., in same case. In cases of this character we think the correct rule is that one riding or walking along the tracks of a street railway company must use reasonable care in the exercise of his faculties of sight and hearing to watch and listen for cars going in either direction. A failure to hear or see the car is not per se proof of negligence in all cases. Whether such exercise of the faculties as, under all the circumstances of the case, was reasonable, would have averted the injury, is a question of fact. The degree of vigilance to be exercised by the person on the track is to be determined by the jury, and not laid down as matter of law, wherever the question of contributory negligence is proper to be submitted to the jury at all.

But in the case at bar the fact that the instruction complained of went beyond the proper limits was not prejudicial to the appellant, for the reason that under any view of the law the undisputed evidence showed his conduct to be so lacking in every element of proper care for his own safety that the court would have been bound to set aside any verdict based upon a finding that he had not been guilty of contributory negligence. According to plaintiff's own testimony, he mounted his bicycle on Pasadena avenue, and started in a southerly direction along said avenue. He was riding either upon the westerly track or between the two tracks of the defendant, when a car of the defendant came up behind him and struck him, inflicting the injuries complained of. He did not remember anything that occurred after he started to ride. The accident occurred in the daytime. A witness called by plaintiff testified, and this is not contradicted by any one, that plaintiff rode about a block and a half along the track before he was struck. There was ample room for him to ride on the street, outside of the track. At the place where the accident occurred, the track was straight. As has been stated, plaintiff was riding a bicycle which, as he himself said, is "a very easy thing to turn from one point to another." All the evidence in the case, the plaintiff's as well as that introduced by the defendant, shows that the plaintiff was not aware of the approaching car till it was practically upon him. His health and hearing were good. Under these circumstances it is perfectly plain that his failure to see or hear the car must have been the result of absolute inattention to his situation and surroundings, and that he exercised no care whatever. To this phase of the case the decision in Everett v. Los Angeles Ry. Co. is applicable, and it is as true here, as it was there, that as matter of law the appellant was guilty of contributory negligence. See, also, Robards v. Indianapolis Street Ry. Co. (Ind. App.) 66 N. E. 66; Morrissey v. Bridgeport Traction Co., 35 Atl. 1126, 68 Conn. 215; Beerman v. Union R. Co., 52 Atl. 190, 24 R. I. 275; McClellan v. Chippewa V. E. Ry. Co., 85 N. W. 1018, 110 Wis. 326. On the evidence the court would have been justified in instructing the jury that appellant was guilty of negligence contributing directly to the injury. He was therefore not harmed by the action of the court in submitting this question to the jury on erroneous instructions, since there was no evidence which would have sustained a finding in his favor under the view of the law most advantageous to him. Under these circumstances, error in the instructions furnishes no ground for reversal. Green v. Ophir, etc., Co., 45 Cal. 522; In re Briswalter, 72 Cal. 109, 13 Pac. 164; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; Edwards v. Wagner, 121 Cal. 376, 53 Pac. 821. It is no answer to this position to say that the record does not show all the evidence given at the trial, but only so much as is necessary to present the errors assigned. It is incumbent upon the party appealing to show, not only abstract error, but error prejudicial to him upon the facts in evidence, and, to avail himself of the point that an instruction was erroneous, he must bring before the court sufficient evidence to show that, upon a proper instruction, there might have been a finding in his favor. If he does less than this, he presents for consideration a mere question of abstract error.

It is further urged that the instruction quoted is erroneous, for the reason that it deprives plaintiff of the right to recover, even though the defendant may have failed to avail itself of an opportunity to avoid the injury after having discovered the dangers of the position in which the plaintiff was. But the instructions given by the court are to be taken as a whole. The jury was fully instructed as to the law of the "last clear chance" doctrine, and the charge, read in its entirety, could not have failed to convey a full understanding of the rights of the plaintiff in this regard, if, indeed, the facts of the case were such as to make this doctrine applicable. Everett v. L. A. Ry. Co., supra.

2. The appellant also claims that the court erred in giving the following charge: "If you find from the evidence that the motorman in charge of defendant's car, when about a block away from the point of the accident, saw the plaintiff riding upon his bicycle between the inner rails of the defendant's east and west tracks, and far enough away from the track on which he was propelling his car so that his said car could have passed the said plaintiff safely, and that he gave warning of his approach, and that the front of his car did pass the plaintiff and that the plaintiff then, either through excitement or otherwise, lost his balance, veered in towards the car, and that the hind step of said car struck plaintiff and that the said car was traveling upon a straight track at the time of the accident, then I charge you, gentlemen, that your verdict must be for the defendant." There was evidence in the record, which, if believed by the jury, sustained each element of the hypothesis stated in this instruction, and, if the facts were found by the jury to be as stated, it is perfectly clear that the injury sustained was not the result of any fault of the defendant. While it is generally the better practice to merely instruct the jury as to the governing rules of law, rather than to attempt to apply these rules concretely to the various complicated states of facts that may be contended for by the respective parties, there was no error in the instruction given, and the appellant cannot have been prejudiced by it.

3. The third point relied on by the appellant is that the court erred in refusing to give the following instruction requested by him: "The court instructs the jury that, if there is no evidence to the contrary, the law presumes that the plaintiff looked and listened to ascertain whether a car was approaching him from the rear, before getting upon the defendant's street car track, if they believe from the evidence that he did get upon said track." It is not necessary to decide in this case whether there is or is not any such presumption of law. The instruction in question was properly refused because it had no application to the facts of the case here presented. All of the evidence shows that the plaintiff had been riding along or upon the track (in whichever position he was) for a block and a half before he was struck by the defendant's car. The only material question is whether he was guilty of negligence at the time of the injury. Whether he had exercised due care at the time he started to ride along the street, a block and a half back of the point of collision, is of no consequence in determining whether he was exercising due care at the time the car struck him.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

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5 Cal. App. 247

### WOOD v. THOMPSON. (Civ. 341.)

(Court of Appeal, First District. California. March 20, 1907.)

VENUE—CONTRACTS—SPECIFIC PERFORMANCE—CONSTITUTIONAL PROVISIONS.

A suit for the specific performance of a contract to convey an interest in mining claims is not one to recover possession of, quiet title to, or enforce a lien on, realty within the Constitution, requiring such actions to be brought in the county where the realty is situated, and the superior court of a county other than that in which the claims are situated has jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, §§ 4–16.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by J. P. Wood against J. A. Thompson. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Vincent Neale, for appellant. Devoto & Richardson, for respondent.

**COOPER, P. J.** This action was brought in the city and county of San Francisco to compel the specific performance of a contract by defendant to convey to plaintiff an undivided one-eighth interest in certain mining claims known as "King Solomon's Mines," situated in Siskiyou county, either by the execution of a good and sufficient deed, or by a decree giving to plaintiff shares of the stock of the Fidelity Investment & Development Company, a corporation, sufficient to represent the one-eighth interest. A demurrer was sustained to the complaint, without leave to amend, upon the ground that the action should have been commenced in Siskiyou county, and that the superior court of San Francisco had no jurisdiction.

In this the court erred. The superior courts are courts of general jurisdiction, and their process extends to all parts of the state unless expressly limited by the statute or the Constitution. Our Constitution contains the following express limitation upon which the defendant relies: "All actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." The above provision, being a limitation upon the general jurisdiction of the superior courts, is to be strictly construed. It prohibits the commencement of certain enumerated actions, but its prohibition must be confined to the actions enumerated therein. Miller & Lux v. Kern Co. Land Co., 140 Cal. 132, 73 Pac. 836, 98 Am. St. Rep. 63. Measured by the above rule the prohibition does not extend to this case. The purpose of the action is not to recover possession of, quiet title to, or enforce a lien upon, "King Solomon's Mines." It is to enforce the specific performance of a contract. If the court should determine that the plaintiff is entitled to a specific performance by a conveyance of an undivided one-eighth interest, that would not of itself entitle the plaintiff to the possession of the real estate.

In Le Breton v. Superior Court, 66 Cal. 27, 4 Pac. 777, it was held that the quoted provision of the Constitution has no application to an action for the settlement of a trust in regard to real estate. In Beach v. Hodgdon, 66 Cal. 187, 5 Pac. 77, it was held that the provision did not apply to a creditors' bill to set aside a conveyance of real estate on the ground of fraud. If the superior court has jurisdiction to set aside a conveyance of land situate in another county, it certainly would have jurisdiction to compel a conveyance of such land. Nor would such action be one for the recovery of possession of real estate.

The order is reversed.

We concur: KERRIGAN, J.; HALL, J.

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5 Cal. App. 228

## ALLSOPP v. JOSHUA HENDY MACH. WORKS. (Civ. 256.)

(Court of Appeal, Third District, California. March 19, 1907.)

1. Appeal—Harmless Error.

Where a cause of action for an accounting was sufficiently pleaded and supported by the evidence, it was immaterial that an allegation that defendant had appropriated the remainder of the property to its own use and a finding to the same effect were not supported by the proof; they being properly regarded as surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4075.]

2. Action—Nature—Contract—Tort.

Where defendant was sued for an accounting of the proceeds of a sale of certain personal property, the action was not changed into one in tort by an allegation that defendant appropriated a part of the property to its own use.

3. Trover and Conversion—Elements—Repudiation of Agency.

Defendant, having undertaken to sell certain property for plaintiff as his agent, returned some of the property to persons from whom it was purchased, receiving credit therefor, and placed the remainder in its own stock, so that its identity was substantially lost. Defendant thereafter sold the property as its own, without keeping any account of its transactions, though it had agreed to dispose of the property as rapidly as possible and to report the sales as they were made. *Held*, that defendant thereby converted the property and was liable for its value as of the date it assumed control over the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 84, 86.]

4. Principal and Agent — Conversion by Agent—Action for Accounting—Demand.

Where, in an action for an accounting of certain property which defendant had agreed to sell as plaintiff's agent, there was proof that defendant had repudiated the agency and converted the property to its own use, plaintiff was not required to prove a demand for the goods to sustain his right to an accounting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 165.]

5. Limitation of Actions—Accounting.

An action for an accounting is limited by Code Civ. Proc. § 343, providing that an action for relief not otherwise provided for must be commenced within four years after the cause of action shall have accrued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 200.]

6. Trover and Conversion—Action—Limitations.

An action for conversion is governed by Code Civ. Proc. § 338, subd. 3, requiring an action for taking, detaining, or injuring any goods or chattels to be brought within three years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 186–188.]

7. LIMITATION OF ACTIONS—EXPRESS TRUSTS—ACCOUNTING.

Where defendant received plaintiff's goods to be sold by defendant as plaintiff's agent and accounted for, defendant was a trustee of an express trust, and hence limitations did not run against defendant's obligation to account until after defendant had repudiated its agency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 506–510.]

8. TRUSTS — ACCOUNTING — VALUE OF PROPERTY—EVIDENCE.

Where defendant received plaintiff's property for sale and account, and defendant's president testified that the fair market value of the property when so received was the same as when previously sold to plaintiff for $5,050, the evidence was sufficient to sustain a finding that the property when received by defendant was worth $4,040, under Civ.Code, §§ 2228, 2237, declaring that a trustee who wrongfully uses or disposes of trust property may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and if he disposes thereof to replace it, with its fruits, or account for its proceeds with interest.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by F. Ernest Allsopp against the Joshua Hendy Machine Works. From a judgment for plaintiff, and from an order denying defendant a new trial and refusing to strike from the cost bill certain percentage fees, defendant appeals. Affirmed.

E. B. Young, for appellant. Chas. W. Slack, for respondent.

BURNETT, J. The complaint alleges that on or about June 17, 1897, the plaintiff and the defendant entered into a contract, whereby the defendant agreed to sell to the plaintiff a five-stamp mill, with certain accessories, for the sum of $5,000; that thereafter by agreement the price was increased to $5,050; that thereafter on or about the 23d day of September, A. D. 1897, the defendant offered to deliver the said property to the plaintiff, and he accepted the said offer, and thereupon he paid defendant the sum of $5,050. There is no denial of these allegations. It is further alleged that on or about October 4, 1897, the defendant agreed with the plaintiff to resell for him the said property and to account for the sales as they were made, and thereupon defendant took possession of the property for said purpose. The answer admits the agreement, but denies that the defendant took possession for the purpose of resale, but alleges that it always had possession, and that no part of the property was ever delivered to plaintiff, but had been left with defendant at the request of plaintiff. The finding of the court in that behalf was in accordance with the foregoing allegations and admissions of the answer. It is further alleged in the complaint that the defendant resold different portions of the property for sums exceeding $3,500, and appropriated to its own use the remainder of the property; that the defendant has never accounted to the plaintiff for the property or the proceeds of the sales thereof, nor has the defendant paid to the plaintiff any of the proceeds, except the sum of $3,500; and that on or about April 4, 1902, the plaintiff demanded an accounting of defendant, and the prayer is for an accounting for the property and the proceeds of the sale. The answer denies that the defendant resold any of the property for any sum in excess of $3,500, denies that it appropriated to its own use any of the property, denies that it has never accounted to the plaintiff for the property or the proceeds of the sales thereof, admits the demand for the accounting, denies its refusal to account, and alleges the payment to plaintiff of all the proceeds of the sales of the property. The finding of the court on this issue is: That the defendant resold a portion of the said property, but the defendant is unable to account for the moneys received from such resales, and that the defendant has never accounted to the plaintiff for the said property, or for the proceeds of the resales thereof. That the defendant, on or about the said 4th day of October, 1897, appropriated to its own use all of the said property, and that the value of said property at said date was and is the sum of $4,040. That the defendant has not paid to the plaintiff any of the proceeds of the resales of the property, except the sum of $3,500, paid as follows: $1,000, April 6, 1899; $1,000, August 10, 1899; $500, November 24, 1899; and $1,000, April 21, 1900." There is also a finding that the defendant failed and refused to account to plaintiff. The court also finds that the action is not barred by the statute of limitations as pleaded by defendant, and the judgment is in favor of plaintiff for the sum of $1,417.57.

The judgment is manifestly just and finds ample support in the evidence. The zeal and sincerity with which they are urged, however, are probably justification for the specific consideration of the points made by appellant. It is contended that the evidence is insufficient to justify the decision, and that said decision is against the law and the evidence. The argument is that the action is for an accounting, and the court finds the property was converted by appellant and bases its judgment upon the rule of damages for conversion, as provided in section 3336, Civ. Code; whereas, it is urged, the evidence does not justify the conclusion that the appellant appropriated the property to its own use. Both parties agree that the action is for an accounting. The gist of such an action is the failure to account. The finding that the defendant "appropriated to its own use all of the said property" is obviously broader than the allegation of the complaint "and has appropriated to its own use the remainder of the said property"; but this is immaterial, and the contention of the insufficiency of the evidence to show any conversion is of no consequence, in view of the fact that a cause of action for an accounting is sufficiently pleaded and supported by the evidence, and the allegation and finding of conversion may be disregarded as surplusage. The allegation of an appropriation of the property by the defendant was unnecessary and did not change the action into one of tort. State v. Chadwick, 10 Or. 423; Segelken v. Meyer, 94 N. Y. 473. But, as pointed out by respondent, there is abundant evidence to show—if it be deemed important—that the property was converted by appellant. The evidence satisfies the requirement of the rule laid down in Steele v. Marsicano, 102 Cal. 666, 36 Pac. 920, to the effect that, "in order to charge the defendant with the conversion of the plaintiff's goods, he must be shown to have done some act implying the exercise or assumption of title, or of a dominion over the goods, or some act inconsistent with the plaintiff's right of ownership, or in the repudiation of such right." It is not apparent what other act could have been done by appellant in respect to the property that would more fully carry with it the implication of the assumption of title to and dominion over the property, or repudiation of any right of respondent in and to the ownership of said property. The defendant having undertaken as an agent to sell the property for plaintiff, having returned some of the property to the persons from whom it was purchased and receiving credit therefor, and having placed the remainder with its own stock so that its identity was substantially lost, and having used and sold the property as its own without keeping any account of its transactions is hardly in a position to urge that it should not be held liable for the value of the machinery as of the date of October 4, 1897, when it agreed in writing to dispose of the machinery as rapidly as possible and report the sales as they were made. As an agent, appellant was charged with the duty of acting in the utmost good faith for the promotion of the interests of the principal. Its conduct was hardly compatible with the requirements of the elemental principles of its trust and the canons of honorable dealing. Section 2228, Civ. Code, provides that: "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." And the doctrine is universally recognized that "the paramount and vital principle of all agencies is good faith, for without it the relation of principal and agent could not very well exist. So sedulously is this principle guarded that all departures from it are esteemed frauds upon the confidence bestowed." 1 Am. & Eng. Ency. of Law, p. 1071. For further illustrations of the same doctrine we may cite: Sterling v. Smith, 97 Cal. 343, 32 Pac. 320; San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410; Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486; Burke v. Bours, 92 Cal. 108, 28 Pac. 57.

In view of the foregoing, the trial court, with some justification at least, might have charged the defendant with the full price paid for the machinery by the plaintiff; but assuredly, the corporation could not expect a more generous concession than the reduction from the price of 20 per cent. which was made by the court. The defendant, being unable to account for the property and its proceeds, could not complain at the action of the court in taking $4,040 as the amount due October 4, 1897, and, according to the well-settled rule of partial payments, computing interest and applying the payments made, and thus determining that the indebtedness of defendant was as found in the judgment. Estate of Den, 35 Cal. 692; 16 Am. & Eng. Ency. of Law, p. 1036.

Appellant's contention that a demand for the delivery of the property was required is likewise destitute of any merit. The appellant answers its own contention by asserting that "this is not an action for conversion, but one for an accounting." But even if it were an action for conversion, under the facts and circumstances of the case no demand would be required. This is apparent from the cases cited by appellant: Wood v. McDonald, 66 Cal. 547, 6 Pac. 452; Remy v. Olds, 88 Cal. 537, 26 Pac. 355; Merrill v. Merrill, 95 Cal. 334, 30 Pac. 542. In the Wood Case it is said: "Proof of any circumstance which would satisfy a jury that a demand would be unavailing, as a refusal by defendant to listen to one, or a statement in advance that he will not deliver, will be sufficient to excuse proof of a demand. If there is proof that defendant had converted the property before or independent of the demand, such conversion—the material matter—will render the defendant liable." "If there is an actual conversion, no demand need be made." Cooley on Torts, p. 530. "Where, however, the agent has been guilty of a breach of duty, as where he fails to render an account of sales, or to notify the principal of the collection of money within a reasonable time, or has converted the property to his own use, there is no necessity for demand before suit." 1 Am. & Eng. Ency. of Law, p. 1092. As before seen, the action was for an accounting, and plaintiff alleged and proved that he demanded that an account be made to him by defendant and its failure and refusal to do so. In that behalf he satisfied the requirements of the law. In support of its plea of the bar of the statute, appellant says: "If the facts stated in the complaint constitute a case of wrongful conversion of personal property by appellant, * * * then the claim of respondent is barred by the statute of limitations, because the conversion is found to have been committed on the 4th day of October, 1897, and his suit was instituted on the 29th day of April, 1902." But it is a sufficient answer to say that the wrong sections of the Code of Civil Procedure were pleaded by defendant, viz., section 337 and subdivision 1 of section 339. The section applicable to conversion is section 338, subd. 3. Lowe v. Ozmun, 137 Cal. 257, 70 Pac. 87, and Horton v. Jack (Cal.) 37 Pac. 652. And the section applicable to causes of action for an accounting is section 343. West v. Russell, 74 Cal. 544, 16 Pac. 392. But, again, there was an express trust created by the transaction between the parties, and the statute of limitations would not begin to run until there was brought home to plaintiff knowledge of the repudiation of the trust or the violation of its terms on the part of defendant. In San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410, it is said: "The statute of limitations cannot be successfully invoked. Reynolds was acting in a fiduciary capacity. Such of his acts as resulted in loss to the corporation were concealed breaches of trust. The statute of limitations would not begin to run in his favor, so as to enable him to escape the results of an accounting, until after knowledge by his principal of his derelictions. In this case the accounting was promptly demanded after discovery." And likewise it may be said here that plaintiff acted speedily and without unnecessary delay. In 19 Am. & Eng. Ency. of Law, p. 187, it is declared: "As long as the relation of principal and agent continues, there is a privity between the parties, and there is nothing to set the statute in operation as to claims and accounts between them. The position of the agent is that of a trustee, and claims against him are governed by a rule similar to that controlling trustees. The assertion by the agent of an adverse right, or his failure to discharge a duty to his principal arising out of his agency, does not set the statute in motion until called to the attention of the principal, or until he knows, or with reasonable diligence might have known, thereof." In 2 Perry on Trusts, § 863, the rule is stated as follows: "As between trustee and cestui que trust, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar. Against an express and continuing trust time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the cestui. * * * The trustee must clearly repudiate the trust and assume an adverse position, with notice to the cestui, before the statute can begin to run." But the principle is too well established to need further citation of authorities.

In its closing brief, appellant seems to have abandoned all the contentions of the opening brief, and to have planted itself firmly upon the proposition that "there is no evidence to support finding 6 of the trial court, 'that the value of the said property at the last-mentioned date (October, 1897) was and is the sum of $4,040'; nor the judgment of said court that respondent recover from appellant a sum of $1,417.57, or any sum." The argument in which appellant indulges is more curious than convincing. Upon general considerations of equity it would seem that appellant should be estopped from contending that the property was worth less than $5,050, the amount paid for it by respondent. But there is evidence to sustain the finding within the rule prescribed by section 2237, Civ. Code, that "a trustee who uses or disposes of the trust property contrary to section 2229 may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he disposed thereof, to replace it, with its fruits, or to account for its proceeds with interest." The testimony of the president of the corporation is sufficient support for the finding of the court. He said that the machinery was sold to Mr. Allsopp for the fair market value, and, when asked if that was not the value at the time it was taken back for resale, his answer was: "I could not say positively. I don't know as there was any particular difference. I don't think there was any appreciable difference." There are other circumstances justifying the court's conclusion, but the foregoing is sufficient.

In addition to the appeal from the judgment and order denying the motion for a new trial, there is also an appeal from an order of the court refusing to strike from the cost bill the amount of $20.88, percentage allowed under an act of the Legislature entitled "An act to regulate fees in the city and county of San Francisco." St. 1865-66, p. 66, c. 91. In the recent case of Doyle v. Eschen et al., we had occasion to consider the question whether the provision involved herein is still in force, and we reached the conclusion that it had not been repealed. We see no reason to modify the views therein expressed.

The judgment and orders are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

5 Cal. App. 273

## AMESTOY ESTATE CO. et al. v. CITY OF LOS ANGELES. (Civ. 333.)

(Court of Appeal, Second District, California. March 26, 1907.)

1. APPEAL—REVIEW—SCOPE—DISMISSAL.

Where a demurrer was sustained to the complaint, and judgment of dismissal was entered thereon upon the merits, the appeal from the judgment involves the action of the court in sustaining the demurrer to the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3450-3452; vol. 2, Appeal and Error, § 420.]

2. JUDGMENT — EQUITABLE RELIEF — LIMITATIONS.

Code Civ. Proc. § 473, relating to the relief from judgments by a court of equity, and providing that the application must be made within a reasonable time, not exceeding six months, an action to set aside a judgment brought a year after the judgment was rendered does not come within the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 363-366.]

3. SAME—EXCUSE FOR FAILURE TO INTERPOSE DEFENSE—IGNORANCE OF FACTS.

Plaintiff began an action against defendant, and served upon it a copy of the complaint, showing that plaintiff claimed the right to the flow in a water course, which comprehended the right to have the flow continue, and was a servitude upon the land of defendant and an interest affecting its real property. An issue in relation thereto was tendered, and the claim was one of the matters examined and determined in the action. *Held*, that the judgment cannot be set aside on the ground that plaintiff's claim was fraudulent, since this was an issue tendered by the complaint, and not extrinsic or collateral to the questions examined and determined in the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 785.]

4. SAME—NEGLIGENCE OF COUNSEL.

A judgment rendered against defendant because it failed to appear and defend in the action cannot be set aside, on the ground that it acted on the advice of counsel, where there was no mistake of fact upon its part, and the selection of the counsel was not induced by any act of plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 821-827.]

5. SAME—COLLATERAL ATTACK.

Where a judgment rendered against plaintiff in a former action appears to be one ordered in accordance with the prayer of the complaint, presumably upon competent evidence, in a proceeding to set aside the judgment, plaintiff cannot question the sufficiency of the evidence to warrant the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 948.]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Amestoy Estate Company against the City of Los Angeles. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

R. M. Widney, for appellants. W. B. Mathews, H. T. Lee, and J. R. Scott, for respondent.

ALLEN, P. J. Action to vacate a judgment of the superior court and to enjoin defendant from asserting rights thereunder. The complaint alleges ownership by plaintiff of a large ranch in Los Angeles county, traversed by the Los Angeles river, a nonnavigable stream; that said lands are riparian to said stream, and the waters thereof are necessary for the irrigation of said lands, and have been so used for more than 50 years; that heretofore, in April, 1903, while plaintiff was so seised, the defendant commenced an action against plaintiff in the superior court of Los Angeles county to determine conflicting interests as to such water and its use. That service of summons was duly made upon plaintiff in June following; that after said service plaintiff correctly and fully stated all the facts involved in said litigation to its attorney, who advised it that it could not successfully defend against said action, and against further expense or litigation in reference thereto; that plaintiff, acting upon such advice, permitted its default to be entered, and on September 11, 1903, judgment was ordered by the court in accordance with the prayer of the complaint and duly entered, by which it was adjudged that the city was the owner in fee of the paramount right to the use of all of the water of said river so far as may be reasonably necessary from time to time to give an ample supply of water for the use of its inhabitants, and for all municipal and public uses; and that the rights of the plaintiff herein were subordinate to the rights of said city. It is alleged that this judgment was ordered upon an unverified complaint, and no evidence was offered additional in its support. Plaintiff in the complaint under consideration alleges, further, that the claim of right asserted by said city in its complaint was unfounded; that the said city possessed no rights to said water, and it well knew such fact and falsely stated that it had title thereto, well knowing that plaintiff herein was the owner of said lands and the riparian rights incident thereto; that plaintiff herein did not discover the mistake and error of its attorney for more than a year after the entry of the judgment aforesaid, nor until January, 1905; that, had plaintiff known of the error and mistake of its counsel, it would have appeared and defended said action and by its answer presented a good and complete defense upon the merits. The complaint further alleges that the riparian rights of the plaintiff are of large value, and without which the value of its lands is destroyed. A general demurrer of the city to the complaint was sustained by the court, and, the plaintiff not desiring to further amend, judgment was entered dismissing the plaintiff's action. From this judgment plaintiff appeals.

The judgment of dismissal, not being for one of the causes provided in section 581, Code Civ. Proc., must be held a judgment upon the merits under section 582; and this appeal therefore involves the action of the court in sustaining the demurrer of the defendant to the complaint. The facts admitted by the demurrer would entitle plaintiff to relief under section 473, Code Civ. Proc., had application been made to the court within a reasonable time, not exceeding six months. Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007; Douglass v. Todd, 96 Cal. 657, 31 Pac. 623, 31 Am. St. Rep. 247. "When the time within which a motion may be made has expired, and no laches or want of diligence is imputable to the party asking relief, there is nothing in reason or propriety preventing the interference of equity." Brackett v. Banegas, 116 Cal. 285, 48 Pac. 90, 58 Am. St. Rep. 164. But there is a marked distinction between the powers of the court in the first instance, wherein discretion is given to the court to relieve a party from a mistake, fraud, or from excusable neglect, under section 473, Code Civ. Proc., and those powers exercised by a court of equity after the lapse of such time when proceedings are instituted by an original bill to vacate the judgment of another court. That a former judgment may be set aside by a court of equity on the ground of fraud, it must be fraud extrinsic or collateral to the questions examined and determined in the action. United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Langdon v. Blackburn, 109 Cal. 26, 41 Pac. 814; Hanley v. Hanley, 114 Cal. 692, 46 Pac. 736.

When the city instituted its original action against plaintiff and served upon it a copy of the complaint, plaintiff had notice of the pendency of the action, was by the service required to appear and answer, and by the Code required to set up any claim of right which it possessed to the property described in the complaint. There is no suggestion in the complaint that plaintiff was prevented by any act of the defendant from appearing and making a proper defense. Conceding the false and fraudulent character of the city's claim, an issue in relation thereto was tendered by the complaint, and such claim was one of the questions examined and determined in the action. Such claim was in no sense collateral. The judgment is conclusive, unless it is shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. Fealey v. Fealy, 104 Cal. 360, 38 Pac. 49, 43 Am. St. Rep. 111. There was no concealment or imposition upon the court. The claim asserted by the city may have been one which the plaintiff herein could have successfully resisted; but it was nevertheless a claim, and under section 738, Code Civ. Proc., an action may be brought by any person against another who claims an interest in real property adverse to him. The claim of the city was to the flow in a water course. This comprehends the right to have such flow continue in such water course over the lands affected, and such right claimed was a servitude upon the land of the plaintiff herein, and, to the extent of the easement, an interest claimed by the city affecting real property described in the complaint. Standart v. Round Valley Water Co., 77 Cal. 399, 19 Pac. 689.

The selection of the attorney upon whose advice plaintiff acted was not induced by any act of the city. It is apparent from plaintiff's complaint that there was no mistake of fact upon its part. It knew of the claim of the city to the water in the river, knew it was a nonnavigable stream, and knew that it owned the land over which the water course extended and the incidental riparian rights appurtenant to such land. Its only mistake, if any, was in accepting the opinion of its attorney that, as a matter of law, the claim of right upon the part of the city was superior to that of the plaintiff as a riparian owner. "It is undoubtedly the true rule that neither the ignorance, the blunders, nor the misapprehension of counsel, not occasioned by the adverse party, is any ground for vacating a judgment or decree." Freeman on Judgments, § 508; Black on Judgments, § 375. The facts involved in Bacon v. Bacon, 89 Pac. 317, were such as justified the conclusion that the plaintiff did not know of her own rights, which clearly distinguishes that case from the one under consideration.

A different rule obtains when the proceedings are under section 473, Code Civ. Proc. That section is broad enough to justify the action of the court in relieving a party from a mistake of law upon the part of his attorney when from reliance thereon he was prevented from making a defense. Douglass v. Todd, supra. The broad provisions of that section are available, however, only to those seeking relief thereunder. It cannot be construed as an attempt to broaden the powers of a court of equity in determining its jurisdiction in an independent proceeding. The reason for applying different rules is obvious. In the one case, the motion is directed to the discretion of a trial court within a limited time and before the judgment has become final; in the other, it is the exercise of equitable powers by an independent court based upon established rules. The restricted power of equity is founded upon the proposition that the verity of a judgment should under all circumstances be maintained when the attack is only upon those matters considered by the court upon the original hearing, without which rule there would be no end to litigation, and no permanent rights could be established by judgments and decrees.

It is alleged in the complaint, although not urged in the briefs, that the judgment was by default and on its face void as unauthorized by section 751 of the Code of Civil Procedure. Were it conceded that section 751 applies to cases other than those where unknown owners are defendants, an inspection of the judgment incorporated in the complaint develops that it was not by default, but was a judgment ordered in accordance with the prayer of the complaint, presumably upon competent evidence. In this proceeding the plaintiff cannot be heard to question the sufficiency of the evidence, presumably before the court, which was by it determined to warrant the judgment.

We find no error in the record, and the judgment is affirmed.

We concur: SHAW, J.; TAGGART, J.

5 Cal. App. 265

## GOOD v. COMMON COUNCIL OF CITY OF SAN DIEGO et al. (Civ. 306.)

(Court of Appeal, Second District, California. March 26, 1907.)

1. MUNICIPAL CORPORATIONS—OFFICERS—REMOVAL.

By chapter 4, § 4, amending article 1, of the charter of San Diego, as approved by resolution of the Legislature February 3, 1905, 25 per cent. of the electors may by petition express their disapproval of the action of any municipal officer whose successor would be elected by such electors, and demand that he be sustained by a vote of confidence or retire, and the charter provides that the petition must contain a statement of the grounds on which removal is sought. A petition stated that the councilman supported a certain ordinance regulating the licensing and sale of liquors in the city of San Diego; that he voted to disregard a former petition for his recall; that he repeatedly voted to disregard petitions to refer to the vote of the people ordinances passed by the council filed in conformity to the provisions of the charter; and that he voted for a false certification of an ordinance to prevent a referendum. *Held*, that the petition was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 354.]

2. Same—Mode of Removal—Petition—Sufficiency.

A certificate of the clerk of the city that he had compared the names on the petition with the great register, and found the petition sufficient, was a sufficient compliance with the statute requiring the certificate to show the "result" of the clerk's examination.

3. Mandamus—Parties.

One of the petitioners may maintain an action for mandamus to compel the calling of an election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 151.]

4. Municipal Corporations—Officers—Removal.

Where a petition bears the proper number of names of electors as shown by the clerks' certificate, no discretion remains with the council, but it is its duty to call an election.

Appeal from Superior Court, San Diego County; D. K. Trask, Judge.

Mandamus by Charles L. Good to compel the common council of the city of San Diego to order an election for the recall of J. N. Reynolds as member of such council. From a judgment awarding the writ, defendants appeal. Affirmed.

Eugene Daney and E. Swift Torrance, for appellants. Luce, Sloane & Luce, for respondent. Anderson & Anderson, amici curiæ.

TAGGART, J. This is an appeal from an order and judgment of the superior court directing a writ of mandate to issue commanding the defendants to order an election for the recall and removal of Jay N. Reynolds, one of the defendants, from the office of councilman of the city of San Diego, to fix date for such election, and to make, or cause to be made, all necessary arrangements for the holding of such election.

Plaintiff was one of 105 signers of a petition presented to the common council of the city of San Diego demanding that an election be called for the removal of said defendant Jay N. Reynolds from the office of member of the common council of the city of San Diego for the Seventh Ward, and the election of his successor, under and by virtue of the provisions of section 4 of chapter 4, adopted as an amendment to article 1 of the charter of that city by vote of the electors thereof on January 7, 1905, which amendment was approved by resolution of the Legislature of the state on February 3, 1905. Statutes and Amendments to Codes Cal. pp. 901–922. The petition was signed and verified by one of the signers, as required by the charter, regularly filed with the city clerk, who within 10 days thereafter submitted to the common council at its regular meeting said petition, accompanied by the certificate of said clerk in the words and figures following, to wit: "San Diego, Cal., March 30, 1906. To the Honorable Common Council of the City of San Diego, California: This is to certify that the foregoing petition of the electors of the Seventh Ward of the City of San Diego, California, for the recall of Councilman Jay N. Reynolds, has been examined by me, and the names on the said petition compared with the Great Register of the County of San Diego, State of California, for the year 1905, and I find said petition to be sufficient. J. F. Butler, City Clerk. [Seal.]" The common council refused to act upon the petition, but "voted to disregard said petition and to table and file the same without action." Plaintiff brings this action as a resident and elector of the Seventh Ward, a qualified signer of said petition, and a property owner and taxpayer in said city, and sets forth the petition for recall in full in his "Affidavit and Petition" in the proceeding before the superior court. Defendant moved to quash the alternative writ issued ex parte, and demurred to plaintiff's affidavit and petition upon which the writ issued. The motion was denied and the demurrer overruled, and, defendants declining to answer, judgment was entered in favor of plaintiff, making the alternative writ peremptory.

These rulings of the court were excepted to, and are assigned as error because (1) the affidavit and petition does not show the petitioner to be a party beneficially interested in the issuance of the writ; (2) the petition for recall does not state grounds sufficient in law; (3) the clerk's certificate attached to the recall petition does not comply with the charter provision by "showing the result of said examination" of the great register; (4) the determination of the sufficiency of the recall petition rests in the discretion of the common council, and cannot be controlled by the mandate of the courts; and (5) the time within which the election should have been held under the provisions of the charter having already expired, no election could be called by the said common council, and the court had no jurisdiction to order an election at a later date. The fixing of the tenure of office of the officers of a municipality subject to removal by the body that elected them is comparatively new in our system of government, and the interpretative branch of the law is in rather an undeveloped state on the subject. A responsible government, however, is the very foundation of the republican system, and there appears no reason why a representative should not be made to retire at any time at the request of the people, as well as at the end of a fixed period. This is not deemed incompatible with a republican form of government in France and several of the South American states. It is similar in principle and application to the custom or rule which makes the ministry or real government of Great Britain answerable at all times for its failure to meet the approval of the electorate of that country on some measure or question of policy. It was evidently the purpose of the framers of the section of the San Diego charter under which the petition in this case was filed to ingraft this principle upon the charter of that city. In the operation of this charter the question is not whether there was cause for the removal of the councilman from office as the word "cause" has heretofore been used in this connection. The fitness of the incumbent, or the propriety or impropriety of his conduct, is not alone involved. Malfeasance, misfeasance, or nonfeasance in office may call for the exercise of the right conferred by this section, but it includes more than these. The charter provides for an answerable or responsible tenure in all elective offices, and "the holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent." By virtue of this provision every elective officer elected after the adoption of the amendment holds office subject to the condition subsequent that 25 per cent. of the electorate of the district from which he was elected may by petition express their disapproval of his action upon some measure or as to some policy, and demand that he be sustained by a vote of confidence or retire. A clear conception of the purpose of this proceeding as distinguished from an ordinary "removal for cause" is necessary in the consideration of the questions here presented. The power to remove a corporate officer from office, for reasonable and just cause, is one of the common-law incidents of all corporations, and this extends to elective as well as appointive officers (Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774; Dillon on Municipal Corporations, §§ 242, 243); and it is competent for the charter of a city to so provide (Croly v. Sacramento, 119 Cal. 234, 51 Pac. 323). In such cases the "just cause" is to be construed as something more than the mere wish of that part of the sovereign people which elected the officer whom it is attempting to remove.

A case of "removal for just cause" in this sense implies some misconduct upon the part of the officer, or imputes to him some violation of the law. Under such circumstances it is necessary that the charges against him shall be based upon some refusal to obey or intention to violate the law prescribing his duties. There are often such penalties attached to proceedings for the removal of officers "for cause shown" that they are and should be carefully guarded from abuse (Croly v. Sacramento, 119 Cal. 234, 51 Pac. 323); but, as to the right to the office as against the people, it is a well-recognized rule that the agency may be terminated at any time by the sovereign power without reason given (Matter of Carter, 141 Cal. 319, 74 Pac. 997). Offices are created by the people for administration of public affairs, and not for the benefit of the officeholder, and revocable at the pleasure of the authority creating them, unless such authority is limited by the power which conferred it. Atty. Gen. v. Jochim, 99 Mich. 358, 58 N. W. 614, 23 L. R. A. 699, 41 Am. St. Rep. 606. There is no doubt that the provision here under consideration, and similar ones in other city charters, are intended to check a growing forgetfulness on the part of officeholders of the principle that the duties of their offices are to be discharged in the interest of the public, and not their own. In the consideration of a freeholder's charter the intention of the people in its adoption is to be considered as a rule of construction. Provisions for the summary removal of appointive officers for cause shown are made by the charter. The general law and the common-law power of a motion, as well as the provisions of the charter, provide for removals of this kind. The purpose of section 4, however, is the reservation, by the people, of the right to remove any elective officer of the city whenever a majority of the electors shall so determine.

The reason why the removal is asked in this case, and the grounds upon which the petition for recall rests, are that the councilman whom it is sought to remove voted for and supported a certain ordinance regulating the licensing and sale of liquors in the city of San Diego, that he voted to diregard a former petition for his recall; that he repeatedly voted to disregard petitions to refer to the vote of the people ordinances passed by the council of said city filed in conformity to the provisions of the charter; and that he voted for a false certification of an ordinance to prevent a referendum. The only reference in the recall petition to the wishes or desires of the councilman's constituents in regard to the matters mentioned, and the only allegation in relation thereto in the "Affidavit and Petition" for the writ of mandate, is found in the following language in the recall petition: "That the official conduct and action of said Jay N. Reynolds ever since he entered upon the duties of said office has been in opposition to the will and preferences of his constituents, and obstructive to the best interests of the city of San Diego." If there be enough of substance in the grounds as stated, the proceeding should not be held to have failed because of lack of detailed and specific statement. The charter provides for a general statement only of the grounds on which the removal is sought, and we think the petition sufficient to cover this provision and to indicate to the officer whose removal is sought why his successor is asked to be elected. The certificate of the city clerk is that he had compared the names on the petition with the great register and found the petition to be sufficient. This was the "result of his examination." Findings that there were 393 votes cast at the last election, and that the 105 names on the petition were on the great register, could have added nothing to this. That it was sufficient, implied "that it fulfilled the requirements of the law." There was nothing to be done by the common council in this connection if the petition had not been sufficient, as the law provided that, if the petition be found insufficient by the clerk, he should return it to the petitioners. In Davenport v. Los Angeles, 146 Cal. 508, 80 Pac. 684, in a similar proceeding, the certificate of the clerk was held to be insufficient because it was ambiguous and on its face showed that the city clerk had not complied with the charter provision contained in the charter of the city of Los Angeles. This provision is the same as that in the San Diego charter. Section 198c, Amendments, Los Angeles Charter; Statutes and Amendments to Codes Cal. 1903, p. 574. By these charter provisions the right to petition for the removal of a public officer is vested in "the electors entitled to vote for a successor to the incumbent sought to be removed." This being the foundation of the right, those who are entitled to demand that the common council call the election can certainly maintain the action to protect the right granted. There is but one question, then, as to how the action must be brought. Must all the petitioners join, must one sue on behalf of himself and others, or may one sue alone? We think the authorities sustain the right of one or more of the petitioners to maintain the proceeding for a writ of mandate. Windsor v. Polk Co., 87 N. W. 705, 115 Iowa, 738; Kimberly v. Morris, 87 Tex. 637, 31 S. W. 808; Frederick v. San Luis Obispo, 118 Cal. 391, 50 Pac. 661.

There is no discretion vested in the common council in connection with the calling of this election. That body's functions are purely ministerial, but, if it be conceded that it was vested with some discretion, it does not follow that it can refuse to act. The duty of determining whether or not the petition contains the proper number of signatures and the comparing of them with the great register devolved upon the city clerk. He is the person given authority to hear and determine the question of sufficiency of the petition, and no appeal therefrom is provided and none apparently intended to be given. This is evident from the provision of the act requiring the return of the petition by the city clerk to the petitioners if found insufficient, and which, in effect, negatives petitioners' right of appeal. Whenever any board, tribunal, or person is by law vested with authority to decide a question, such decision, when made, is res judicata, and as conclusive of the issues involved in the decision as though the adjudication had been made by a court of general jurisdiction." Freeman on Judgments, § 531, cited and affirmed in People v. Los Angeles, 133 Cal. 342, 65 Pac. 749, and People v. Ontario, 148 Cal. 637, 84 Pac. 205. But conceding that the council had supervisory power and refused to order an election in the face of a sufficient petition, mandamus will lie to compel it to act. Sansom v. Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505; Keller v. Hewitt, 109 Cal. 146, 41 Pac. 871; Wood v. Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249. It would be a strange perversion of the law if the common council in order to defeat one of the provisions of the charter, could, merely by dilatory action, not only refuse to comply with the directions of the charter, but prevent the courts from furnishing a remedy for the wrong done by its act. This would furnish the exception to section 3523 of the Civil Code that "for every wrong there is a remedy." Such a result is to be avoided, if possible. Conceding that provisions of the election law are mandatory, they are yet to be liberally construed to accomplish the purpose intended by the law. Jennings v. Brown, 114 Cal. 307, 46 Pac. 77, 34 L. R. A. 45; Packwood v. Brownell, 121 Cal. 480, 53 Pac. 1079. We find nothing in any of the cases cited that calls for a construction of the law that would defeat its purpose entirely, when there is one which would enable it to be enforced or carried out in the manner provided by its terms. The policy of the law and its effect are both much discussed in the briefs of counsel for both parties, as well as those of the amici curiæ, and the latter and the respondent have strenuously defended the constitutionality of the charter provision, although appellant disclaims any intention of raising this question. The policy of the law has been considered by us only in so far as it was necessary to determine the purpose and intention of the people of the city of San Diego in adopting the section involved. Whether, as applied, "their new scheme of reform will result in disastrous consequences" or not, is a matter that should have been considered by the people in adopting the amendment to the charter, but it cannot affect the action of this court on the question before it.

The constitutionality of the charter provision, not being presented by the appellant, has not been considered. The recent decision of the Supreme Court in Re Pfahler (Cal.) 88 Pac. 270, discusses many of the propositions of law presented by respondent in his brief in relation to the constitutionality of the section of the charter here being considered, as applied to other provisions of the charter of Los Angeles city, and is conclusive as to some of them; but this matter is not before us.

Judgment of the superior court affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 256

## VIRGINIA TIMBER & LUMBER CO. v. GLENWOOD LUMBER CO. (Civ. 207.)

(Court of Appeals, First District, California. March 25, 1907.)

1. TROVER AND CONVERSION — PLEADING — ISSUES AND PROOF—FRAUD.

Plaintiff, having sold lumber to a third person, who transferred it to defendant, in an action against defendant for its conversion, plaintiff could not show that the sale to the third person was obtained through his fraud; the alleged fraud not having been pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, § 209.]

2. SALES — BONA FIDE PURCHASER — PRE-EXISTING DEBT.

A transfer of property in consideration of a pre-existing debt is a transfer for a valuable consideration sufficient to render the buyer a bona fide purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 688-691.]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by the Virginia Timber & Lumber Company against the Glenwood Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

Jackson Hatch and Walter H. Linforth, for appellant. Corbet & Goodwin, B. A. Herrington, and Louis H. Brownstone, for respondent.

COOPER, P. J. Action to recover damages for the alleged wrongful conversion of personal property. The action was tried with a jury, and a verdict rendered for plaintiff in the sum of $1,625.59, for which judgment was entered. This is an appeal from the judgment on the judgment roll and a bill of exceptions.

The plaintiff alleges that on or about the 15th day of July, 1903, it was the owner and entitled to the possession of a lot of lumber described in the complaint, and that defendant at said time wrongfully converted the same to its use, to the damage of plaintiff in the sum of $2,000, for which amount judgment is prayed. In support of the complaint, the plaintiff, under proper objections on the part of defendant, was allowed to introduce evidence tending to show that, between the 1st day of May and the 1st day of July, 1903, it sold and delivered the lumber to one Routt on credit, and that it has not been paid for said lumber; that at the time Routt purchased the lumber he was doing business under the name of the San José Lumber Company, and had his office with defendant, and used its yard in which to pile the lumber; that the lumber was hauled from the railroad depot with defendant's teams, and was, when placed in defendant's yard, turned over to and became, so far as Routt was concerned, the property of defendant; that in March, 1903, before any of the lumber had been sold or delivered to Routt, he had entered into a writen contract with defendant to purchase its entire stock of lumber in its yards for the sum of about $39,000, of which sum the said Routt paid $3,000, and no more; that, under the contract so made by Routt with defendant, the entire stock of lumber in defendant's yard was to remain the property of defendant until fully paid for by Routt, but the business was to be carried on as before, a correct account of the expenses and of all sales to be kept, and Routt to be credited on the purchase price with the net proceeds of such sales; that Routt was to keep up the stock of lumber, so as to keep the business going; that Routt agreed with defendant to keep up at his own cost and charge all such lumber and supplies incident to the proper carrying on of defendant's business in connection with said lumber yard, an account of all transactions and sales to be kept; that the lumber in controversy was sold and delivered to defendant by Routt under such arrangement; that prior to selling the lumber to Routt plaintiff had asked him for references as to his honesty and financial standing; and that plaintiff communicated with the persons to whom it was referred, and received from them replies highly favorable to Routt. In other words, the plaintiff's theory of the case upon the trial was that the sale made by it to Routt was made through fraud, consisting of false representations made by Routt as to his financial standing and his ability to pay, and that defendant was not an innocent purchaser for value, for the reason that the consideration of the transfer to defendant was a prior indebtedness of Routt to defendant. Routt was not made a party defendant. It is conceded that the lumber was sold and delivered to him by plaintiff. The complaint contains not a word as to any fraud, or as to any attempt by plaintiff to rescind.

The question, then, is as to whether or not the plaintiff having sold and delivered the lumber to Routt, can, under the complaint in conversion, notwithstanding defendant's objection, prove facts to show that the sale to Routt was fraudulent, and therefore void. We are clearly of the opinion that the evidence was not admissible under the pleadings. The complaint must state the facts upon which it is sought to recover. In order to have enabled the plaintiff to introduce evidence of fraud in this case, it must have alleged the facts and circumstances with sufficient particularity to show that the sale to Routt was fraudulent. It alleged that it was the owner and entitled to the possession of the property at the time it claims that the defendant converted it, but the evidence shows that it had prior to that time sold and delivered it to Routt. Plaintiff, in order to have been entitled to any relief, must necessarily have proven the sale to Routt, and that it was fraudulent. The cause of action depended upon the proof of fraud. If it was necessary to prove fraud in this case, it was necessary to allege it. The defendant was entitled to know the facts upon which the plaintiff relied so that it might prepare itself to meet them. Defendant was charged with having wrongfully converted the property, but it appears that it purchased the property from Routt, to whom it had been sold by plaintiff. Plaintiff having sold the property to Routt, and delivered him the possession of it, enabled Routt to sell to defendant with an apparently good title. If the plaintiff would relieve itself of its sale to Routt, it must state the facts constituting the fraud with sufficient particularity to enable the defendant to meet them. The object of pleading is to arrive at the issue and give fair warning to the adversary. The issue to be tried in this case was as to whether or not the sale to Routt was procured by fraud. The reasoning of Burris v. Adams, 96 Cal. 664, 31 Pac. 565, seems to dispose of the case at bar. That was an action in which the plaintiff claimed to be the owner and desired his title quieted to an undivided one-eighth of certain land. His cause of action depended upon proof of fraud at a certain probate sale, but he did not allege the facts constituting the fraud upon which he relied. The court below sustained the objection to the evidence, upon the ground that there was no averment in the complaint of the acts constituting the fraud. The court sustained the ruling, and in the opinion said: "The complaint contains only the averments usually employed in an ordinary action to quiet title. Where the cause of action depends upon the proof of fraud, the facts constituting the fraud must be averred. * * * He knew from the start that the respondent had a perfect legal title, which he could overthrow by proving her guilty of a certain fraud, and he did not aver fraud even in general terms." In the case at bar the plaintiff knew that it, at least, had parted with the legal title to the lumber by a sale thereof, and that it could not recover without overthrowing that sale. It did not aver the fraud, or even mention the sale. It knew it had sold the lumber, but alleged that it was the owner thereof.

In Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045, the defendant claimed that the money deposited was the property of the husband of plaintiff, and that the intent of the deposit in the wife's name was to defraud creditors. The court said: "If the appellant had intended to avoid such gift, he should have made proper averments therefor in his answer, in order that the plaintiff might meet them at the trial. Fraud is never to be presumed, and whenever it constitutes an element of a cause of action, or of a defense which is of an affirmative nature, and invoked as conferring a right against the plaintiff, it must be alleged. In Capuro v. Builders' Ins. Co., 39 Cal. 124, the court said: "The rule is, undoubtedly, as stated by appellant, that when a party relies upon fraud, either to support his cause of action or in defense, he must set up the facts which constitute the fraud. It follows, as a necessary consequence of that proposition, that he can prove only those facts which he has set up." To the same effect, see Kent v. Snyder, 30 Cal. 666; Sterling v. Smith, 97 Cal. 343, 32 Pac. 320; Moore v. Copp, 119 Cal. 429, 51 Pac. 630; Burris v. Kennedy et al., 108 Cal. 331, 41 Pac. 458; Albertoli v. Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200; Glazer v. Clift, 10 Cal. 303; Leszinsky v. White, 45 Cal. 278. Plaintiff does not cite any California case in support of its contention, but it cites four cases from other states, in which it is claimed the rule is different. Two of them are from Nebraska. Phenix Iron Works v. McEvony, 47 Neb. 228, 66 N. W. 290, 53 Am. St. Rep. 527, and Pekin Plow Co. v. Wilson, 92 N. W. 176, 66 Neb. 115. They were actions in replevin, and the court held that "The Code takes actions of replevin out of the general rule in regard to pleadings."

Even if this were an action in replevin, we have no such Code provision. Benesch et al. v. Waggner, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254, was an action in replevin, and proceeds upon the theory that in such action, where a delivery of the property is claimed, an affidavit must be made by the plaintiff showing "the alleged cause of the detention thereof according to his best knowledge and belief," which it would seem would inform the defendant sufficiently as to the acts claimed to be fraudulent. Salisbury v. Barton, 66 Pac. 618, 63 Kan. 552. The action was in replevin. The facts are not very fully stated in the opinion. The court said that the plaintiff pleaded three elements which, if proved, would entitle him to recover—"ownership, right of possession, and wrongful detention by the defendants." In the case at bar the plaintiff claimed that it had parted with the ownership by reason of a sale, that such sale was the result of fraud, and that it rescinded the sale. Having parted with the ownership, its right of action depended upon proving facts showing that by reason of fraud it was induced to part with such ownership, so as to entitle it to be relieved of the effect of the transfer of such ownership. It was not entitled to prove such facts without alleging them.

The court, at the request of plaintiff, gave instructions numbered 5, 6, 7, and 8, in regard to the question of an innocent purchaser for value. The sixth instruction is as follows: "I instruct you that a pre-existing debt is not a sufficient consideration for the transfer of property, to warrant the person securing such property to hold it as against the right of the one from whom the buyer has obtained such goods by fraud in the purchase." Instructions 5, 7, and 8 contain the same proposition expressed and repeated in different words. The eighth instruction expressly states that the "crediting of the value of said lumber to the account of said Routt by the Glenwood Lumber Company, pursuant to the contract made between the Glenwood Lumber Company and said Routt March 31, 1903, would not make said Glenwood Lumber Company an innocent purchaser for the value of said lumber." No evidence was offered in any way to connect the defendant with any fraud, or the knowledge of any fraud on the part of Routt, and hence it is evident that the proposition as stated to the jury by the instructions was that the payment of a prior indebtedness was not a valuable consideration for the sale of the lumber to defendant. Such is not the law in this state, and the giving of the instructions was error. A conveyance or transfer of property in consideration of a preexisting indebtedness is a conveyance for a valuable consideration. Frey v. Clifford, 44 Cal. 342; Davis v. Russell, 52 Cal. 611, 28 Am. Rep. 647; Sackett v. Johnson, 54 Cal. 107; Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Duff v. Randall, 116 Cal. 226, 48 Pac. 66, 58 Am. St. Rep. 158.

The judgment is reversed.

We concur: KERRIGAN, J.; HALL, J.

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5 Cal. App. 249

## RIGHETTI v. RIGHETTI. (Civ. 329.)

(Court of Appeal, Second District, California. March 22, 1907. Rehearing Denied April 20, 1907.)

1. BILLS AND NOTES — MODIFICATION — ORAL CHANGE.

Where there was an agreement that, if the maker of a note would withhold payment until certain proceedings instituted against the payee were settled, no interest would be charged thereon after maturity, and the maker retained the money until such proceedings were settled, the agreement, though oral, having been executed, had the effect to change the stipulation of the note as to interest.

2. TENDER — SUFFICIENCY — KEEPING TENDER GOOD.

A deposit in a bank of the balance due on a note to be paid upon the surrender of that note and another was not a deposit, within the meaning of Civ. Code, § 1500, providing that an obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tender, §§ 36, 55.]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Tognina Righetti against Orazio Righetti. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Judgment and order reversed, and cause remanded, with instructions to the trial court to order a judgment entered for plaintiff.

S. V. Wright and Albert Nelson, for appellant. W. H. Spencer and William Shipsey, for respondent.

ALLEN, P. J. Action upon a promissory note. Judgment for defendant. Appeal by plaintiff therefrom, and from an order denying a new trial.

The findings of the court—all of which, except as hereinafter noted, have some support in the evidence—and the evidence in the record together establish the following facts: The note sued on was executed by defendant as consideration for the purchase of an interest in a business theretofore conducted by plaintiff's husband and defendant. Before its maturity the husband was adjudged a bankrupt, and a trustee in bankruptcy instituted proceedings to have the note declared a part of the estate of the bankrupt, for its possession, or the value thereof, and procured an injunctional order that the plaintiff be restrained from selling or disposing of the note pending the action. During all of the period involved in this action, the husband of the plaintiff acted as her agent with full authority in the premises. At the maturity of the note defendant notified the husband as such agent that he intended to deposit the money in bank in extinguishment of the note. Thereupon it was agreed that, if the defendant would retain the money until the proceedings instituted by the trustee against the wife were settled, no interest would be charged thereon after maturity. Acting upon this agreement, the defendant retained the money until such proceedings were settled, except that for the purpose of procuring an adjustment with the creditors of the husband, who was then in jail upon a charge of fraud, defendant advanced $1,800, which was received as part payment of such note, which sum, together with $50 paid as interest, constituted the only payments thereon; and a balance remained unpaid of $296.70. After the dismissal of the action by the trustee, defendant offered to pay this balance, but it was refused, and a claim made that a much larger sum was due. Through threats and by duress the husband of the plaintiff procured a check from defendant for $600 and a new note for $300 in settlement of the balance of $296.70. This check and the old note were left in escrow; the latter to be surrendered upon payment of the check. The defendant stopped payment of the check, and through his attorneys deposited $296.70 in the Commercial Bank of San Luis Obispo, to be paid plaintiff or her agent upon surrender of the old note and the note for $300. This plaintiff declined to accept.

It is contended that the agreement waiving interest, being oral, could not have the effect to change the written contract of the parties; but, while oral, it was fully executed. Under the terms of the injunctional order, the plaintiff had a right to enforce collection, and the defendant, under the Code, a right to deposit the money in extinguishment of the debt. The oral agreement in relation to the retention of the money and waiver of proceedings to collect, being fully executed, had the effect to change the stipulation as to interest.

It is contended, further, that the allegations of the complaint in relation to the coercion claimed in procuring the check and note of $300 are insufficient. In view of the fact that the fruits of the attempted settlement were voluntarily surrendered by plaintiff to defendant upon the trial, further consideration of the questions involved would serve no useful purpose. We find no evidence in support of the finding that the deposit of $296.70 was made in the Commercial Bank to the credit either of the plaintiff or her agent. On the contrary, it was deposited in the bank, to be paid conditionally upon the surrender of the two notes. The deposit contemplated by section 1500 of the Civil Code, the effect of which is an extinguishment of the obligation, is an unconditional deposit to the credit of the holder or owner of the obligation. This unconditional deposit was not made, and the court erred in treating the same as an extinguishment of the obligation. In addition to this, had it been a deposit resulting in an extinguishment, the court possessed no right to direct the manner of its distribution, either as to costs or otherwise. Money deposited under the provisions of section 1500, Civ. Code, becomes at once the property of the person to whose credit it is placed, and is no more subject to such an order than any other deposit in the bank.

A careful examination of the record discloses no error, other than the one last above referred to. It plainly appears from the record that it was the duty of the court to have entered a judgment in favor of the plaintiff for the $296.70, the admitted balance unpaid upon the note.

It is therefore ordered that the judgment and order be reversed, and the cause remanded, with instructions to the trial court to order a judgment entered in favor of the plaintiff and against defendant for $296.70, without costs to either party.

We concur: SHAW, J.; TAGGART, J.

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5 Cal. App. 252

## WOOD, CURTIS & CO. v. SCURICH. (Civ. 292.)

(Court of Appeal, First District, California. March 22, 1907. Rehearing Denied by Supreme Court May 21, 1907.)

1. SALES—CONTRACTS—RECOVERY FOR BREACH—NONPERFORMANCE BY PLAINTIFF.

Where plaintiff has failed to accept and pay for apples properly delivered under a contract, he cannot recover for defendant's failure to make further deliveries thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 434.]

2. CONTRACTS—NOTICE OF RESCISSION UNNECESSARY.

In an action for breach of contract, where plaintiff himself had failed to perform and the defense is based on that fact, notice of rescission is unnecessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1191.]

3. APPEAL—REVIEW—HARMLESS ERROR—PARTY NOT ENTITLED TO RECOVER IN ANY EVENT.

Where plaintiff is not entitled to recover on a contract because of his own breach, rulings of the court and failure to find on the question of damages are immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4035, 4036.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Wood, Curtis & Co. against Luke Scurich. From a judgment for defendant, plaintiff appeals. Affirmed.

W. T. Jeter, C. M. Cassin, and L. T. Hatfield, for appellant. Wyckoff & Gardner, for respondent.

HALL, J. Plaintiff brought this action to recover damages for failure of defendant to deliver three car loads of apples under a contract, whereby defendant agreed to deliver to plaintiff ten car loads of Bellflower apples of a specified quality for a specified price, shipment to be made between September 15 and November 15, 1903, at the convenience of buyer, say one car load per week. Each car to be paid for upon delivery. Plaintiff's claim for damages is for the alleged failure of defendant to deliver the eighth, ninth, and tenth car loads of apples.

Defendant pleaded as a defense that plaintiff did not comply with the terms of the contract upon its part, in this: That defendant delivered a car load of apples (the fifth car load) on the 7th day of October, 1903, which were in all respects in accordance with the requirements of the contract, but that plaintiff refused to pay therefor until the 14th day of November, 1903, and that on the 27th day of October, 1903, defendant delivered a car load of apples to plaintiff (eighth car load), which were in all respects in accordance with the requirements of the contract, but that plaintiff refused to accept or to pay for the same, and never has paid for the same. Plaintiff attempted to justify its refusal to pay for the fifth car load upon delivery, upon the ground that they were not of the quality required by the contract, but upon confessedly sufficient evidence the court found that they were of such quality. Plaintiff also attempted to justify its refusal to accept the eighth car load, upon the ground that they were not of the quality stipulated for by the contract, but the court also, upon confessedly sufficient evidence, found that they were of such quality. The eighth car load was tendered on the 27th day of October, 1903, and, as the evidence of plaintiff discloses, was rejected after inspection by plaintiff upon the alleged ground that the apples were not of the quality called for by the contract. As we have just said, the court found upon sufficient evidence that the apples were of the quality called for by the terms of the contract. This justified the finding or conclusion of the court that defendant was excused from further performance by the defaults and failures of plaintiff.

"One who refuses or fails to perform the conditions imposed on him by the terms of a contract, and shows no excuse for such refusal or failure cannot recover for a breach of the contract by the other party." 11 Cent. Dig. § 1207, citing The Alida (C. C.) 12 Fed. 343; Baird v. Evans, 20 Ill. 30; Bishop v. Newton, 20 Ill. 175; Schoonover v. Christy, 20 Ill. 426; Heaston v. Colgrove, 3 Ind. 265; Morton v. Kane, 18 Ind. 191; Smith v. Cedar Rapids & M. R. Co., 43 Iowa, 239; Golding v. Petit, 20 La. Ann. 505; Coates v. Sangston, 5 Md. 121; Reynolds v. Burlington & M. R. R. Co., 11 Neb. 186, 7 N. W. 737; Chicago, B. & Q. R. Co. v. Cochran, 42 Neb. 531, 60 N. W. 894; Elliott v. Heath, 14 N. H. 131; Boyett v. Braswell, 72 N. C. 260; Davis v. Yates, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 265; Warren v. Bean, 6 Wis. 120.

In Azema v. Levy, 5 N. Y. Supp. 418, under a contract to sell and deliver 500 bags of beans, to be delivered in two lots of 250 bags each, it was held that a refusal of the buyer to accept the first shipment of 250 bags released the seller of the obligation to make any further tender. In Providence Coal Co. v. Coxe, 35 Atl. 210, 19 R. I. 380, 582, plaintiff sued for breach of contract to sell and deliver 10,000 tons of coal, the shipments to be distributed equally over a period of several months. It was held that the refusal of plaintiff to take the agreed portions of the coal during the earlier months precluded recovery of damages for refusal of defendant to supply coal during the latter months. So also in Canda v. Wick, 100 N. Y. 127, 2 N. E. 381, it was held that the refusal of the buyer to receive one boat load of bricks on a contract calling for the delivery of 400,000 bricks to be delivered from time to time absolved the seller from making any further deliveries; the grounds of the refusal to accept being found to be untrue in fact. It has also been held that the refusal of one party to a contract to make payment as called for by the terms of a contract excuses the other party from further performance on his part. Johnson v. Tyng, 37 N. Y. Supp. 516, 1 App. Div. 610; Schwartz v. Saunders, 46 Ill. 15; Hale v. Sheehan, 71 N. W. 1019, 52 Neb. 184; Minaker v. Cal. Canneries Co., 138 Cal. 239, 71 Pac. 110. In Minaker v. Cal. Canneries Co., supra, defendant refused to make payments required by custom on a contract for sale of fruit, and, on being sued for the fruit that had been delivered, counterclaimed for damages because of refusal of plaintiff to deliver the balance of the fruit. The court said: "Of course, defendant was not entitled to recover damages as for breach of the contract on the part of plaintiffs without showing performance on its part of its own agreement. This it failed to do; but, on the contrary, it was the first party to disregard and violate the conditions of the contract. It was just as important that payment should be made as agreed upon as it was that deliveries should be made according to the contract, and, when one of the parties flatly declared that it would not pay as agreed, the other party had the right to refuse to further deliver."

In the case at bar it is not necessary for us to determine that the delay in making payment for the fifth car load of apples was such a breach as excused the defendant from further performing. It is sufficient to say that the refusal to accept or to pay for the eighth car load of apples was such a breach on the part of plaintiff as precludes it from the recovery of any damages because of the refusal of defendant to make any further deliveries. It signed and was bound by the terms of the contract. It was just as much its duty to accept the apples when delivered under the contract, if of the stipulated quality, as it was the duty of defendant to deliver the apples. Being the first to refuse to perform, it cannot complain because the defendant refused to further perform on his part. See cases cited supra, and also to the same effect Dunn v. Daly, 78 Cal. 644, 21 Pac. 377; Twomey v. People's Ice Co., 66 Cal. 233, 5 Pac. 158; Johnson v. Moss, 45 Cal. 515.

The point urged by appellant that defendant did not show that he had given notice of a rescission of the contract cannot avail appellant. Defendant's defense is not predicated upon a rescission of the contract on his part, but rests upon the proposition that one party to a contract who has refused to perform his part of the contract cannot recover damages for a refusal of the other party to perform after such breach. The rule that one who wrongfully refuses to perform the conditions of the contract on his part cannot recover for a breach of the contract by the other party is akin to the rule in equity that one who asks equity must do equity. The plaintiff not being entitled to recover at all because of its own breach of the contract, any rulings that the court made concerning the admission of evidence on the question of damages, as well as its failure to find upon any such questions, become immaterial.

We find no errors prejudicial to the plaintiff.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

5 Cal. App. 262

## JOHN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. (Civ. 369.)

(Court of Appeal, Second District, California. March 25, 1907.)

1. DIVORCE—DECREE—EXTENT OF RELIEF.

Civ. Code, § 147, requires the court, in rendering a decree of divorce, to make disposition of the homestead. Section 146 provides that, if a homestead has been selected from the property of either spouse, it shall on divorce be assigned to the former owner. Section 131 provides that all issues shall be tried and determined at the time when the court determines whether the divorce should be granted. *Held*, that it was proper for the court to include in the interlocutory judgment adjudging a divorce a determination as to the disposition of the homestead; such question having been an issue in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 701, 705–708.]

2. ABATEMENT AND REVIVAL — DEATH OF PLAINTIFF—DEATH AFTER DECISION—EFFECT —ENTRY OF JUDGMENT.

In an action for divorce, the court had jurisdiction to enter final judgment for plaintiff after his death, the same not having impaired the power of the court by the express provisions of Civ. Code, § 132, and Code Civ. Proc. § 669, providing that if a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 335–337.]

Application by Lydia M. John for a writ of certiorari to review the action of the superior court in Los Angeles county in granting a decree of divorce in an action by Joseph S. John against the applicant. Application denied.

T. M. Stewart, for petitioner. A. C. Lawson, for respondent.

SHAW, J. This is an application for a writ of certiorari.

In an action for divorce brought by Joseph S. John against the petitioner, Lydia M. John, it was alleged that certain real property therein described was the separate property of the plaintiff in said action, and that plaintiff had declared a homestead thereon. The default of the defendant was duly entered, followed on January 31, 1905, by an interlocutory judgment, whereby it was adjudged that plaintiff was entitled to a divorce and that the homestead set out in the complaint was the separate property of the plaintiff and should be set aside and awarded to him. Nearly one year after the entry of this judgment the defendant, who is petitioner here, interposed certain motions having for their object the reopening of the case so far as it disposed of the real estate, all of which motions were denied, and on May 26, 1906, and after the death of the plaintiff, Joseph S. John, which occurred March 8, 1906, the court rendered its final decree in accordance with the interlocutory judgment and decision had upon the trial of the case.

Petitioner contends, first, that that part of the interlocutory judgment adjudging the real property to be the separate estate of the plaintiff was and is in excess of the jurisdiction of the court; second, that the final decree, by reason of the fact that it was rendered after the death of Joseph S. John, the plaintiff in said action, was and is void. Neither position is tenable. It appears from the complaint that certain real estate therein described constituted the homestead of the parties, and it was alleged that the said real estate so homesteaded was the separate property of the plaintiff. Section 147, Civ. Code, requires that "the court in rendering a decree of divorce, must make such order for the disposition of the * * * homestead, as in this chapter provided." And section 146, Civ. Code, provides: "In case of the dissolution of the marriage, * * * the homestead shall be assigned as follows: * * * (4) If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property. * * *" It clearly appears from the above-quoted provisions of the Code that it was the duty of the court to determine whether or not the real estate described in the complaint was the separate property of the plaintiff as therein alleged. It was an issue in the case, and section 131, Civ. Code, contemplates that all issues embraced in the pleadings shall be tried and determined at the time when, and upon the trial wherein, the court determines whether or not "the divorce ought to be granted." It is at this time that the court is required to "file its decision and conclusions of law as in other cases," and this decision must respond to all the issues involved in the action. Glass v. Glass (decided at the October terms of this court) 88 Pac. 734. In this case one of the issues was whether or not the real property upon which the homestead was impressed was the separate property of the plaintiff. Section 132 gives the court the power of its own motion to enter final judgment at the expiration of one year from the entry of the interlocutory judgment; and the fact that this authority is given the court would seem to exclude the idea that a trial was contemplated at the time of entering this last judgment. It has been said that there are three parties to an action for the dissolution of the bonds of matrimony; that the state by reason of its interest in maintaining the marriage relation is an interested third party. Deyoe v. Superior Court, 140 Cal. 482, 74 Pac. 28, 98 Am. St. Rep. 73. The real parties are not allowed to control the subject of the action as they may dispose of property rights. "The Legislature has complete control of the subject and may impose whatever restrictions or delays it pleases either in regard to the time for beginning the action, or the method and order of procedure after the action is begun." Grannis v. Superior Court, 146 Cal. 256, 79 Pac. 891, 106 Am. St. Rep. 23. And it may likewise, upon a dissolution of the marriage, when property rights of the parties to a divorce suit are involved, require that such rights and property interests shall be determined by the court at the time when the court determines whether "the divorce ought to be granted." The decision of the court, both as to the granting of the divorce and the disposition of the property, is subject to review on appeal; and certainly it was never intended that there should be a delay of a year, or possibly a longer period in case of an appeal from an interlocutory judgment, and then another trial as to issues involving the property rights of the parties, followed by the delay of another appeal from a decision of the court thereon and judgment disposing of the same.

It appears that at the expiration of the year the plaintiff made a motion for final judgment. This was opposed by the defendant, and pending the disposition of defendant's motions the plaintiff died, and final judgment was not entered until May 26th. His death, according to the express provisions of section 132, Civ. Code, did not impair the power of the court to enter final judgment. Section 669, Code Civ. Proc., provides that if a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. There had been a decision of all the issues of fact at the time of entering the interlocutory judgment, and both section 132, Civ. Code, and section 669, Code Civ. Proc., constitute authority for the action taken by the court in this case.

The application is denied.

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 278

## HEALY et al. v. ANGLO-CALIFORNIAN BANK, Limited, et al. (Civ. 251.)

(Court of Appeal, Third District, California. March 27, 1907.)

WATERS AND WATER COURSES — IRRIGATION DISTRICTS—POWERS AND PROCEEDINGS—CONSTRUCTION WORK.

St. 1897, pp. 254, 272, c. 189, provides that an irrigation district, after adopting a plan, shall give notice calling for bids for the construction of the work or any portion thereof, and that, if less than the whole of the work is advertised, the portion so advertised must be "particularly described" in such notice, which shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive sealed proposals therefor. A notice for bids for a portion of the work did not refer to flumes, trestles, and chutes included in the plans and specifications, the notice called for railroad crossings not shown by the plans, and in various other respects there were discrepancies between the plans and notice. *Held*, that an attempted acceptance and award to a bidder was void, as the statute requires that, in the case of the construction of a part of the work, the work, described in the notice must agree substantially with the work described in the plans and specifications.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by William H. Healy and another against the Anglo-Californian Bank and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

W. H. Hatton and L. L. Dennett, for appellants. Alex. G. Eells, for respondents.

CHIPMAN, P. J. Plaintiffs allege in their complaint that on November 29, 1902, they caused to be delivered to defendant irrigation district a sealed proposal in writing to do certain work for it upon its canal system, and, accompanying said proposal, placed in the possession of said defendant irrigation district their check for $6,000, upon the face of which check was written, "Not to be cashed unless forfeited." That said check was certified by said defendant bank and was so delivered under an express agreement between said defendant irrigation district and plaintiff that, "if said proposal were not by said Modesto Irrigation District accepted, said check should be returned to plaintiffs." That said proposal was never accepted by defendant district, nor was it ever in fact forfeited to said district. That, "notwithstanding the premises, the defendants Modesto Irrigation District and F. C. Davis as its president as aforesaid, threatens to collect the amount of said check * * * and will do so unless prevented by the injunction of this court, to the great and irreparable injury of these plaintiffs. And the said defendant Anglo-Californian Bank * * * and its managers as aforesaid threaten to cash and pay the amount of said check * * * to said defendant Modesto Irrigation District, * * * and will do so unless prevented," etc. An injunction is prayed for, and also that defendant district be directed to surrender said check to plaintiffs.

The defendant bank made default. Defendant district, answering the complaint, alleged that on November 5, 1902, defendant gave notice by publication, as required by law, calling for bids for constructing a certain portion of the irrigation work of said district, a copy of which said notice is made part of the answer. Among other things said notice set forth the following, to wit: "Sealed proposals will be received * * * on the 29th day of November, 1902, for the construction of bridges, drops, railroad crossings and headgates hereafter particularly described and according to the plans and specifications of said work and instructions to bidders, which can be seen at the office of said board. The contract will be let to the lowest responsible bidders, but the board may reject any or all bids. The proposals must be in writing and signed by the bidder and must be upon forms furnished by the board, with blanks properly filled out, and be enclosed in a sealed envelope. * * * Said proposals must be accompanied by a certified check, * * * and if such bid is accepted and the contract awarded to such bidder, and he fails to enter into such contract and to furnish such bond, then his check and the money payable thereon, shall be and remain the property of said district. * * * Any person to whom a contract shall be awarded shall, within ten days' notice of such award, make, execute and deliver to said board a written contract, in form satisfactory to said board, for the performance of said work, at the time to be specified, in the manner according to and upon the terms prescribed by this notice, such proposal, and said plans and specifications. * * * Said work is particularly described as follows: The construction of the drops, headgates, bridges and railroad crossings within the boundaries and said irrigation district according to the plans as aforesaid. Said bids should specify the price per thousand of lumber, the price of concrete per cubic yard and of syphon pipe per foot, all in place. The work will comprise about 75 drops, 34 bridges, 8 railroad crossings and 5 headgates. Full details of the requirements can be obtained from the said plans and specifications on file at the office of the said board of directors."

It is further averred that on November 29, 1902, the several bids or proposals were opened by defendant, and plaintiffs presented and delivered to said defendant a bid in writing for the construction of the work advertised in said notice, "which said bid was accompanied by a certified check hereinbefore mentioned, which said certified check is for the amount required in said notice"; that defendant "duly accepted the said bid or proposal in writing of said plaintiffs * * * and awarded the said plaintiffs the contract for the construction of such portion of irrigation work of said district as was set forth in said bid or proposal in writing of said plaintiffs, and thereafter duly notified said plaintiffs of the said acceptance of their said bid and of the awarding to plaintiffs of said contract"; that by said bid plaintiffs agreed that if not accepted and said contract awarded to them, and in case there was any default on the part of plaintiffs in executing the contract and bond required by said notice, the said check and the money payable thereon should be and remain the property of said district; that plaintiffs have failed and refused to enter into such contract and to furnish the required bond.

The court found "that each and all the facts alleged in the complaint of plaintiffs herein are true as alleged," and "that all the denials in the answer of defendants as appearing are untrue." The court also found "that it is not a fact that said board of directors * * * duly or at all accepted said bid or proposal of plaintiffs. That it is not a fact that said board ever duly or at all awarded to plaintiffs the contract mentioned in said answer, nor any other contract." As conclusion of law the court found that plaintiffs are entitled to judgment as prayed for, and judgment was accordingly entered. Defendants appeal from the judgment and from the order denying their motion for a new trial.

The findings are challenged as unsupported by the evidence, and, in point of fact, rightly so. The evidence is undisputed that plaintiffs submitted a bid pursuant to the proposals of defendants and put up their certified check as there required, and that the bid of plaintiffs was accepted by defendants, and plaintiffs notified thereof, but that plaintiffs refused to proceed further in the matter. The findings and judgment can be sustained only upon the proposition advanced by plaintiffs "that the court found that, in contemplation of law, the whole proceeding was null and void and the attempted acceptance and award simply nugatory," as, it is claimed, "was the case in Perine Co. v. Pasadena, 116 Cal. 6, 47 Pac. 777." The argument is that appellant is a public municipal corporation, and its officers are public officers (In re Madera Irrigation District, 92 Cal. 297, 319, 323, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 174, 17 Sup. Ct. 56, 41 L. Ed. 369), and that, "if any of the essential proceedings prescribed by the statute for investing the officers of such a corporation with power to contract be dispensed with, no liability is upon the corporation, by reason of such a contract," citing Forest v. Levee Ditch (C. C.) 77 Fed. 555; City v. Morgan, 62 N. E. 127, 65 Ohio St. 219. Admittedly, the power given the defendants is found in section 53 of the so-called "Wright Act." St. 1897, pp. 254, 272, c. 189. Section 53 is as follows: "After adopting a plan for such canal or canals, storage reservoirs and works as in this act provided for, the board of directors shall give notice, by publication thereof * * * calling for bids for the construction of such work, or of any portion thereof; if less than the whole of the work is advertised, then the portion so advertised must be particularly described in such notice. Said notice shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder; * * * and as soon as convenient thereafter the board shall let said work, either in portions or as a whole, to the lowest responsible bidder; or they may reject any or all bids and readvertise for proposals, or may proceed to construct the work under their own superintendence." In Perine Co. v. Pasadena, supra, a contractor bid for certain work under the street law, and, as required by that law, accompanied his bid by a check subject to forfeiture in case he refused or neglected to enter into a contract, if his bid was accepted. He was awarded the contract, but refused to proceed further and brought suit to recover his deposit. It was held that the street law contemplates forfeiture for a failure to enter into a contract based upon legal proceedings of the municipal authorities, but if they are illegal the provision of the contract relating to a deposit is a naked offer without consideration, and the bidder is not estopped thereby. It was held, also, that a discretion lodged in the board of supervisors alone could not be delegated to the superintendent or city surveyor; and, where the specifications of a contemplated street improvement leave it to them to designate what extra concrete shall be put in, thus giving them power to increase the price indefinitely to be paid by the property owner without his having the means of knowing the ultimate cost of the finished work, the proceedings for the improvement are rendered invalid.

Respondents contend that the notice of proposals is jurisdictional by analogy to the notice of intention in the case of street work under the street law, and that the description of the proposed work must be at least as certain as is required under the street law, and, as held in Partridge v. Lucas, 99 Cal. 521, 33 Pac. 1082, it must enumerate the different classes of work and enumerate them correctly, and it must, by definite and certain references to specifications, put intending bidders in a position to ascertain definitely what is intended to be required of them. Appellants contend that there is a wide difference between the object of the notice of intention in the street law and the advertisement or notice for bids in the Wright irrigation law; that the only object of the advertisement is to give notice to intending bidders, and does not concern owners of irrigated land in the district. Furthermore, it is claimed that the notice is in no sense jurisdictional, but that the adoption of the plans is the source of the jurisdiction to be exercised. It is perhaps, not necessary to decide just how far in all cases the advertisement for bids is jurisdictional, or how closely the analogy may be drawn between the notices referred to in the two acts. This much, however, we think may be safely affirmed: That while section 53 of the Wright act provides for calling for bids for the entire work "after adopting a plan," and does not require in terms that in such case the work shall be particularly described, the act does specifically provide that, "if less than the whole work is advertised (which is the case here), then the portion so advertised must be particularly described in such notice." It will be observed that the statute requires that the notice shall set forth that the plans and specifications can be seen at the office of the board "and that the board will receive sealed proposals therefor and that the contract will be let to the lowest responsible bidder * * * and thereafter the board shall let said work." Clearly, the act contemplates that the work "particularly described in such notice" must agree substantially with the work described in the plans and specifications, and must relate to the same work, otherwise the bidders might be misled to their disadvantage by reason of doubts as to which of the two descriptions of the work should be followed.

Whether there be uncertainty in the specifications as to the substantial terms of the proposed contract or a substantial variance as to such terms between the notice to bidders and the plans and specifications, the result would be the same, as is set forth in Packard v. Hayes, 51 Atl. 34, 94 Md. 233, where the court said: "Necessarily, then, all the essentials that the municipality designs that the contract proposed to be made shall contain is to be determined before proposals are invited, and are to be placed before the bidder as the basis of his bid; otherwise there would be no standard by which bidding could be made with the definiteness and precision which would leave nothing to be done except to ascertain the lowest bid. And it may be said there could be no effective competition in bidding, which it was the evident design of the provisions of the charter we are considering to secure. That proposals for contracts under these provisions should be made by bidders with knowledge of, and with reference to, all the essential elements of the contract into which they are invited to enter is enforced by other considerations. The object of the provisions of the municipal charter we are considering is to prevent favoritism and extravagance in the making of municipal contracts. The effect of those provisions to produce the result intended would be greatly impaired, and the purpose of them might be entirely defeated, if the method of awarding contracts under them which was pursued in this case could be sustained. The absence of any definite and precise basis for competition among the bidders, the allowing of each bidder to submit his own independent proposition as to what would form an important element of the contract, and the reservation of a discretion to be exercised by a municipal authority as to an essential of the contract after bids had been submitted, make the contract here the subject of controversy violative of the intent and purpose of the provisions of law in question as well as of the essential character of competitive bidding." See, also, Hardware Co. v. Erb, 17 S. W. 7, 54 Ark. 645, 13 L. R. A. 353. In Hardware Co. v. Erb, the court stated certain principles deemed to be indispensable to competitive bidding: (1) An offering to the public; (2) opportunity for competition; (3) basis for exact comparison of bids, i. e., "bidding for the same particular thing to be done according to the same specifications." It is immaterial that fraud be shown. It is the opportunity for fraud or favoritism that is forbidden. Bolton v. Gilleran, 105 Cal. 244, 252, 38 Pac. 881, 45 Am. St. Rep. 33.

What, then, do the facts show? The notice reads: "Said work is particularly described as follows: The construction of the drops, headgates, bridges and railroad crossings * * * according to the plans aforesaid." The plans and specifications included "flumes," "trestles," and "chutes" not mentioned in the notice. The notice called for certain railroad crossings, but the plans showed no such crossings. As to these crossings, it is explained that after the notice was published, and before the bids were submitted, the bidders were told not to include the railroad crossings in their bids, and plaintiffs did not, in fact, include them in their bid, although one bidder did include them in his offer. The notice speaks of concrete and syphon pipe, no details of which are mentioned in the specifications; nor did the form of bid furnished by defendants provide for them, although one of the bidders included these items in his bid. The drops were the most expensive part of the work, but the plans showed only what was called a "typical drop." This showed the manner of construction, but gave no suggestion as to the amount of excavation in the 73 required or of the nature of the land or its contour where the drops were to be placed. There was a profile of the work, but it was not referred to in the notice as part of the plans, and was not furnished with the "set" furnished for plaintiffs' examination. Attention is called, also, to the omission in the notice to state any time within which the work was to be performed. The notice read "at the time to be specified." The specifications required the successful bidder to execute the contract within 10 days from acceptance of his proposal, and called for prompt and vigorous work to "the time fixed for the completion of the contract," subject to certain penalties; but nowhere is this time stated. Apparently, the time of completion was left entirely discretionary with defendants, and might have been so fixed as to greatly increase the bidders' burdens. It has been held that the time for completing the work should have been stated in the notice. Kneeland v. Furlong, 20 Wis. 460; Manley B. Co. v. Newton, 40 S. E. 277, 114 Ga. 245. It was not stated either in the notice or plans.

The notice stated that the bids should specify the price of certain materials, to wit, concrete and syphon pipe, all in place; but the form of bid furnished by defendants, as already noticed, omitted mention of these materials, from which it appears that the bids were not permitted to include the work advertised for. Andrews v. Board (Idaho) 63 Pac. 593, is cited, where the court held that where proposals for a two-span, 500-foot bridge were called for, and a three-span bridge, less than 500 feet long, was let under the call, the bidding was not competitive. The bid admittedly refers to the notice as well as to the plans, and is an offer to construct all the work advertised, including, as we have seen, work which was omitted from the plans. To say the least of these provisions, it is scarcely possible to determine whether the contract should be confined to the work mentioned in the notice, or the proposals or the plans. Packard v. Hayes et al., 51 Atl. 32, 34, 94 Md. 233, supra.

Attention is also invited to certain uncertainties in the specifications. Some principles governing in such case have already been adverted to. There being no time fixed for completion of the work opened a wide door for favoritism and precluded the probability, if not the possibility, of a letting to the lowest responsible bidder. It is irreconcilable with fair dealing to leave it in the power of defendants to fix a time different for a favored bidder from that fixed for one not favored, which might be done in advance of the bidding. It is no answer, as appellants contend, that we must not presume that the officers of the district will violate law. It is not a question of presumption of official honesty and integrity, but a question of opportunity to do wrong, that the law guards against. Bolton v. Gilleran, supra.

Turning to specifications numbered 16 and 17, we find an irreconcilable conflict. In 16 provision is made for a change of work from that described in the specifications, but "no material change shall be made unless first agreed on in writing by the board and contractors." In 17 the unqualified right is retained in the district "to change at any time during the progress of the work, the alignment, grades and width of the canal or any part thereof, and also the limits of all sections; or alter the character, vary the dimensions or change of location of structures, or substitute one kind of work or material for another [and many other like powers], * * * without the contract price being thereby affected unless the aggregate value of all work contemplated by the contract be changed fully twenty (20) per cent., in which case a fair allowance either to the district or contractor shall be made [not by the district but] by the engineer." The contractor, however, may "throw up said contract," and the district "may settle with the contractor on the measure of damages he may suffer." Probably these contradictory provisions crept in through an inadvertent commingling of the form of specifications for the entire work with specifications for a part of the whole work. However this may be, the provisions stand unexplained, under which it is hard to conceive how a bidder could safely enter into a contract.

It is also provided in the specifications that "bidders may also submit their own plans and specifications for the whole or any portion thereof," etc. This provision probably came from the form to be used where the whole work under a general plan, or some part of it, was to be bid for; but it is used here, and is not explained. In the case of Ertle v. Leary, 114 Cal. 238, 46 Pac. 1, it was held that, where the law required the contract to be let to the lowest bidder upon plans previously adopted by the board of supervisors, there is no authority to let a contract upon plans to be submitted by the bidders, thereby preventing competition in the bidding and giving the board an opportunity for favoritism.

In the specifications for "drops," the right was reserved to the engineer "to modify or change the detail of construction." Like reservation was provided as to headgates, "and no extra expense allowed for the same." Bolton v. Gilleran, supra; Perine Co. v. Pasadena, supra; Chase v. Scheerer, 136 Cal. 248, 68 Pac. 768; Packard v. Hayes, 51 Atl. 32, 94 Md. 233, supra.

In view of the foregoing facts, we think the conclusion of law arrived at by the trial court was correct.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

150 Cal. 790

## MILTIMORE v. NOFZIGER BROS. LUMBER CO. et al. (L. A. 1,789.)

(Supreme Court of California. April 2, 1907.)

MECHANICS' LIENS—CLAIMANTS—PRIORITIES—STATUTES—VALIDITY.

Const. art. 20, § 15, providing that "mechanics, materialmen, artisans and laborers of every class," etc., shall have a lien for labor or material furnished, secures liens to mechanics, materialmen, artisans, and laborers and places them on an equality, and Code Civ. Proc. § 1194, determining the priority of liens so as to give a priority to persons performing manual labor, is void so far as it creates priorities between persons performing manual labor and materialmen.

Shaw, Sloss, and Angellotti, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Mrs. Paul Miltimore against the Nofziger Bros. Lumber Company and others, in which some of the defendants began independent actions and others filed cross-complaints. From a judgment settling the rights of the defendants in the actions consolidated in the trial court, certain of the defendants appeal. Reversed.

G. D. Garmo, Scarborough & Bowen, Ed. G. Kuster, and Chas. L. Batcheller, for appellant. M. W. Conkling, for respondent Frank James, amicus curiæ.

PER CURIAM. The plaintiff was the owner of a lot upon which she had caused a building to be erected. When it was completed, there remained unpaid a portion of the contract price which she had agreed to pay for the erection of the building. The other parties to the several appeals here under consideration, except the original contractor, are persons claiming liens on the property for labor done or materials furnished in the building. The unpaid balance was not sufficient to pay all the liens, and, the owner being unable to determine with certainty the amount or priority of the respective liens, and there being some dispute among the lien claimants concerning their respective claims and rights of priority, she began the main action, bringing the money unpaid into court, summoning all parties claiming an interest therein to appear and interplead as to their respective rights to the fund and asking to be relieved from further responsibility in the matter. Some of the parties began independent actions to foreclose their liens, and some appeared in the main action and filed cross-complaints therein for such foreclosure. The actions were, however, all consolidated in the lower court and tried together. Judgment was given in favor of the owner as prayed for in her complaint. The rights of the several lien claimants to the fund were declared by the judgment in accordance with their rank, as provided by section 1194 of the Code of Civil Procedure; the laborers being given the first right, the materialmen the second right, the residue, if any, being given to the subcontractors. There were among the several claimants representatives of each of these classes.

The subcontractors contend that all the claimants are entitled to share alike in the fund, without preference of one over the other, this claim being founded on the proposition that section 1194, aforesaid, so far as it declares that one class of lienholders shall have priority over another, is unconstitutional. The materialmen contend that, at all events, it is invalid so far as it gives the laborers preference to the persons who furnish materials for the building. It is stipulated that these comprise the only questions to be determined upon the respective appeals, there being separate appeals on behalf of the materialmen and subcontractors, respectively.

Section 1194, so far as material, is as follows: "In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien, or class of liens, which shall be in the following order: (1) All persons performing manual labor in, on or about the same. (2) Persons furnishing materials. (3) Sub-contractors. (4) Original contractors. And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank." Section 15 of article 20 of the Constitution reads thus: "Mechanics, materialmen, artisans and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide by law for the speedy and efficient enforcement of such liens." The court is of the opinion that the constitutional provision designating the persons entitled to liens as "mechanics, materialmen, artisans and laborers of every class," was intended to secure liens to these classes of persons for claims accruing to them for work done or materials furnished by them personally, and that it does not give a lien to contractors or subcontractors, as such. If a contractor or subcontractor personally labors in the erection of a building or improvement or furnishes materials used therein, it may be that he would have a lien, under the Constitution, for the value of such labor or material, but it would not be given by virtue of his contract, or to the amount of the contract price. His right to a lien under the contract is given solely by the statutory provisions in his behalf. The Constitution does not provide for him as contractor or subcontractor. It follows that section 1194, in so far as it prefers the laborers and materialmen to contractors and subcontractors, and in so far as it prefers subcontractors to contractors, does not violate the Constitution.

The effect of the constitutional provision, above quoted, is to place mechanics, materialmen, artisans, and laborers in the same class. They are each to have a lien, the mechanic, laborer, and artisan, for the value of his personal work or services bestowed, and the materialman for the value of materials furnished by him, and no preference is given to the one over the other. Their equality is thus established by the Constitution, and it cannot be impaired or destroyed by the Legislature. The Constitution is self-executing to the extent that it confers upon these classes of persons a lien, and makes them equal, in point of rank, with regard to each other. The provision of the Code that persons performing manual labor shall be first paid out of the proceeds of the property, and, in effect, that the materialman shall have no lien, except upon such balance of the proceeds as may remain after the laborers are fully paid, clearly impairs, and in many cases will destroy, the right of materialmen given by the Constitution. To that extent the statute is void. The court below should have directed that the laborers and materialmen should share alike in the proceeds of the property in proportion to the amount of their respective liens.

The judgment is reversed.

SHAW, SLOSS, and ANGELLOTTI, JJ. We dissent from the opinion of the court filed on April 2, 1907. We think, under the Constitution, the Legislature has power to provide a different order of priority with respect to laborers and materialmen, as well as with respect to contractors, subcontractors and other classes of lien claimants.

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150 Cal. 762

## BLOOM v. GORDAN et al. (S. F. 4,701.)

(Supreme Court of California. April 2, 1907.)

PARTITION — INTERLOCUTORY JUDGMENT — APPEAL—PERFECTING APPEAL IN TIME.

Code Civ. Proc. § 939, subd. 3, provides that an appeal may be taken from an interlocutory judgment in actions for partition of real estate within 60 days after the order of interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk. The order was entered in the minutes December 23, 1905, and filed with the clerk of the court on January 9, 1906. *Held*, that an appeal taken upon March 18, 1906, was too late.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Rosa Bloom against Pauline Gordan and others. From a judgment for plaintiff, defendants appeal. Dismissed.

William T. Kearney, for appellants. Otto I. Wise, for respondent.

PER CURIAM. This is a motion to dismiss the appeal of certain defendants from the interlocutory judgment given in an action for the partition of real property. It is shown by the affidavit of the county clerk that the interlocutory decree in partition and order of sale were entered in the minutes of the court upon December 23, 1905. The interlocutory decree in partition and order of sale were filed with the clerk of the said superior court upon the 9th day of January, 1906. Admittedly, the appeal was not taken until the 18th of March, 1906. Subdivision 3 of section 939 of the Code of Civil Procedure declares that an appeal may be taken from an interlocutory judgment in actions for partition of real estate within 60 days after the order of (or) interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk. The only answer made to this motion is the affidavit of W. T. Kearney, attorney for appellants, who declares "that an interlocutory order or decree in partition and order of sale and accounting in the above-entitled action was entered January 28, 1906." From the explanation which was given upon the argument we conclude that the affiant here means the date of the entry in the judgment book, and not the date of entry in the minutes; but, if there be a conflict in the evidence upon this point, it must be resolved in favor of the positive testimony of the clerk of the superior court, with the corroborative affidavit of attorney for respondent. Whether the time for appeal be considered as beginning to run from the date of the entry in the minutes (December 23, 1905), or from the date of the filing with the clerk of the court (January 9, 1906), from either point of time the appeal taken upon March 18, 1906, was too late. Bartlett v. Mackey, 130 Cal. 181, 62 Pac. 482.

The appeal is therefore dismissed.

150 Cal. 737

## HEMENWAY v. THAXTER et al. (L. A. 1,658.)

(Supreme Court of California. April 2, 1907.)

1. FRAUDULENT CONVEYANCES—CONSIDERATION—EVIDENCE—SUFFICIENCY.

In a suit to restrain the sale of certain land under an execution against plaintiff's husband, evidence *held* to sustain a finding that a conveyance of the property to plaintiff was voluntary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 896, 898-900.]

2. SAME—FRAUD.

Where a debtor admitted that, by the conveyance of certain land to his mother-in-law for the benefit of his wife, he divested himself of all property liable to execution and became thereby and has ever since remained insolvent, the conveyance being voluntary, was fraudulent as to his creditors, as provided by Civ. Code, § 3442.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 138.]

3. SAME—SUBSEQUENT CREDITORS.

Where a conveyance of land by a debtor was made with intent to defraud existing creditors, proof of such fact was sufficient prima facie evidence of fraud as against subsequent creditors to entitle them to avoid the conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 895.]

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Sarah M. Hemenway against Mabel Thaxter and others. From a judgment for defendants, and from an order denying plaintiff's motion for a new trial, she appeals. On certificate from the District Court of Appeal of the Second District. Affirmed.

Tom C. Thornton and Clarence Thompson, for appellant. F. C. Austin and W. P. L. Stafford, for respondents.

PER CURIAM. This cause was certified to this court upon the disagreement of the justices of the District Court of Appeal of the Second District. While the action was pending before that court, the following opinion was prepared by Allen, J., and that opinion is hereby adopted as the opinion of this court:

"Action by plaintiff to enjoin the defendants from selling under execution certain real property. Findings and judgment for the defendants; a new trial denied, and from the judgment and order denying a new trial plaintiff appeals.

"Plaintiff in her complaint alleges ownership as her separate estate of a tract of land in San Bernardino county, which defendants were threatening to sell under execution to satisfy a judgment against her husband.

"The material facts involved in this appeal may be summarized as follows: Mrs. Alvira Brown, the mother of the plaintiff, loaned to the plaintiff's husband, about the year 1865, the sum of $3,000, for which plaintiff's husband executed his note. A portion of this money was invested in real property in Illinois, which was sold and $5,000 realized by plaintiff's husband therefrom. This money was reinvested by the husband in certain real property in San Bernardino county, the subject of this action, in the name of the plaintiff's husband, who with plaintiff, his wife, on January 1, 1898, signed a conveyance of such property to Alvira Brown, plaintiff's mother. At the time this deed was signed Mrs. Brown was absent from California and knew nothing about its execution, although previously it had been agreed between plaintiff, her husband, and Mrs. Brown that the property should be conveyed to Mrs. Brown, who was to fix the property in plaintiff's hands so there should be no trouble if anything should happen suddenly to the husband. Afterwards, on June 28, 1898, Hemenway and his wife acknowledged this deed, so as to entitle the same to record, and the same was placed by Hemenway on record June 29, 1898. At the time these last two conveyances were delivered Mr. Hemenway owed one Simonsen about $1,600. Simonsen brought two suits against Hemenway to recover this indebtedness, in one of which actions an attachment was issued, and on June 24, 1898, the same was levied upon the property involved in this action. In the other, which involved the $600 indebtedness, no attachment was issued. Judgments in these actions were subsequently rendered, one for $1,000 and one for $600. Execution was issued out of the $1,000 judgment, and the premises described in the complaint were sold and redeemed. The judgment for $600 in favor of Simonsen was and is unpaid. At the time of the conveyances mentioned Hemenway owed no other debts other than the debt to Simonsen and a debt claimed by him to be due Mrs. Brown on account of the original $3,000 loan and accumulated interest. Afterwards, in September of 1900, Hemenway contracted an obligation in favor of defendant Thaxter for $2,500, on account of which judgment was rendered in July of 1902, out of which judgment the execution, the enforcement of which is sought to be restrained, issued.

"Upon the trial of this action, the court found: That plaintiff was not the owner as her separate estate of the premises; that the said premises were purchased with community funds; that the conveyance by Hemenway and his wife to Mrs. Brown was a voluntary conveyance, made with intent to hinder, delay, and defraud existing and subsequent creditors; that Hemenway had existing creditors at the time; that the conveyance by Mrs. Brown to Mrs. Hemenway was voluntary and without consideration, and was made to her in furtherance of the intent of said Hemenway to hinder, delay, and defraud creditors; that Hemenway by such conveyance became insolvent and has not at any time since said conveyance had any property not exempt from execution; that the claimed indebtedness of Hemenway to Alvira Brown was a pretext only for the conveyance; that Hemenway has continued in possession ever since the conveyance; that the judgment in favor of Mrs. Thaxter is wholly unpaid. And, as a conclusion of law, the court found that Mrs. Thaxter, the subsequent creditor, is not defeated of her right to attack the fraudulent transfer, and that restraining order theretofore granted should be dissolved. A decree was entered accordingly.

"It is insisted by appellant that there is no evidence warranting the finding of the court that the deed from Hemenway to Mrs. Brown, and the deed from Mrs. Brown to Mrs. Hemenway, were in either case fraudulent, voluntary, or without consideration, or that the same was in fraud of creditors and void; and, further, that, were it to be conceded that the conveyances were in fraud of the existing creditor Simonsen, subsequent creditors could not successfully attack such conveyances under sections 3441, 3442 of the Civil Code.

"As to the voluntary character of the conveyances, there was much conflict between the testimony and the circumstances connected with the transaction, and an examination of the record indicates to us that the finding of the court that the conveyances were voluntary should not be disturbed. A trial court may very properly determine that direct evidence is successfully rebutted by circumstances and conduct of parties inconsistent with such direct evidence. There is much in the record indicating that the claimed indebtedness of Hemenway to Mrs. Brown was a pretense only, and that the true intent of the parties by the conveyance was to vest the title in plaintiff without valuable consideration being paid therefor. There is, in fact, much in the direct testimony of Hemenway indicating this fact. He testifies that it was agreed between himself and Mrs. Brown that the property should go to the plaintiff. He further testifies that he does not know how long Mrs. Brown kept the note for $3,000 originally executed by him to her, and does not know whether it was taken up and destroyed in 5, 25, or 30 years; that he executed to Mrs. Brown many notes for other loans and had various settlements, and his only statement connecting the note with the conveyance to Mrs. Brown is that a note was surrendered by Mrs. Brown when the deed was executed, but what note it was, for what amount, and whether it was then a subsisting obligation or not, is not disclosed. That the conveyance, if voluntary, was in fraud of Simonsen scarcely requires argument. Section 3442 of the Civil Code proves that 'any transfer * * * made or given voluntarily, or without valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors.' Hemenway admits that by this conveyance he divested himself of all property liable to execution; that he became thereby, and has ever since remained, insolvent. The consequence of this conveyance being, then, to render Hemenway insolvent, he will be presumed to have intended its natural consequence, from which follows an intent to become insolvent, or contemplated insolvency, in the language of the act. The finding of the court as to the insolvency of Hemenway is sufficient in its terms to establish that fact.

"There remains, therefore, only the question as to the right of a subsequent creditor to attach such conveyance upon the ground that it is also in fraud of him. The rule laid down in Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569, approved in Banning v. Marleau, 133 Cal. 488, 65 Pac. 964, that 'evidence of an intent to defraud existing creditors is deemed sufficient prima facie evidence of fraud against subsequent creditors,' has never been criticised or modified, to our knowledge. Applying this rule, therefore, we must conclude that, even though fraudulent intent is a question of fact and not of law, as laid down in section 3442 of the Civil Code, where the fraud as to existing creditors is established as a question of fact, it is also established prima facie as to subsequent creditors. It was for the trial court to say whether this prima facie case had been overcome by other testimony. It determined the matter adversely to the appellant, and under the familiar rule must be accepted. The finding of the court that the conveyance was fraudulent and void, if warranted, effectually disposes of the claim of plaintiff that such conveyance vested the property in her as her own separate estate; for, being void, it was not effectual for the conveyance of any estate."

It is therefore ordered that the judgment and order be affirmed.

150 Cal. 772

## BELL v. ADAMS et al. (L. A. 1,682.)

(Supreme Court of California. April 2, 1907.)

1. Contracts — Joint and Several Contracts—Statutes.

A contract whereby owners of mines employed one to operate the mines, for which services the owners agreed to pay him the reasonable value thereof whenever they sold the mines, is joint and several within Civ. Code, § 1659, providing that, where the parties who unite in a promise receive benefit from the consideration, their promise is presumed to be joint and several.

2. Judgment—Co-Parties.

Owners of mines employed one to operate them, and agreed to pay him for his services the reasonable value thereof when the mines were sold. The mines were sold, but the services were not paid for. The employé sued the owners, one of whom appeared and answered separately, denying the contract. No objection was made to proceeding with the trial as against the answering defendant alone. *Held*, that under Code Civ. Proc. §§ 414, 579, providing that in an action against several defendants the court may render judgment against one or more of them, etc., the court was authorized to render judgment against the answering defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 416, 419.]

3. Trial—Findings—Issues.

Where, in an action for services performed under a contract of employment, the admitted facts establish the conclusion that the statute of limitations has not run against the claim, a finding on the issue raised by a plea of limitations is not necessary to support a judgment for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 911.]

4. Same.

The findings must respond to the issues, and there must be a finding on every material fact alleged in the complaint and controverted by the answer necessary to support the judgment rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 911, 914.]

5. Same.

In an action for services rendered under a joint and several contract, whereby three persons employed plaintiff to perform the services and agreed to pay him therefor, the complaint alleged that "the defendants agreed to pay plaintiff" for the services. The separate answer of one of the defendants denied that he so agreed, but was silent in regard to the fact that the other defendants agreed to pay. The court found that the answering defendant agreed to pay plaintiff. *Held*, that the finding covered the issue of whether the answering defendant agreed to pay, and it, together with the admission in the answer that the other defendants had agreed to pay, proved that all the defendants had agreed to pay as alleged in the complaint, authorizing a judgment against the answering defendant alone.

6. Same.

Where, in an action against several defendants for services rendered under a joint and several contract with them, one of the defendants appeared and answered separately, and the court found that the answering defendant had paid for no part of the services, a judgment against him for the services was authorized; the finding implying that the debt due to plaintiff remained unpaid.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by G. S. Bell against Samuel B. Adams and others. From a judgment for plaintiff, defendant Samuel B. Adams appeals. Affirmed.

Hubert T. Morrow, Oscar C. Mueller, and Sidney J. Parsons, for appellant. C. C. De Garmo and E. H. Wilson, for respondent.

SHAW, J. This case was transferred to the District Court of Appeal of the Second District, and, that court being unable to agree upon a decision, it was again transferred to this court. The following opinion prepared by Mr. Justice Allen of that court meets with our approval, and is adopted as the opinion of this court:

"Appeal by defendant Samuel B. Adams from a money judgment rendered against him alone in favor of the plaintiff.

"The complaint alleges a contract between plaintiff and defendants, by which plaintiff was to manage and operate certain mines belonging to the defendants, for which services defendants agreed to pay the reasonable value thereof, which is alleged to be $4,000, whenever the defendants sold the mines. It is further alleged that within a year preceding the bringing of the action defendants sold said mines. Nonpayment of such claim for services is alleged. Service of process does not appear from the record to have been made upon any of the defendants. Defendant Adams, however, appeared and answered separately, denying the contract as set out, and denying that he ever agreed to pay for such services, or that such services were ever rendered, or that the same were of the value alleged or any value in excess of $710, which amount is claimed to have been paid, admits the sale of the mines as alleged. A plea of the statute of limitations is also interposed. The trial court found that the contract set out was entered into between plaintiff and defendant Adams, and that Adams agreed to pay therefor the reasonable value of the services rendered when the mines were sold; that the same were rendered as alleged in the complaint, and were of the value of $4,000; and that said Adams had paid no part thereof. Judgment was rendered accordingly.

"The principal point relied upon by the appellant is that, the action being against all defendants jointly, the findings do not respond to the case made by the pleadings, in that they do not find as to the making of a contract, or the performance of services, or nonpayment as alleged; nor is there any finding upon the issue of the statute of limitations. The joint ownership by defendants of the mines, their sale, and the agreement of defendants to pay for the services of the plaintiff is not denied; the denial in the last regard being merely that Adams did not agree to pay therefor. The contract set out in the complaint was joint and several. Civ. Code, § 1659. Section 414, Code Civ. Proc., provides that when the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more but not on all of them, the plaintiff may proceed to judgment against the defendant served, etc. No objection appears from the record to have been made in the court below to proceeding with the trial as against the answering defendant alone; and under section 579, Code Civ. Proc., the court was authorized to render judgment. Kelley v. Plover, 103 Cal. 36, 36 Pac. 1020. The precise question involved here was decided adversely to appellant's contention by this court in McKee v. Cunningham, 84 Pac. 260. Nor is such decision in conflict with the various decisions cited by appellant which have reference to the character of the action as applied to its subject-matter. The admitted facts demonstrate that the findings as to the statute of limitations could not have been otherwise than against appellant. They establish the conclusion that the statute has not run, and a finding thereon was not necessary to support a judgment. Lewis v. Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; Winslow v. Gohransen, 88 Cal. 451, 26 Pac. 504. The finding of the court as to nonpayment is positive as to the appellant-defendant, which must be taken as including payment by him, or by any other person for him or for his benefit, either associated with him in the joint enterprise or otherwise."

A more particular statement than is made in the foregoing opinion will show that there is no variance with respect to the contract alleged and that stated in the findings. It is not necessary in every case that there should be findings upon all the allegations of the complaint. The findings must respond to the issues only, and the true rule is that there must be a finding upon every material fact alleged in the complaint and controverted by the answer, provided it is necessary to support the judgment rendered in the action. The findings in this case conform to this requirement. The complaint alleges that "the defendants agreed to pay plaintiffs" for the services; that is, in effect, that all three defendants so agreed. The answer denies that the defendant Adams so agreed, and is silent in regard to the fact that the other defendants agreed to pay. Every fact not denied by the answer is admitted to be true, and hence the case was submitted with the admission that the other two defendants had agreed as alleged, leaving the court to find only as to whether or not Adams had agreed. The finding that Adams did agree to pay the plaintiff exactly covered the issue in this respect, so that, together with the admission, it was fully established that all the defendants had agreed as alleged in the complaint. As Adams alone had then appeared, judgment was properly given against him alone.

With respect to the finding of nonpayment, the rule applies that upon an appeal from the judgment roll alone the language of the findings is to be given the broadest possible meaning, whenever it is necessary to do so in order to support the judgment. If, by any usage of the English language, the finding that Adams has not paid for the plaintiff's services can be construed to imply that the debt to the plaintiff remains unpaid, then, upon this appeal, the finding is sufficient on that point. A payment by one joint obligor is, in contemplation of law and so far as the obligee is concerned, a payment by all. Each joint obligee is, in law, the agent of the others to make such payment. If one of the others had in fact paid the plaintiff, he would have paid for Adams, as well as himself, and it would be a legal truth that Adams had paid. So the statement that Adams has not paid, in its broadest sense, is a statement that he has not paid, either in person, or by his co-obligors. So understood, it means that none of them has paid and that the debt remains unpaid. This form of statement might be insufficient in a pleading, if the objection were raised by demurrer, but it is sufficient in a finding upon an appeal from the judgment roll alone.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

150 Cal. 797

## MILLER v. KERN COUNTY. (L. A. 1,741, 1,762.)

(Supreme Court of California. April 3, 1907.)

1. TAXATION—RECOVERY OF TAXES PAID—INTEREST.

In an action to recover invalid taxes paid under protest, under Pol. Code, § 3819, interest could only be allowed against the county from the time of the judgment declaring the money due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1015.]

2. SAME—ASSESSMENT ROLLS OR BOOKS—STATUTORY PROVISIONS—AFFIDAVITS.

Pol. Code, § 3885, provides that no assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law. The clerk of the board of supervisors delivered the corrected assessment book to the county auditor, but did not affix to it an affidavit, as required by Pol. Code, § 3682, and the auditor delivered it to the tax collector, but also failed to attach his affidavit, as required by Pol. Code, § 3732. *Held*, that where the clerk and the auditor, respectively, made and attached the affidavits required by them before plaintiff made his protest or paid any taxes, and no injury was caused to him by the delay, the assessment was not invalid because of the delay.

3. SAME—NOTICE TO TAXPAYERS.

In an action to recover invalid taxes paid under protest, where on a former appeal it was decided that the failure of the tax collector to give notice to the taxpayers would not make the tax invalid, the giving of this notice before the affidavits of the clerk of the board of supervisors and the auditor were affixed to the assessment book, as required by Pol. Code, §§ 3682, 3732, did not render the tax invalid.

4. APPEAL—DETERMINATION AND DISPOSITION OF CAUSE—NEW TRIAL.

Where the facts upon which the decision of a case depends were agreed upon by the parties, and are fully set forth in the findings, there is no necessity for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4597.]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Henry Miller against Kern county. From a judgment for plaintiff, defendant appeals. Reversed and modified.

U. S. Webb, Atty Gen., J. W. P. Laird, and Rowen Irwin, for appellant. Isaac Frohman and Frohman & Jacobs, for respondent.

SHAW, J. This case is docketed under the above numbers; No. 1,741 being an appeal from the judgment, and No. 1,762 an appeal from an order denying defendant's motion for a new trial. We have concluded that the judgment must be reversed, with directions to enter a modified judgment on the findings. The action is brought under section 3819 of the Political Code, to recover taxes claimed to be illegal and paid under protest. The case was before this court upon a former appeal by the plaintiff from a judgment given in favor of the defendant, upon a demurrer to the complaint. Upon that appeal the judgment was reversed. Miller v. County of Kern, 137 Cal. 516, 70 Pac. 549. Many questions arising in the case were decided against the plaintiff on that appeal, and are not now argued. After the case again reached the lower court, an answer was filed denying the facts upon which the reversal was based. Upon the trial, an agreed statement of facts was filed, from which the court made findings and gave judgment in favor of plaintiff as prayed for.

1. Upon the former appeal it was decided that growing alfalfa is not subject to taxation, and hence that the item of $1,110, paid by plaintiff as taxes levied on certain growing alfalfa assessed at $60,000, was invalid. The court below, upon the subsequent trial, declared the entire tax invalid, and gave judgment for the taxes paid, with interest thereon from the date of payment to the time of trial. The appellant concedes the invalidity of the tax as to the sum of $1,110, levied upon growing alfalfa, but insists that no interest should have been allowed thereon, until after judgment. In this the appellant is correct. In Sav. & L. Soc. v. San Francisco, 131 Cal. 356, 63 Pac. 1013, and Columbia Sav. Bank v. Los Angeles, 137 Cal. 471, 70 Pac. 308, it was, in substance, held that in an action to recover taxes paid under protest, under section 3819 of the Political Code, interest after payment and before trial was not allowable, and that interest could only be allowed against the county and state from the time of the adjudication declaring the money due. The judgment now appealed from was rendered on November 22, 1904. It was correct to the extent of $1,110, and no more. Upon the going down of the remittitur the plaintiff will be entitled to judgment for that sum with legal interest from the date above given. Columbia Sav. Bank v. Los Angeles, supra.

2. The only points upon which it is now claimed that the balance of the tax paid was invalid are: First, that although the clerk of the board of supervisors deliverd the corrected assessment book for the year 1895 to the county auditor on the first Monday of August, 1895, the time required by section 3682, Pol. Code, he did not affix to it, nor accompany it with, an affidavit, as required by that section, that the affidavit was made and affixed to the book on November 1, 1895, and not before; and, second, that the auditor, after computing and extending the taxes on the book, delivered it to the tax collector on the second Monday of October, 1895, as required by section 3732 of the Political Code, and did not then, nor at all, until November 1, 1895, make or attach to the book his affidavit in authentication thereof, as required by that section, and that, in the meantime, the tax collector had published the notice to taxpayers, as required by section 3746, Pol. Code. The allegations of the complaint are that the corrected assessment book, when it was delivered by the clerk of the board of supervisors to the auditor, and thereafter when delivered by the auditor to the tax collector, was not accompanied by the affidavit required by section 3682, nor by any affidavit, nor was any affidavit of the auditor attached thereto, as required by section 3732, when it was delivered to the tax collector. In the decision upon the former appeal, these allegations were admitted by the demurrer, and as it did not appear, and was not presumed, that the affidavits had been attached after delivery, the case was decided upon the theory that they had never been attached, and were entirely lacking. Upon that assumption, the taxes were said to be void; but the question of their validity in case it should afterwards be shown that the proper affidavits were attached after the respective deliveries of the book was expressly left open and undecided. Upon the subsequent trial in the lower court, in response to the allegations of the answer, the court made findings that on November 1, 1895, after the assessment book was delivered to the tax collector, and after publication by him of the notice to taxpayers, the clerk of the board of supervisors and county auditor, respectively, made and attached to the book the affidavits required of them, respectively, by sections 3682 and 3732 aforesaid. The plaintiff did not make his protest, nor pay any taxes, until November 25, 1895. At that time the affidavits were attached as required. There is no claim that the delay in attaching them, or their absence prior to November 1st, caused any injury to the plaintiff or affected him

in any manner. We are of the opinion that the defect previously existing in the assessment, by reason of the lack of these affidavits, was cured by the facts as above found by the court. The making and attaching of these affidavits to the assessment book is required, as stated by this court upon the former appeal, for the purpose of authentication. They are "acts relating to the assessment or collection of taxes," beyond doubt. Section 3885 of the Political Code is as follows: "No assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law." There was not an entire failure to perform the acts of making and affixing the affidavits. They were properly made and affixed, but not within the time specified in the Code. No injury was caused, and we cannot see that any injury could be caused, by the delay. By the express language of section 3885 the delay did not make the affidavits or the assessment in question illegal. They were lawfully made and attached, and if the assessment was previously invalid for lack of them, as had been, in effect, decided for the purposes of this case, it became valid and lawful the moment they became attached to the book on November 1, 1895. This is a reasonable doctrine, and we perceive no benefit, public or private, to be derived from holding the contrary. It is fully supported by the decisions in similar cases. Buswell v. Supervisors, 116 Cal. 354, 48 Pac. 226; People v. Eureka, etc., Co., 48 Cal. 146; Hart v. Plum, 14 Cal. 155; Payne v. San Francisco, 3 Cal. 126; State v. Mining Co., 15 Nev. 388; State v. Western U. T. Co., 4 Nev. 344; Walker v. Edmunds, 197 Pa. 647, 47 Atl. 868; Hooker v. Bond, 118 Mich. 257, 76 N. W. 405; 1 Cooley on Taxation (3d Ed.) 486.

It is suggested that the fact that the tax collector had given the notice to the taxpayers, as required by section 3746, before these affidavits were attached, made the defect incurable, unless a new notice was given thereafter, which does not appear to have been done. This proposition is sufficiently answered by the decision upon the former appeal in this case, wherein it was held that an entire failure to give this notice would not make the tax invalid. 137 Cal. 524, 70 Pac. 549. Conceding, therefore, that the tax could not lawfully have been collected prior to November 1st, and assuming that then, for the first time, the tax collector received a valid assessment book for that year, and that his previous notice to taxpayers was ineffectual, his subsequent failure to give the notice would not affect the validity of the tax, nor authorize its recovery after payment under protest.

The facts upon which the decision of this case depends, having been agreed upon by the parties, and being fully set forth in the findings, there is no necessity for another trial. The order denying the new trial is affirmed without costs to either party. The judgment is reversed, with costs, and the cause remanded to the superior court, with directions to that court to enter judgment in favor of the plaintiff against the defendant for the amount of $1,110, and legal interest thereon from November 22, 1904, to the date of such judgment, with costs of suit, other than the costs of the appeals.

We concur: ANGELLOTTI, J; SLOSS, J.

150 Cal. 801

## KERN VALLEY WATER CO. v. KERN COUNTY. (L. A. 1,742.)

(Supreme Court of California. April 3, 1907.)

1. TAXATION — RECOVERY OF TAX PAID — INTEREST.

In an action to recover invalid taxes paid under protest, under Pol. Code, § 3819, interest is not recoverable on the amount paid before judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1015.]

2. APPEAL — DISPOSITION OF CAUSE — NEW TRIAL—NECESSITY.

Where, in a proceeding to recover taxes paid under protest, the findings of the court are in accordance with an agreed statement of facts signed by the parties, and the rights are fully disclosed thereby so that justice can be done by a modification of the judgment which includes items not authorized by the findings, no further proceedings are necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4484.]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Kern Valley Water Company against the county of Kern. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

U. S. Webb, Atty. Gen., J. W. P. Laird, and Rowen Irwin, for appellant. Isaac Frohman and Frohman & Jacobs, for respondent.

SHAW, J. The defendant appeals from the judgment upon the judgment roll. The action is brought under section 3819 of the Political Code, to recover taxes alleged to be illegal and paid under protest.

1. So far as the claim of illegality is founded upon the failure of the clerk of the board of supervisors and the county auditor, respectively, to attach an affidavit to the assessment book, as required of them, respectively, by sections 3682 and 3732 of the Political Code prior to November 1, 1895, the decision must be against the plaintiff, upon the authority of the opinion in the case of Miller v. County of Kern (L. A. No. 1,741) 90 Pac. 119, decided concurrently with the present case, wherein the question is sufficiently discussed.

2. The judgment for the plaintiff was for the sum of $1,900.96. The items composing

this sum were $1,110, assessed upon a certain canal; $67.52, assessed upon certain lands; and $723.44, allowed by the court as interest on the first two items from the time of payment thereof under protest, until November 22, 1904, the date of the judgment. Upon the authority of Sav. & Loan Soc. v. San Francisco, 131 Cal. 363, 63 Pac. 665, Columbia Sav. Bank v. Los Angeles, 137 Cal. 471, 70 Pac. 308, and Miller v. County of Kern, supra, the allowance of interest thus made must be held erroneous.

3. The canal above mentioned was situated in more than one school district, and also in more than one road district. The assessment, however, did not show in what school districts and road districts it was thus situated, nor were the respective parts of the canal situated in the respective road districts separately assessed, or otherwise designated, so that the tax due in each district could be ascertained therefrom. This rendered the tax on that item of the assessment void. It was so decided in Kern V. W. Co. v. County of Kern, 137 Cal. 511, 70 Pac. 476, which was a former appeal in this case. The item of $67.52 was claimed to be void for the same reasons, and the facts were so alleged in the complaint. When the cause again came up in the lower court after the reversal on the former appeal, issue was taken on these allegations by the answer, and the court in response thereto made findings that the allegations of the complaint were untrue, and that the assessment book did show in what school districts and road districts, respectively, the lands were situated, and that they were separately assessed accordingly. We are at a loss to understand the reason for including this item in the judgment, and, as the respondent advances none, we presume it was an inadvertence. The judgment is to this extent erroneous. The facts were found by the court in accordance with an agreed statement thereof signed by the parties, and the rights are fully disclosed thereby. No further proceedings appear to be necessary. The appellant does not claim that the judgment is erroneous in any other particulars than those above given. Justice can be done by a modification of the judgment by this court.

The judgment of the superior court appealed from is modified by striking therefrom the item of $723.44, allowed as interest, and the further sum of $67.52, included therein for taxes paid on property of the plaintiff other than the canal. The judgment as thus modified will be for the sum of $1,110, and will stand as a judgment of its date, November 22, 1904, and is to bear interest from and after that date at the legal rate of 7 per cent. per annum, and as so modified the judgment is affirmed. The appellant will recover the costs of appeal.

We concur: ANGELLOTTI, J.; SLOSS, J.

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151 Cal. 32

## JACKSON v. PORTER LAND & WATER CO. (L. A. 1761.)

(Supreme Court of California. April 4, 1907. Rehearing Denied May 4, 1907.)

SALES—ACCEPTANCE—WAIVER OF DEFECTS.

Where a purchaser under an executory contract for the sale of personal property finds from examination that the property does not conform to the contract, he must promptly reject it, and a delay of nearly three months in rejecting a pumping plant, during which time the purchaser operated the plant for his own benefit, without notice to the seller of any insufficiency, was equivalent to an acceptance of the plant, and a waiver of any defect therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 457.]

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Byron Jackson against the Porter Land & Water Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Ward Chapman and J. G. Chapman, for appellant. John D. Pope, for respondent.

LORIGAN, J. This action was brought to recover the contract price for furnishing and erecting pumping machinery.

The trial court found: That the parties entered into a contract on June 2, 1902, whereby plaintiff was to erect on the premises of defendant a pumping plant consisting of a 35 actual horse power Olds distillate engine with a 110-gallon oil tank, together with a horizontal centrifugal pump of a capacity to elevate 350 inches of water 24 feet high, said plant, and all connections to be first class and connected with defendant's 15 wells, the plant to be completed within 30 days and guarantied to perform the work as specified, the purchase price being $3,250. The time provided in the agreement for installing the pumping plant was waived by the defendant. That plaintiff performed all the conditions of the agreement except that he did not erect or furnish a 35 actual horse power engine as provided in the contract, but, on the contrary, the engine erected by plaintiff on said premises and as part of said pumping plant was materially less than 35 horse power. That said engine was not capable of providing the necessary power to raise the amount of water in said contract required. That on the 12th of August, 1902, the pumping plant including the engine, was received by defendant, but was not to be considered accepted till examined by an expert to be called by defendant. That said pumping plant was operated by defendant continuously from the 12th day of August, 1902, to the 7th day of September, 1902, when an expert called by defendant examined the same and found only a trivial defect in the governor attached to the engine, which was promptly remedied, and thereafter defendant continued to operate said pumping plant in pumping water for its irrigating system until about the 5th day of November, 1902, at which last date defendant discontinued the use of the engine and pump, constituting part of said pumping plant, but did not notify plaintiff that it had done so until somewhere between the 15th and 30th days of that month. That some time during the latter half of the month of November, 1902, defendant notified plaintiff that the said engine was not of the horse power provided for in the contract. That during the entire time defendant was using said pumping plant it knew the engine was not of the horse power provided in the contract. That after November 5, 1902, when defendant ceased operating said engine and pump, it detached from nearly all of its 15 wells the horizontal pipe furnished by plaintiff as part of the pumping plant and which was about 1,600 feet in length, and had been laid in an open trench with suction pipes on each side of said 15 wells from which the said pumping plant was designed and intended to draw water, but left said 1,600 feet of pipe in the trench with openings made by detaching the suction pipe leading down into the wells, through which openings water from defendant's flowing wells and seepage waters coming into said trench were allowed to enter said pipe, and defendant removed the plug from the lower end of said pipe so as to permit water to flow through the same into defendant's irrigating system, and thereby continuously supplied water to the customers of defendant from the time when it ceased to operate said engine and pump. That without the knowledge or consent of plaintiff in October, 1903, defendant caused said engine to be operated by an hydraulic engineer for the portions of two days for the purpose of testing and ascertaining the horse power of said engine. In addition the court found that by taking the pumping plant, including the said engine, into its possession on the 12th of August, 1902, and by operating the same for a period of nearly three months, to wit, until the 5th day of November, 1902, without any notice to the plaintiff of the inefficiency of said machinery, or that the same was not satisfactory, the defendant accepted the said plant, notwithstanding it was not in accordance with the contract. Upon these findings judgment was rendered in favor of plaintiff for the full amount of the purchase price. This appeal is taken by the defendant from the judgment and the order of the court denying its motion for a new trial.

It is insisted by appellant that the evidence is insufficient to justify the finding that defendant accepted the plant as furnished by the plaintiff, and that the judgment was not warranted by the findings.

The point that the findings were not justified by the evidence is, we think, untenable. The evidence on the question of acceptance, as upon all the other facts in issue, except the terms of the contract and the incapacity of the engine to raise the amount of water required by the agreement, is conflicting, but there was certainly sufficient evidence to be gathered from the conflict supporting all the findings made by the court. It is true that the court was in error as to some dates mentioned in the findings and in some minor particulars, but we do not consider that these substantially affect the sufficiency of the findings.

There was evidence in the case showing that under the contract between them the plaintiff set up on the premises of defendant, in connection with its irrigating system, a pumping plant claimed by plaintiff to be of the character called for in the agreement. The defendant had fifteen wells to be operated by this plant, and, the machinery having been installed, pipes laid, and connections made with all of these wells, a test operation of the plant was commenced by the plaintiff on August 1, 1902. It was provided in the contract that the plant should be installed by plaintiff in complete running order, and that he should leave his expert with it for six days to instruct the engineer of defendant how to operate the plant, and it was in harmony with this provision of the agreement and to test the plant that a six days' run by the expert of plaintiff was commenced on August 1, 1902. The evidence of plaintiff shows that at the end of that time the engine, pump, suction pipe, and other connections worked perfectly, and that the only difficulty which arose with the machinery during that period, but which was overcome, was in the circulating pump, the pulley of which had to be changed several times. The run during these six days, however, demonstrated that the engine furnished and operated by plaintiff as part of the plant was not of 35 actual horse power as provided in the contract, but of very much less power; that it was incapable of raising the quantity of water called for and incapable of raising more than a little over one-fourth of the amount. This was known to the defendant at that time. After this run of six days plaintiff saw the superintendent of the defendant company and told him that the plant had been run six days and was alright. The superintendent insisted that it had not been run six days without touching the plant, and that plaintiff would have to have his expert run it another six days. This plaintiff did, commencing on August 6th, and ran it to the 12th of August. The engine, pump, and connections worked perfectly, but this operation still demonstrated that the engine was incapable of lifting a greater quantity than previously pumped. On August 12, 1902, plaintiff again sought the superintendent of defendant and asked him to accept the plant or take it under his charge. The superintendent said that the plaintiff could turn the plant over to him, but, as to acceptance, replied "that he would have his own expert go out to the plant at some future time—at some time in the near future, immediately—and look over the ground and see if all the conditions of the contract were fulfilled." Plaintiff immediately turned the plant over to defendant, whose engineer thereafter, and while it was in operation, handled it. About August 26, 1902, while the engineer of defendant was operating the plant, some trouble with the pump was reported to plaintiff, who sent a man out to inspect it. He found that for lack of oil the babbitting had melted and stuck onto the shaft of the pump. The shaft was taken out, repaired, and placed back. Thereafter, and towards the end of August, 1902, defendant engaged an expert and sent him out to the plant to examine it. The expert made the examination and made a written report to defendant, stating that he had examined the pumping plant, "and found it to be in good working order, with the exception of the gas engine. That is out of adjustment. When this is adjusted I think the plant will work satisfactorily." This expert, called as a witness, testified that the adjustment of the engine referred to in his report had relation to the governor on the engine, which needed repairing. Plaintiff, having been notified that the governor needed adjustment, sent on September 6, 1902, one of his machinists to see what was at fault. He examined the engine and on the trial testified that he found the distillate they were using in the engine was very poor; that it tended to cause the electrodes—that is, the sparking points—to become corroded in a very short space of time; that it was so with the engine he was examining; that, when he came back from the inspection, he sent out another electrode. The court was warranted from the evidence in finding that these two matters—the corroding of the electrodes and the babbitting of the pumping shaft—were the only faults found in the perfect operation of the machinery; that they were not incident to any defects of the machinery itself, but the result of either a use of poor distillate, or proceeded from carelessness or want of familiarity on the part of defendant's engineer with the operation of this make of engine installed by plaintiff; that these were the only matters affecting the operation of the engine which were called to plaintiff's attention, were trivial and promptly remedied, and hence the court was justified in finding that all the conditions of the contract with plaintiff, save as to the capacity of the engine to be furnished, were performed.

Referring to the findings in the light of the evidence thus far recited, it is apparent that the court was in error in finding that the examination of the pumping plant by the expert of defendant was made on September 7, 1902—it is apparent from the date of the expert's report to defendant that it was as early at least as August 29, 1902—and the finding that a defective governor on the engine was repaired, it apparently was a defective electrode; but these are immaterial errors, and we mention them only because appellant refers to them.

Proceeding now to a further consideration of the evidence: It shows that aside from these defects referred to no complaint of the operation of the pumping machine was made to plaintiff; that from the time the plant was received by the plaintiff on August 12th, though not then accepted, and from the time the expert of defendant reported upon it towards the end of August, 1902, down to October 5, 1902, the plant was operated by the engineer of defendant, was used in the business of defendant in pumping water for its irrigation system, with full knowledge on the part of the defendant that it was not nearly the horse power capacity which plaintiff had contracted to furnish, and was not and could not be operated so as to lift the amount of water it was agreed it should; that with this knowledge of its incapacity to perform the work the defendant used it to pump such water as its capacity would furnish, and at no time during that period while it was so using it made any objection or complaint that it was not as contracted for, nor notified the plaintiff that it would not be accepted until long after October 5, 1902, the date when the engine and pump were received by defendant.

Defendant, it is true, contends that during all this period it was experimenting with the plant and endeavored to make the plant work successfully. But as there was evidence that at the first test, with the machinery working perfectly, it was demonstrated that the engine did not have nearly the capacity contracted for, it is apparent that no amount of experimental work could increase such capacity, and it was demonstrated during its entire operation, at the original test, after the defendant had taken it in charge, when its expert reported upon it, and all during the month or more thereafter while defendant continued operating it, that it was incapable of at all pumping the water it was contracted to do. The trouble with the engine was of such a character that no amount of experimenting, repairing, or adjusting of machinery could remedy it. It did not have the horse power which was contracted for, and there was nothing that could be done with it to give it that power. It was impossible to have it operate to the capacity it was agreed it should. The only remedy for this defect was to remove the engine and obtain another that did have the requisite horse power. Defendant knew this from the very start—the very first test—and when it continued to use and operate the plant with this engine, particularly for over a month after it had sent this expert to examine and report on it with a view of either accepting or rejecting it, and with knowledge that the engine could not possibly develop the horse power agreed to, and without any notice to plaintiff that the engine was insufficient or unsatisfactory, or that it would not be accepted, the court was justified in finding from the evidence that defendant had, in fact, accepted the engine, notwithstanding it was not in accordance with the contract. It is true that the court was in error in finding that the defendant actually used the engine and pump up to November 5, 1902. The insertion of the month of "November" was probably a clerical error. The evidence showed they were used up to October 5, 1902, when defendant removed it. However, we think this is not a material error. Eliminating dates and leaving the finding stand as a general one of acceptance of the plant, it is still sustained by the evidence.

And the finding that defendant accepted the plant, though not as contracted for, being sustained by the evidence, the judgment rendered for plaintiff was proper. The rule is elementary as to the respective rights of the parties under an executory contract for the sale of personal property. As to the purchaser he is bound to accept the property, provided it conforms to the terms of the contract, or, if not according to the contract, he may reject or refuse to accept it. Although the property may not be of the quality or description contracted for, he may nevertheless, if he so elect, waive the defect, and acceptance of the property offered constitutes such a waiver. When personal property is tendered or delivered to a purchaser in fulfillment of a contract for the purchase thereof, the duty devolves upon him to make an examination of the property tendered or delivered for the purpose of determining whether it fills the contract, and, if from such examination he finds it does not, he must promptly reject it. This duty of inspection for the purpose of determining whether the property complies with the contract must be exercised within a reasonable time, and what is a reasonable time depends upon the circumstances of each particular case.

Applying these general rules to the matter at bar: The engine to operate the pumping plant was to be of a certain description and of certain specified effective power, to be installed and put in running order by plaintiff. He furnished an engine and plant, and put it in running order. This did not vest the title in defendant. It was not required to accept the engine unless it conformed to the contract. This could only be determined upon trial. Upon trial as early as August 12, 1902, it was demonstrated that the engine was absolutely incapable of pumping the quantity of water stipulated for, and, as early as that date defendant knew it. It was the duty of the defendant after such demonstration to then act promptly and refuse to accept the engine. Instead of doing this, it went on using the engine in the regular conduct of its business, and for its own advantage, for almost two months before it notified plaintiff that it would not accept it. This was not only not acting promptly, but it was an unreasonable and unwarranted delay amounting to an election to accept the engine, though it was not of the capacity which had been contracted for. And the defendant, having thus accepted the engine, was precluded from claiming that it was not of the character provided for in the contract, and plaintiff was entitled to a judgment for the purchase price as if the engine contracted for had actually been installed.

As generally sustaining these views, we cite Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305; Boughton v. Standish, 48 Vt. 595; McBride v. McClure, 49 Ill. App. 612; Boothby v. Scales, 27 Wis. 262; Tufts v. Mabie, 7 Kan. App. 129, 53 Pac. 84; Brown v. Foster, 108 N. Y. 387, 15 N. E. 608; Palmer v. Banfield, 86 Wis. 441, 56 N. W. 1090; Carleton v. Jenks, 80 Fed. 937, 26 C. C. A. 265; 24 Am. & Eng. Ency. of Law, 1093.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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150 Cal. 741

## KLINE v. SANTA BARBARA CONSOL. RY. CO. (L. A. 1,638.)

(Supreme Court of California. April 2, 1907.)

1. CARRIERS—CARRIAGE OF PASSENGERS—CARE REQUIRED OF CARRIER.

A common carrier of passengers must exercise the utmost care, diligence, and foresight of a very cautious person, and is responsible for any injury to a passenger except that occasioned by inevitable casualty or some other cause which human foresight could not prevent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1087.]

2. DAMAGES—ELEMENTS OF DAMAGES—INJURIES TO PERSON.

Where a person injured in a street car accident was rendered to some extent unable to care for herself, and her injury necessitated the hiring of somebody to care for her, such result was an element to be considered in assessing her damages.

3. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE INADMISSIBLE UNDER PLEADINGS.

The introduction of evidence in a personal injury case as to the extent and permanence of plaintiff's injuries, although inadmissible under the pleadings, was harmless error where the plaintiff had submitted before the trial to a physical examination by surgeons selected by the defendant to ascertain what her injuries were, since the evidence could not have operated as a surprise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4153.]

4. SAME—MOTION TO STRIKE OUT—REFUSAL.

The error in refusing to strike out an opinion of a witness, in a suit for injuries caused by a street car, that the car was moving at "an unpardonable high rate of speed," was not prejudicial where it was conceded that the car had escaped all control and had descended a grade at a dangerous rate of speed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4161.]

5. Evidence — Subjects of Expert Testimony—Matters of Common Knowledge.

It does not require an expert to testify as to the suffering of an injured person, but the testimony of any one of ordinary intelligence and experience is competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2240.]

6. Appeal—Review—Excluding Proper Evidence—Harmless Error.

The improper rejecting of hypothetical questions was harmless error where, by a mere change in the form of the questions, all the evidence sought to be obtained by the rejected questions was introduced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4194.]

In Bank. Appeal from Superior Court, Santa Barbara County; Felix W. Ewing, Judge.

Action by Clemence Kline against the Santa Barbara Consolidated Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. H. Trowbridge and Henley C. Booth, for appellant. W. S. Day and John J. Squier, for respondent.

BEATTY, C. J. On July 26, 1903, the defendant, a street railway corporation engaged in operating electric cars in the city of Santa Barbara, received the plaintiff, a woman 65 years of age, as a passenger in one of its cars at the terminus of the line immediately in front of the old Franciscan Mission in said city. When the plaintiff boarded the car, she seated herself on one of the rear outside seats, which was long enough to seat three persons comfortably, and which ran parallel with the axis of the car. Immediately in front of her was a standard carrying a handrail, and extending from the side steps of the car to the roof. After the car had been under way a few yards it gained speed despite the fact that the motorman and conductor applied the brakes, which were of the hand-lever pattern, and when the car—the speed having become greatly accelerated—reached a curve 974 feet from the mission, the lurch of the car in rounding the curve threw the plaintiff from her seat to the ground, causing the injuries for which this action was brought. The action was defended upon two grounds: First. That the loss of control of the car was due to the fact that the county of Santa Barbara shortly before the date of the accident, in applying crude oil to the roadway, had left a puddle of oil at the extreme end of the track, which had become covered with dust; that the car on which plaintiff became a passenger, being an excursion car, was run out to the end of the track to avoid interruption to the regular cars; and that thereby, without the knowledge of defendant, its officers, or the car crew, its wheels and brake blocks had become saturated with oil, and useless as a means of controlling the car on the down grade from the mission to the curve. Second. That the plaintiff was warned of the situation in time to have secured herself from any danger of being thrown off the car by simply grasping the standard post in front of her, and that, having neglected this precaution, she was guilty of contributory negligence. In mitigation of damages the defendant offered to prove that the injuries resulting from the accident would have been much less serious if the plaintiff had been properly treated by the surgeon employed by her. The case was tried by jury and a verdict returned in favor of plaintiff for $8,000. Defendant appeals from the judgment. The record here includes a bill of exceptions embodying the evidence, and the exceptions taken at the trial to the rulings of the court upon objections to evidence, and in giving and refusing requests to charge.

The cause was originally transferred for hearing to the District Court of Appeal, where the judgment of the superior court was affirmed. Upon petition of appellant it was ordered to a rehearing in this court, principally for the purpose of giving further consideration to the questions raised as to the correctness of two instructions given to the jury by the trial judge, and approved by the District Court of Appeal. Besides these questions, counsel for appellant insisted at the rehearing, as they did in their petition, upon further consideration of some of their assignments of error, not expressly dealt with in the opinion of the district court of appeal. The most important of these questions in its bearing upon this case, and upon other cases likely to arise in which it will be invoked as a precedent, relates to the degree of care required to be exercised by common carriers of passengers, and the duty imposed upon such carriers in the exercise of that care.

In submitting the case to the jury the judge of the superior court gave, among others, the following instruction: "Contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved. On the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff tends to show that the injury was occasioned by the contributory negligence of the passenger or by inevitable casualty, or by some other cause which human care and foresight could not prevent." The objection to this instruction is directed to the words: "Occasioned by inevitable casualty or some other cause which human foresight could not prevent." This is construed by counsel as requiring a degree of care which would be the utmost that the human mind is capable of imagining, and such they contend is not the law. But, whatever the instruction may be held to mean, it cannot be denied that this court, in a number of instances, has approved it as a correct statement of the law, so that either counsel are mistaken in their construction, or the rule of law is as stringent as their construction makes it. As long ago as 1859 in deciding the case of Fairchild v. California Stage Co., 13 Cal. 604, Justice Baldwin, delivering the opinion of the court, quoted with entire approval the unanimous decision of the Virginia Court of Appeals that "passenger carriers bind themselves to carry safely those whom they admit into their coaches, as far as human care and foresight will go—that is, for the utmost care and diligence of very cautious persons—and, of course, they are responsible for any, even the slightest, neglect"; citing Story on Bailments, §§ 601, 601a, where that author uses this language: "And the onus probandi is on the proprietors of the coach to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable casualty or by some cause which human care and foresight could not prevent."

This decision has since been approved and followed in several other similar cases, and as to the point under consideration remains unquestioned. In substance the rule there affirmed has been made statute law in section 2100 of the Civil Code, which requires of the carrier of passengers the use of the "utmost care and diligence." And this as appears from the passage quoted from the Virginia case (Farish v. Reigle, 11 Grat. 711, 62 Am. Dec. 666), and approved by this court, is construed to mean all the care which human foresight will suggest. In another case which was decided before the adoption of the Civil Code, this court cited section 601 of Story on Bailments as authority for the rule that "carriers of passengers bind themselves to carry safely those whom they take into their coaches or cars as far as human care and foresight will go; that is, for the utmost care and diligence of very cautious persons." Wheaton v. N. B. & M. R. R. Co., 36 Cal. 593. And in that case, the court, after stating the rule proceeded to explain it as follows: "Whether in case of injury they have exercised such care and diligence is to be determined in view of the facts and circumstances which existed prior to the accident, and they cannot be held not to have done so because, after the accident, it may appear that it could have been avoided by precaution which a very cautious person, not knowing that the accident was about to occur, would not have taken. But this form of expressing the rule is not more clear than the bare statement that the carrier must exercise the utmost care, diligence and foresight of a very cautious person." These extracts from the opinions of this court in a stagecoach case, and a street railway case, decided before the adoption of our Civil Code, show that the language of instruction 7 given in this case had not only been approved as a correct statement of the rule of law, but had been explained and construed as the equivalent and no more than the equivalent of the rule enacted in section 2100 of that Code. It cannot be error, therefore, for a trial court, in submitting a case of this kind to the jury, to state the rule in its approved form, and, if counsel have reason to fear that the jury may understand the rule so expressed as requiring more than the utmost caution of very cautious persons, in view of the circumstances known or imputed to the knowledge of the carrier before the accident, they have the right to propose an instruction embodying the proper qualification. Other cases decided since the adoption of the Code rule are in perfect accord with those previously decided. See Jamison v. S. J. & S. Co., 55 Cal. 593. In Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, there is a very full review of the authorities on this point, citing not only Story on Bailments, but Cooley on Torts, and a large number of decisions of courts in other jurisdictions, all supporting the rule in terms or substance, as it was given in this case. It was approved in terms in Mitchell v. S. P. R. R. Co., 87 Cal. 64, 75, 25 Pac. 245, 11 L. R. A. 130, and in the very recent case of Boone v. Oakland Traction Co., 139 Cal. 494, 73 Pac. 243. Counsel contends that what was said in the two cases last cited was dictum, because the judgments against the carriers were reversed on other grounds. But it was not dictum—the point was involved in each case, and was certain to arise on the new trial which was ordered. It was therefore a point to be decided, and, being decided, became in each instance the law of the case. Instructions couched in terms similar to those in question may have been disapproved in other jurisdictions, but here the form in which the rule was stated has been so often approved, and the means of preventing its misconstruction or misapplication are so entirely within the power of the defense in actions for damages that this court could not with any consistency or justice set aside its previous rulings in this class of cases. The propriety of this conclusion could not be more clearly illustrated than it is by the fact that in this case counsel for the defendant asked, and the court gave, the following instruction to the jury: "(5) You are instructed that, while a street railway company does not insure the absolute safety of its passengers, it is the duty of the street railway company, and was the duty of the defendant in this case, to do all that human care, vigilance, and foresight could under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers; and you are instructed that if the injury to the plaintiff was caused solely by the brakes not working and the reason of the brakes not working was oil on the track, and that the defendant did not know that such oil was on the track at the time of the accident and should not have known in the exercise of such care, vigilance, and foresight, then the injury to the plaintiff was caused by a mere accident for which the defendant is not responsible and your verdict should be for the defendant." From which it appears that so far from questioning the rule at the trial counsel for the defendant requested the court to give it in the very words complained of, with an explanation which freed it completely from the construction which they say renders it erroneous.

The following is the eighth instruction, given to the jury at the request of the plaintiff: "(8) If the plaintiff is entitled to recover, the measure of her recovery is what is denominated compensatory damages; that is, such sum as will compensate her for any injury she has sustained. The elements entering into such damages are the following: (1) Such sum as will compensate her for the expenses, if any, she has incurred in caring for and nursing herself during any period she was disabled by the injury, not exceeding the sum of $497; (2) the value of her time while she will necessarily be disabled as the result of the injury; and (3) such reasonable sum as the jury shall award her on account of any pain and anxiety she may have suffered, or will necessarily suffer, by reason of her injury. The first of these elements is the subject of direct proof, and is to be determined by the jury on the evidence they have before them; but the second and third elements are from necessity left to the sound discretion of the jury, however the damages in all cannot exceed the amounts alleged in the complaint." It is contended that the second clause of this instruction contains an erroneous and misleading statement of the law, and that it must have led the jury to render what appellant views as a verdict excessive in amount. The evidence to be considered in determining the propriety of this instruction was to the effect that the plaintiff was a woman, 65 years of age, engaged in no gainful occupation, but capable, before the accident, of taking care of herself, and accustomed to active outdoor exercise. She lived with her married daughters, part of the time in Santa Barbara, with one, and at other times in Alameda with another. The effect of the injuries sustained at the time of the accident was to make her permanently lame, and to render her to some extent unable to care for herself—a disability continuing up to the time of the trial, and, according to the testimony of her surgeon, likely to be permanent. This would probably impose upon her the necessity of hiring the services of some one to do for her what she could no longer do for herself, and this was an element of damage which she had a right to ask the jury to consider. The value of a person's time is the equivalent of his power to earn money, in a gainful occupation, when he is so engaged, and ordinarily means nothing more. But it is not doing violence to language to say that the ability of a person to care for himself, and the practice of doing so, instead of hiring the services of others, gives a value to his time, even if he is earning nothing, and, if so, the deprivation of such ability by the wrongful act of another imposes upon the wrongdoer the obligation to compensate him for the value of the time he can no longer employ in his own service. Construed in this light the instruction was not erroneous, though it might have been more clearly expressed. The decision in Storrs v. L. A. Traction Co., 134 Cal. 91, 66 Pac. 72, is not authority for or against the point here decided. The instruction sustained in that case was different from that here in question, but it does not follow that this instruction is therefore wrong. Whether this element of damage was sufficiently pleaded, in view of the special demurrer of defendant, may admit of doubt. But if so, the error in admitting evidence as to the extent and permanence of the injuries sustained by plaintiff cannot have operated as a surprise to the defendant, for it appears that she had submitted before the trial to a physical examination by surgeons selected by the defendant for the purpose of ascertaining what her injuries were, and whether they had been properly treated. The error, if any, was therefore harmless.

The court did err in refusing to strike out the opinion of the witness Lutgen that the car was moving at "an unpardonable high rate of speed," but this error could have had no prejudicial effect in view of the conceded fact that the car escaped all control and descended the grade at a dangerous rate of speed, which the combined efforts of motorman and conductor were insufficient to arrest or moderate.

Numerous exceptions were taken by defendant to the admission of evidence, and refusals to strike out evidence of the suffering endured by the plaintiff in consequence of her injuries. A bystander testified that immediately after the accident she was unable to stand and suffered intensely. Her daughter testified that, when she was brought home, she was unable to walk, and was suffering intensely, and that she continued for days to suffer, could not be moved, etc. A trained nurse in charge of the case testified to the same thing, and the attending surgeon testified that her sufferings were severe. The objections to this line of testimony are that nonexpert witnesses were allowed to give their opinions as to her inability to stand and walk, and as to her suffering, and that it was error to permit them to testify to anything beyond her acts and exclamations indicative of present pain. The witness who testified she could not stand was one of those who assisted in lifting her from the ground and placing her on the car after the accident. Her daughter saw her carried by four men from the car to her house. The trained nurse and the surgeon had nursed and attended her during the progress of her partial recovery. All of the evidence on the part of the defendant, as well as that of the plaintiff, was to the effect that the injury to plaintiff consisted, in addition to superficial bruises, of a fracture of the neck of the femur. In view of this undisputed evidence as to the nature of the principal injury to plaintiff, the evidence that she could not stand or walk after the accident must have been harmless, for a court ought to take judicial notice of the fact that a woman with a broken thighbone will scarcely be able to walk or stand alone. As to the suffering, that also would necessarily follow from such an injury. But the evidence was not incompetent. It does not require an expert to tell whether a person suffers. The appearance of a person who suffers severely is sufficient to manifest his condition to anyone of ordinary intelligence and experience. These witnesses had all observed her, and heard her groans and complaints, and were competent to give an opinion as to her suffering.

There was a conflict of evidence as to whether plaintiff sustained an impacted or unimpacted fracture of the neck of the femur. The surgeon who attended her testified that it was impacted, and it appeared that he had treated her according to that diagnosis. The surgeons who examined her for defendant testified that the fracture was unimpacted, and for the purpose of showing that the treatment she had received aggravated her injury one of these surgeons was asked two hypothetical questions, to each of which the court sustained objections. These objections, in my opinion, should have been overruled, but here again the error was harmless, for, by a mere change in the form of his questions, the defendant's counsel brought out fully the opinion of the witness as to the nature of the injury, the error in treating it, and the injurious results of the treatment.

Appellant, not claiming that plaintiff's instruction No. 7 above quoted is erroneous in any particular except that which has been already considered, makes the point that instructions were given at its request which conflict with No. 7 in other material particulars. If this was so, it would not be a reason for setting aside the verdict, but there is no conflict. Defendant's instructions merely stated, rather too favorably to it, certain qualifications of the rule announced in No. 7.

We have here considered all the points to which our attention has been directed in the petition for a rehearing, and do not deem it necessary to notice particularly other points made prior to the hearing in the district court of appeal.

We think the record presents no material error, and the judgment is therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

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## ROBINSON v. KERRIGAN, Judge. (S. F. 4,659.)

(Supreme Court of California. April 5, 1907. Rehearing Denied May 4, 1907.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—SERVICE OF PROCESS.

Act March 17, 1897 (St. 1897, p. 138, c. 110), provides for the registration of land titles through proceedings in the superior court, whereby the official certificate will always show the state of title. Under section 13, notice of the hearing of the petition must be given by publication, and also in the manner prescribed for the service of ordinary process to all parties shown by the petition or abstract of title to be interested, etc. Section 17 provides the final decree shall be conclusive of the title against all persons, known or unknown, whether named in the proceedings or not. *Held*, that the law is not unconstitutional as depriving persons of property without due process of law, because precluding persons who may have interest in the land, but whose names are not specified in the proceedings.

2. SAME — DESTRUCTION OF GOVERNMENTAL FUNCTIONS—JUDICIAL POWERS.

The proceedings authorized by the statute are judicial, and not administrative, and hence do not infringe the constitutional provision for the division of governmental functions.

3. STATUTES—SPECIAL—VALIDITY.

The act is not invalid as special legislation, because it makes special provision regarding the statute of limitations and the rights of purchasers in good faith of land registered under the act.

4. SAME—POWER OF STATE—LAND TITLES.

The state has full control of the mode of transferring and establishing land titles, may provide a special proceeding in rem to fix the status of land, and declare the nature of the titles and interests therein, and the persons in whom such titles and interests are then vested, and may do this whenever it may be considered necessary or likely to promote the general welfare.

5. CONSTITUTIONAL LAW — EXECUTIVE OFFICERS—EXERCISE OF JUDICIAL FUNCTION.

Act March 17, 1897 (St. 1897, p. 138, c. 110), providing for the registration of land titles, and providing that the registrar shall note upon the duplicate certificate of title in his office the existence and general character of instruments creating liens, trusts, etc., affecting the land described in the certificate, does not violate the constitutional inhibition against the executive department exercising the functions of another department, though the registrar is called upon to determine the legal effect of such instruments.

6. STATUTES—TITLE—EXPRESSION OF SUBJECT.

Act March 17, 1897 (St. 1897, p. 138, c. 110), "An act for the certification of land titles and the simplification of the transfer of real estate," does not violate Const. art. 4, § 24, requiring every act to embrace but one subject, which shall be expressed in its title, because the act makes it a felony to fraudulently procure a false certificate, because the county recorder is made registrar, because the registrar is prohibited from practicing law, etc.; all of such provisions being germane to the general subject expressed in the title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 136–150.]

In Bank. Application by Charlotte Robinson for a writ of mandamus to the superior court of the city and county of San Francisco, and Frank H. Kerrigan, judge thereof. Granted.

Walter H. Robinson (Robert T. Devlin, of counsel), for petitioner. Lent & Humphrey, for respondent. Page, McClutchen & Knight, amicus curiæ.

SHAW, J. This is an original proceeding in this court for a writ of mandate. The plaintiff asks a writ to compel the defendant, as judge of the superior court, to make an order appointing a time for the hearing of a petition filed in the superior court to obtain registration of certain lands, as provided in the act of March 17, 1897, entitled "An act for the certification of land titles and the simplification of the transfer of real estate," known as the "Torrens Law." St. 1897, p. 138, c. 110. The defendant refused to make the order, basing his refusal upon the ground that the act above mentioned is unconstitutional and void. The validity of the act is the sole question presented for our consideration.

The object of the act is well stated in the title. It purports to establish a system for the registration of title to land, whereby the official certificate will always show the state of the title and the person in whom it is vested, and to provide that, after the original registration, transfers of the land may be made in the manner prescribed in detail in the act. As a foundation for the system it is necessary to have the title established. To that end a proceeding is authorized whereby such title may be settled and declared by a decree of the superior court. The title, thus established, is to be certified by the county recorder, and the certificate is made conclusive evidence of title in the person therein named as the owner. The principal point urged in opposition to the issuance of the writ is that the proceeding thus provided for is unconstitutional, because, first, it would deprive persons of property without due process of law; second, it would deprive persons of the equal protection of the laws; and, third, it commits to the judicial department of the state functions which are not judicial in character, but purely administrative and executive, contrary to section 1 of article 3 of the state Constitution, prohibiting one department of state from exercising functions belonging to another.

It is necessary to give a brief statement of the essential features of the proceeding to establish and register titles. Any person owning land which he desires to bring within the operation of the act must avail himself of this proceeding. He is required to file in the superior court a verified petition, setting forth his name, occupation, residence, and post office address; whether married or single, and, if married, the name and residence of the husband or wife; the description of the land and a statement of his estate or interest in it; that the land is occupied or unoccupied, as the case may be, and if occupied, the name and post office address of each occupant and the interest or estate such occupant has or claims in the land; the liens and incumbrances thereon and easements therein, with the name and address of the holder thereof, if known; whether or not any other person has or claims any estate or interest of any character in the land, and the name and address, if known, of every such person and the nature of the estate or interest owned or claimed by him; and the names and addresses of all the owners of adjoining lands, so far as the same can be ascertained. The petition must be accompanied by a plat of a survey of the land, made by a county surveyor, or a licensed surveyor, with a verified or certified abstract of title, made by some person or corporation thereunto authorized as specially provided in the act. Section 6. The court must examine and determine, from the abstract of title, whether or not it shows the title to be in the petitioner as alleged, and, if it so determine, it shall thereupon appoint a day for the hearing of the petition. Section 12. Notice of the time and place of the hearing must be given by four weeks' publication in some designated newspaper of general circulation. Notice thereof must also be served in the manner prescribed for service of summons in a civil action, either personal or by publication, as the facts may require, upon all the parties shown by the petition, or by the abstract of title, to be interested, and also upon the husband or wife of the petitioner and upon the owners of the adjoining lands. Section 13. We construe this provision for service of notice to mean that the service to be thus made on these persons must be personal service, except in those cases wherein, under sections 412 and 413 of the Code of Civil Procedure, service may be made by publication, and that service upon such parties by publication must be made upon affidavit and order, as in those sections provided, and for the period and in the manner there required. Upon the hearing, if the court finds in accordance with the petition, it must make and enter a decree that the petitioner is the owner of the land, accurately describing it, attaching thereto a diagram thereof, and setting forth the particulars of the liens, incumbrances, and easements, and an appeal may be taken therefrom as in civil actions. Section 15. The decree, when it becomes final, is made conclusive of the title and estate therein declared and described, against the rights of all persons, known or unknown, whether named in the proceedings or not. Section 17. A certified copy of the decree is to be filed with the county recorder, who is designated as "registrar" for the purposes of the act, and upon it he is to issue a certificate of title to the person named in the decree as owner, and enter a duplicate thereof in a book kept in his office for that purpose. Sections 22, 23. The land thereupon becomes "registered land," and the owner named in the certificate thereupon holds it free from every claim except those noted in the certificate. Subsequent transfers of such "registered land" are to be made and entered in the manner prescribed in the act, and certificates thereof are to be issued by the registrar to the transferee, which shall be conclusive evidence of his title as therein stated. Any person who has been, or would be, defrauded by the decree, and who had no actual notice of the proceeding, may maintain an action to establish his right, against the registered owner, at any time within five years after the first registration.

1. It is conceded, as a matter of course, that there would be no want of due process of law, if the proceedings affected only those persons who are named in the petition, and who, consequently, must be served with notice, either personal or by publication, in the same manner as in the case of a summons in a civil action. The objection in this respect is that the decree, by the terms of the act, will preclude persons who are not named, persons who really own the land, or an interest therein, but who, because of the fact that their claims or their existence, are unknown to the petitioner, are not named in the petition, and who, consequently, will not receive any notice except that afforded by the four weeks' publication required by the act, and who may have no actual knowledge of the proceeding or of the decree. The proceeding is, in all important particulars, of similar character to that provided by the act of 1906, known as the "McEnerney Act." St. 1906, p. 78. In that act it was expressly provided that the proceeding to establish title therein authorized should be had against all persons claiming any interest in, or lien on, the land, whether known or unknown, and that, if the required notices were given and served, the decree should be conclusive and binding upon all persons, whether named or not, although, as to those not named and unknown, the act required no notice except by publication. In the case of Title & Document Restoration Company v. Kerrigan (Cal. Sup.) 88 Pac. 356, that act was attacked as unconstitutional in the same particulars as those here urged against the Torrens law, and it was declared to be valid and constitutional. The reasons for holding that act valid are set forth at length in the elaborate opinion of Justice Sloss, rendered in that case. They are fully applicable to the case now under consideration, and we refer to that opinion for a full answer to the objection that the Torrens law does not provide for due process of law, nor afford to all persons the equal protection of the law. Similar laws have been enacted in Illinois, Minnesota and Massachusetts. These laws were attacked in the Supreme Courts of those states, on similar constitutional grounds, and have been declared valid. These decisions fully support the conclusion that the act in question does not deprive persons of property without due process of law, nor withhold from them the equal protection of law. People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571; Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433. The state has full control over the subject of the mode of transferring and establishing titles to property within its limits. For these purposes the state has power to provide a special proceeding, in the nature of a proceeding in rem, to fix the status of the land and declare the nature of the titles and interests therein, and the person or persons in whom such titles and interests are, at the time, vested. It may do this whenever it may be considered necessary, or likely to promote the general welfare. Arndt v. Griggs, 134 U. S. 321, 10 Sup. Ct. 557, 33 L. Ed. 918; People v. Simon, supra; Hamilton v. Brown, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691.

2. The proposition that the proceeding is judicial and not administrative, that it is properly a matter for the judicial department, was also fully considered and established in Title, etc., Company v. Kerrigan, supra, and the reasons there given apply here. The claim on behalf of the defendant in this particular seems to be based on the theory that there is or may be no adverse party to the proceeding; that it may be had where there is, in fact, no adverse claim, lien, or incumbrance to or upon the land; and hence that it is not adversary in character. That it may not become adversary in this sense, is, of course, conceded. It would not necessarily follow that the proceeding was not judicial. It needs no citation of authority to establish the proposition that the power of a court to entertain an action does not depend upon the appearance of the defendant and his active opposition to the claims of the plaintiff.

The contention is further made, in this connection, that judicial power can be exercised only to settle existing disputes and controversies, and that, if none exist, the act of merely describing and declaring an undisputed title is necessarily administrative, and cannot be performed by the judicial department. This argument does not fully meet the case. It may be admitted that the existence of controversies which could not be settled by the interested parties, and the necessity of some other means of determining such controversies, were the primal causes for the institution of courts with power to adjudge between the parties to the strife, and, consequently, that, originally, the exercise of judicial power implied the existence of an actual present controversy to be determined. But the refinements of civilized life, and the necessity for the orderly regulation, determination, and protection of human affairs and rights of property, have long required the extension of the judicial power beyond the settlement of controversies which have actually arisen, so as to include the function of providing security against disputes and claims which may arise. Hence, in modern times, the power of the courts may be, and often is, exerted to protect property and rights from possible, though at the time unknown, hostile claims and pretensions, or to merely declare a status or right, and thereby to forestall and prevent controversies which, but for the judicial declaration, might arise in the course of future transactions or proceedings. In the case provided for by the McEnerney act, the total destruction of all the public records and muniments of title had endangered all real property, had exposed land titles to any sort of false claims, and had made it impossible for any landowner to prove or exhibit his title in the usual manner, if he wished to dispose of or mortgage his land, or defend his title in court. It therefore became necessary to provide for the establishment of a new record title. In the case of the Torrens law, the plan for a new method of registering and transferring title made it necessary that the absolute title should first be established and declared. In each case a status or right was to be established, declared, and made conclusive, as the foundation for subsequent proceedings and transactions. This was a sufficient cause for placing the property to be thus affected within the jurisdiction of the court as a res, the ultimate right and title to which could be there adjudicated, after reasonable notice to all possible claimants to appear and assert their claims. Whether or not this is strictly an exercise of judicial power, as originally instituted, it cannot be denied that it is a power of the class which, from time immemorial, has been committed to and exercised by the courts. At the time the Constitution was adopted this class of powers had long been usually exercised by the courts alone. It must be presumed that in providing therein for the division of governmental power into three departments, legislative, executive, and judicial, and declaring that no person charged with the exercise of the powers belonging to one of them should exercise functions appertaining to either of the others, this usual power of the courts was in mind, and that it was intended that the courts should continue to exercise these quasi judicial powers, as they had previously been accustomed to do. A law which merely creates a new occasion and provides a new procedure for the exercise of this power cannot be said to transgress this clause of the Constitution.

Furthermore, in such matters, there is always a possiblity that there may be a hostile claim or dispute as to the right to be established. If it were necessary to find further justification for classing this power as judicial, this circumstance would be sufficient. A hostile claim being possible, there is, in contemplation of law, an adverse claim to be settled, a right to be protected against the possible claimant, for which a judicial decree is the only practicable and effectual remedy.

3. The claim is made, although not argued, that by sections 48, 49, 55, 58, 59, 60, 61, 64, 67 and 68 of the act, the registrar is given judicial powers. These sections require the registrar to note upon the duplicate certificate of title in his office the existence and general character of instruments creating liens, incumbrances, trusts, powers, or leases affecting the land described in the certificate. The point is that the registrar is required to determine the legal effect of these instruments, and that this is a judicial function which can be given only to a judicial officer. There is no force to the objection. Every administrative officer is frequently called upon, in the discharge of his duties, to decide questions of law relating thereto. The recorder is required to determine whether an instrument presented for record is a deed, a mortgage, a lease, a notice of action, or what not, so as to record it in its proper book. The sheriff must often determine, for his own guidance in making a levy, the ownership of property. The clerk must determine the nature and legal effect of papers filed with him, and perform the appropriate duty respecting them. The duties required of the registrar by these sections are of the same nature. His decision in the matter is not conclusive. If he decides wrongfully and refuses to perform the appropriate duty in the premises, he may be compelled to act properly by means of a writ of mandamus, the same as any other ministerial officer who mistakes his duty under the law and refuses to perform it. The exercise of such powers by ministerial officers is a necessary function of the executive department, and, although it may require similar deliberation to that involved in the exercise of judicial power, the bestowal of such powers upon the executive department does not violate the provisions of the Constitution forbidding that department to exercise the functions of any other department. People v. Simon, supra; Owners v. People, 113 Ill. 296; 1 Story on Const. (5th Ed.) § 525.

4. It is claimed that the act is special because it makes special provisions regarding the statute of limitations, the rights of purchasers in good faith of land registered under the act, and other matters peculiar to the lands which are brought within its provisions. We perceive no merit in this contention. The fact that the land thus registered may be conveyed and transferred by means different from that required as to other lands,

and the necessity of a special proceeding as a foundation for the system, creates a separate class of such registered lands and authorizes special provisions of law on the subject, applying only to such registered lands, the owners thereof or persons interested therein, or to the procedure whereby the system is to be inaugurated.

5. The claim is also made that the act violates the provision of section 24, art. 4, of the Constitution, that "Every act shall embrace but one subject, which subject shall be expressed in its title." The title of the act is "An act for the certification of land titles and the simplification of the transfer of real estate." St. 1897, p. 138, c. 110. The act makes it a felony to fraudulently procure a false certificate of title under the act, or to fraudulently obtain any false entry thereunder. Sections 111, 112. The county recorder is constituted the registrar, under the act, and required to perform the duties of registrar. Section 1. The official bond of the recorder is made to cover his duties as registrar. Section 2. The registrar is prohibited from practicing law. Section 4. The filing of the petition to establish title operates as a lis pendens. Section 11. The decree is made final and conclusive. Section 17. Liens are not to become effective on registered land until their entry on the duplicate certificate in the recorder's office. Sections 91, 92, 93, 94, and 95. Claims to registered lands cannot be obtained by adverse possession. Section 35. Four weeks' constructive notice is all that is required with respect to persons who are unknown. Section 13. These provisions relate to the subjects of felonies, county officers, county government, principal and surety, attorneys at law, judgments, liens, procedure, and adverse claims, respectively, and it is claimed that the act is void because none of them are mentioned in the title; and it is intimated that, if they were mentioned, the law would be contrary to the mandate of the Constitution that the act shall embrace but one subject. If the first proposition is well taken, it is certain that the second is also established; but the mere statement of the objection is almost sufficient to refute it. While it is true that none of the subjects thus designated are expressed in the title, they are all germane to the general subject there expressed, and, taken together, they compose a part of the general scheme and are appropriate to effect the main object of the law. Further examination would have disclosed a large number of such "subjects" in the body of the act, which are not mentioned in the title. The same criticism might be made of many acts on a general subject which have always been considered as valid. The act establishing the scheme is the appropriate place for provisions necessary to make it effective and symmetrical. If it were necessary to mention every subdivision of the general subject of an act in the title, to the extent here claimed, our statutes would present a somewhat ludicrous appearance. The statement of the subject in the title would generally occupy almost as much space as the act itself. Furthermore, if subjects, as intended by the Constitution, must be so minutely subdivided, it would be impracticable to enact any comprehensive law on any general subject, by reason of the necessity of dividing it into so many separate acts. The provision must receive, and it has received, a more liberal construction. The word "subject" is given a broader meaning. People v. Mullender, 132 Cal. 217, 64 Pac. 299. All the provisions objected to as constituting a different subject are reasonably necessary as means for attaining the object of the act indicated by the subject which is expressed, and hence they are considered as included in the title, as subdivisions of the general subject there stated. People v. Parks, 58 Cal. 636; Ex parte Liddell, 93 Cal. 633, 29 Pac. 251; Hellman v. Schoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86; Deyoe v. Superior Court, 140 Cal. 476, 488, 74 Pac. 28, 98 Am. St. Rep. 73. We think the title to the act sufficiently expresses the subject to which it relates, and that it embraces but one general subject. We find no sufficient ground for holding the law unconstitutional.

Let the writ of mandate issue as prayed for.

We concur: SLOSS, J.; HENSHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.

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150 Cal. 793

## PEOPLE'S HOME SAVINGS BANK v. SHERMAN. (L. A. 1,610.)

(Supreme Court of California. April 2, 1907.)

1. Dismissal and Nonsuit—Involuntary Dismissal—Failure to Prosecute.

In an action by a bank against a stockholder to collect a call for the balance of a subscription, it appeared that the bank continued in business for more than three years after its officers knew of its insolvency, without questioning the validity of the transfer by defendant of his shares to another, to be held in trust for defendant; that after the call was made plaintiff delayed until the last day possible to bring the action, in order to avoid the bar of the statute; that the action was brought in the wrong county, and plaintiff then waited three years before pressing for hearing a motion by defendant to transfer to the proper county, and more than a year after issue joined before taking any steps to bring the case to trial, during which time efforts were being made to adjust the case—a dismissal of the action was no abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, §§ 104, 140, 141.]

2. Same—Hearing and Determination.

The superior court, in ruling on a motion to dismiss an action for want of diligence in prosecuting the same, might properly consider any facts appearing in the record of the case, whether the same occurred before the action was commenced or afterward.

3. **Appeal and Error — Review — Scope of Review.**
In reviewing the action of the superior court on a motion to dismiss an action for want of diligence in prosecution thereof, the appellate court may take into consideration all facts appearing in the record of the case, whether the same occurred before the action was commenced or afterward.

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the People's Home Savings Bank against M. H. Sherman. Appeal by plaintiff from a judgment dismissing the action. Affirmed.

Stratton & Kaufman and F. G. Finlayson, for appellant. John D. Pope, for respondent.

SHAW, J. On April 24, 1906, this cause, and a number of others, which had been decided by the district court of appeal, were transferred to this court for decision. The order was a general one, applying to all the cases, and was made in consequence of the fact that the destruction of the records of this court in San Francisco by the fire of April 18th, of that year, made it impossible for the court to examine a case within the time limited for making such order. In the district court an opinion was rendered, in part as follows: "Appeal from a judgment dismissing the plaintiff's action for want of diligent prosecution. On December 10, 1902, the defendant joined issue in the cause by filing his answer. The motion to dismiss was made December 22, 1903, one year and twelve days after issue joined. It is made to appear from the record that defendant became a stockholder in plaintiff corporation on the 29th of May, 1890, by subscribing for 300 shares of the capital stock of the par value of $100, of which subscription price he paid one-third, agreeing to pay the remaining two-thirds upon call. It further appears that on September 30, 1891, the corporation became insolvent, a fact well known to its directors and to defendant; but, notwithstanding this insolvency, the bank continued to do business until the 9th day of January, 1895, at which date it went into liquidation in accordance with the bank commissioners' act; that on the 30th day of September, 1891, when the bank was so insolvent, defendant transferred his shares of stock to one B. N. Pratt, without consideration, and Pratt thereafter held the stock in trust for defendant; that on September 30, 1895, plaintiff through its board of directors made a call upon the stockholders for the unpaid subscription; and that neither defendant nor Pratt paid the $20,000 unpaid upon the stock so standing in the name of Pratt. It further appears that on the 29th day of September, 1897, the complaint in this proceeding was filed against defendant in the city and county of San Francisco. It does not appear from the record that any summons was ever issued or served; but on the 7th of February, 1899, defendant entered an appearance to said proceeding by general demurrer, and moved for a change of place of trial; that no proceedings were had upon said demurrer or said motion until the 17th day of June, 1902, on which date an order was made transferring the cause to Los Angeles county, the proper county, for trial; that thereafter, on October 3, 1902, the demurrer was overruled, and on December 10, 1902, issue was joined; that during the whole time from the commencement of the action up until September, 1903, persistent effort was being made by plaintiff, through its attorneys and officers, to effect a settlement and adjustment of their alleged claim, on which last-named date the terms of settlement were practically agreed upon by the parties, but never finally consummated, and on December 22, 1903, defendant gave notice of his intention to move for an order dismissing the action for failure of plaintiff to prosecute the same with reasonable diligence. This motion was heard on the 2d day of February, 1904, and granted. The question presented upon this appeal is whether the court abused its discretion in granting such order. Were the length of time between the negotiations for settlement and the granting of the motion alone to be considered, we should have no hesitancy in saying that the short lapse of time would not have justified the action of the court. In all of the cases cited, and of which we have made examination, notably Simmons v. Keller, 50 Cal. 38, and Kornahrens v. His Creditors, 64 Cal. 492, 3 Pac. 126, a much greater time elapsed between the joining of issue and the order of dismissal; and in Kornahrens v. His Creditors, supra, while only nine months had elapsed, there were circumstances taken into consideration in connection therewith which justified the court in its action. An examination of the entire record impresses us with the conviction that the court did not abuse its discretion in dismissing this proceeding under the circumstances of this case. The fact that a banking corporation continued to do business for more than three years after its officers knew of its insolvency, without questioning the validity of the transfer of stock to a third party, that after a call had been made it should delay until the last day possible to bring the action in order to avoid the bar of the statute, and then to bring such action in the wrong county, thereafter to wait three years before pressing for hearing the motion to transfer to the proper county, and more than a year after issue joined before taking any steps to bring the cause to trial, during all of which time constant and repeated efforts were being made to settle and adjust the case, may well have indicated to the trial court that the action was not brought in good faith, nor maintained with a view to having the court pass upon the rights of the parties, but that the process of the court was being used for the purpose of inducing or compelling a compromise and adjustment of a disputed liability. That this court would be warranted in reversing the judgment of the court in this case, a gross abuse of discretion should be made to appear, which, in our opinion, is not disclosed in this record. Allen, J."

Upon a reconsideration of the case, we are satisfied with the foregoing, and adopt it as a part of the opinion of this court. In response to the chief objection made in the petition for transfer to this court, we add the statement that the superior court, in ruling upon the motion to dismiss the action for want of diligence in prosecuting the same, could properly consider any facts appearing in the record of the case and bearing upon the question of diligence and good faith, whether the same occurred before the action was begun or afterwards, and that in reviewing the action of the superior court, and considering whether or not its discretion was properly exercised, the appellate court should also take such circumstances into consideration.

The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.

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150 Cal. 785

## KOYER v. WILLMON. (L. A. 1,575.)

(Supreme Court of California. April 2, 1907.)

1. PARTNERSHIP — PURCHASE OF LAND — CONTRACT.

Where plaintiff and defendant agreed to purchase certain real property, including the lot in question, on joint account, and to take the title in the name of S., who should hold it for the joint benefit of plaintiff and defendant, each paying one-half of the price, and each being the owner of an undivided one-half interest therein, the agreement constituted plaintiff and defendant partners in the enterprise.

2. SAME—ORAL AGREEMENT.

A partnership to buy, hold, and sell lands may be validly formed by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 2.]

3. TRUST — CONSTRUCTIVE TRUST — PARTNERSHIP AGREEMENT—BREACH.

Where plaintiff and defendant were partners in the purchase and sale of certain land for their joint benefit, and defendant improperly purchased the lot in controversy, which was within the partnership agreement, in his own name, and with his own funds, over plaintiff's protest, plaintiff having furnished money for a portion of the expenses, and having agreed to pay his share of the purchase price, defendant held the land as trustee of a constructive trust for the benefit of the firm.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 153, 154.]

4. SAME—ENFORCEMENT—CONDITIONS PRECEDENT—TENDER.

Where defendant purchased a lot in controversy in his own name, in violation of an agreement to purchase as the property of a firm of which plaintiff and defendant were members, and refused to recognize plaintiff's interest in the property, plaintiff was not bound to make a formal tender of one-half of the purchase price as a condition precedent to his right to enforce a trust in the property.

5. PARTNERSHIP — CAPACITY OF PARTNERS — OUTSIDE BUSINESS.

Where plaintiff and defendant agreed to purchase, hold, and sell certain land on joint account, the fact that plaintiff had a general partner, with whom he was engaged in the real estate business, did not disqualify him from entering into a particular partnership with defendant for the purchase and sale of the land in controversy for their joint benefit.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by A. S. Koyer against J. C. Willmon. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Jones & Weller (J. S. Chapman, of counsel), for appellant. O. B. Carter, for respondent.

SHAW, J. Plaintiff began this action to obtain a decree declaring that the defendant holds title to an undivided one-half of a certain lot 14, in block 93, fully described in the complaint, in trust for the plaintiff, for an accounting of the money advanced by the defendant in the purchase thereof, and to compel the defendant, upon payment to him by the plaintiff of the amount advanced on behalf of the plaintiff by him, to convey to plaintiff said one-half interest. The court below granted a nonsuit at the close of the plaintiff's evidence, and rendered judgment thereon in favor of the defendant. The plaintiff appeals.

The evidence is contained in a bill of exceptions. The complaint alleges that the plaintiff and defendant entered into an agreement to purchase certain real property situated in San Pedro, in Los Angeles county, including the said lot 14, and that it was agreed between them that all of said property should be purchased on joint account and title thereto taken by one Lydia B. Shields, who should hold the same for the joint benefit of the plaintiff and defendant; that each should pay one-half of the purchase price therefor, and each should be the owner of an undivided one-half interest therein; that the lands consisted of two parcels, both of which it was agreed were necessary for the purpose for which the lands were to be purchased, one parcel being the said lot 14, and the other the remaining lands. It is further alleged that, in pursuance of the agreement, the plaintiff and defendant purchased the second parcel, and each paid one-half of the price thereof; that the defendant went to San Pedro to buy the lot 14, in pursuance of the agreement; that he did purchase it and paid the price therefor, but that, instead of taking the title in the name of Lydia B. Shields for their joint use, as agreed, the defendant caused the title to be conveyed to himself alone, and thereupon claimed the same as his own property, and has ever since claimed the whole of said lot as his own and asserted that the plaintiff has no interest therein, or in any part thereof. It is also averred that the plaintiff has at all times been ready, able, and willing to repay to the defendant the one-half of the money expended by the defendant in buying said lot, that he tendered the same to the defendant before suit, and that plaintiff offers to deposit the same in court, upon the conveyance to him of an undivided one-half of the lot.

The effect of the agreement alleged was to make the plaintiff and defendant partners in the enterprise of buying and holding the property which was the subject of the agreement. It is not alleged that the agreement was in writing, and the evidence shows that it was made by parol, and not in writing. It is settled by the decisions in this state that a partnership for the purpose of buying, holding, and selling lands may be formed by an agreement resting in parol, only, and that such parol agreement is valid. Bates v. Babcock, 95 Cal. 479, 484, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; Coward v. Clanton, 79 Cal. 26, 21 Pac. 359. See, also, Holmes v. McCray, 19 Am. Rep. 735, 51 Ind. 358; Snyder v. Wolford, 53 Am. Rep. 22, 33 Minn. 175, 22 N. W. 254.

The existence of the partnership between them placed them in confidential relations toward each other, with respect to the property which was the subject of the agreement. Each occupied the position of a trustee to the other with regard to all the partnership transactions, including the transactions contemplated by the firm, and constituting the object or purpose for which the partnership was formed. When Willmon undertook to accomplish for the firm the purchase of lot 14, he was acting as agent and trustee of the plaintiff, and, in contemplation of law, the plaintiff was the beneficiary of that trust, with relation to his portion of the property. "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary." Civ. Code, § 2228. He cannot "use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." Civ. Code, § 2229. When Willmon succeeded in procuring the option to purchase lot 14, he was acting for the firm, and the right to purchase the property became trust property in his hands, or under his control. Under the principles above stated, he could not thereupon appropriate the trust property to his own use, nor deal with it otherwise than for the benefit of the partnership. The trust arising upon this transaction was not technically a resulting trust, and the decisions to the effect that a resulting trust does not arise unless the beneficiary has paid the price, or some other valuable consideration on the faith of the transaction, do not apply to the case. The trust imposed upon the defendant here is of the class known as "constructive trusts." It may be created in property, although the person sought to be charged as trustee bought and paid for it with his own means, as where a guardian buys directly from his ward, or an administrator purchases from an heir the property of the estate. In such cases the beneficiary of the constructive trust may tender to the defendant and offer to pay into court for the trustee whatever may be found just and equitable, and demand a reconveyance from the trustee, to be delivered on payment of the money. The fact of a previous tender or payment is usually important only to the determination of the question whether the plaintiff or the defendant shall recover costs. Gray v. Dougherty, 25 Cal. 282. At the time Willmon obtained this lot, the other property had been purchased and paid for by the firm, and the plaintiff had assisted in obtaining information about the ownership of the lot in question, and had paid the railroad fare for the trip of Willmon to find the person holding the option, and had otherwise contributed to that part of the proposed purchase. The relations were such that Willmon could not take the property without allowing the plaintiff to share therein according to the partnership agreement. It was gained by the violation of a trust. Civ. Code, § 2224; Rose v. Hayden, 35 Kan. 106, 10 Pac. 556, 57 Am. Rep. 145; Case v. Carroll, 35 N. Y. 388; Manning v. Hayden, 16 Fed. Cas. No. 9,043.

Under the rules governing the consideration of evidence on a motion for nonsuit, the evidence was sufficient to sustain the plaintiff's case. The testimony of the plaintiff was to the effect that the parties decided to buy the whole of the property because of its frontage on the Bay of San Pedro and its supposed advantages for wharfage purposes, and lot 14 was necessary, as it enabled them "to control the situation there"; that they thereupon agreed to buy all the property for their joint use, and each should pay one-half the price; that they bought and paid for the other lots and had the title taken, as agreed, in the name of Lydia B. Shields; that there was some difficulty in finding the name of the owner of lot 14, but plaintiff ascertained it, and Willmon thereupon wrote to her at plaintiff's suggestion, and obtained an answer from her saying that she had given an option on it to some one in San Pedro, but not disclosing his name; that thereupon Willmon, at plaintiff's request, and at plaintiff's expense for railroad fare, made two trips to San Pedro for the purpose of finding the person holding the option; that upon the second trip he succeeded in finding the man, bought the property, paid for it with his own funds, took title thereto in his own name; and that he thereupon reported the fact to plaintiff, and declared that it was his own property, and that the plaintiff had no interest in that part of the transaction. Plaintiff thereupon "made it plain to Mr. Willmon that (he) wanted the property, and that (he) was ready to pay for it"; but Willmon told him he need not say anything more about it, that he was going to keep the property, and walked out of the office where the conversation took place. The conduct of the defendant above recited made it unnecessary for the plaintiff to go further and make a formal tender of one-half the purchase money in furtherance of his claim, as a condition precedent to the right to maintain an action to enforce his rights. It is claimed that the decision of the court below was justified by the testimony of the plaintiff on cross-examination. At the close of the cross-examination, as it appears in the record, the plaintiff testified as follows: "The defendant and I were not partners during any of these transactions, but during all of said time Mr. Sherwood was and still is my partner in the real estate business." It is evident that the plaintiff was here speaking of a general partnership, and not of the special agreement with regard to the property in controversy, and that this testimony was not contradictory of, or inconsistent with, his previous testimony as to the facts concerning the agreement between himself and Willmon. The fact that he had a general partner, with whom he was engaged in the real estate business, did not prevent him from entering into a particular partnership with Willmon relating to a particular lot, or lots, of land, to buy and sell the same for their joint benefit, or to engage in any other joint enterprise concerning such lands. The motion for a nonsuit should have been denied.

The judgment is reversed, and the cause remanded to the court below for further proceedings.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.; HENSHAW, J.

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151 Cal. 52

## FELLOWS v. CITY OF LOS ANGELES et al. (L. A. 1,652.)

(Supreme Court of California. April 5, 1907.)

1. Waters and Water Courses — Public Water Supply—Statutory Provisions—Actions—Supply to Private Consumers.

Const. art. 14, § 1, and Act March 12, 1885, pp. 95, 97, 98, c. 115, §§ 1, 8, 10, declare that the use of all water appropriated for sale, rental or distribution is a public use. Under sections 8 and 10 of such act, corporations or persons engaged in furnishing water to the inhabitants of any county which have appropriated water to that use (other than to the inhabitants of a city, or town, or city and county), are required to distribute such water at the rates fixed by the board of supervisors of the county or as fixed by the corporations or persons, and, upon tender of such rates and demand therefor by any inhabitant who is entitled to water from such system, such person or corporation must furnish the inhabitant with water to the extent of his reasonable share of the available supply. *Held*, that if the place of distribution and use is outside of any city or town or city and county, the statute applies to the system, though the supply may be obtained from a natural source situated within the limits of some city.

2. Abatement—Grounds—Improper Joinder of Remedies—Waiver.

In a proceeding to enjoin defendants from cutting off plaintiff's water supply and to compel them to furnish water to certain other premises belonging to plaintiff, where the facts are sufficient to justify relief by injunction as to one lot and by writ of mandamus as to the other, and the proper parties defendant are before the court for both kinds of relief and the demurrer to the complaint is upon the sole ground that it does not state a cause of action and hence does not present the objection that there is a misjoinder of causes, the superior court has jurisdiction to give relief by injunction and mandamus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, § 505.]

3. Waters and Water Courses—Acquirement of Waterworks by City.

Where a city purchases land and water rights previously reduced to private ownership, the property is not relieved from the burden upon it by virtue of the appropriation of the water to public use, to which it was subject at the time of the purchase.

4. Same.

A city after acquiring a water system cannot discontinue its operation, cease to furnish water to the persons theretofore receiving and entitled to receive it, retain title, possession, control, and management of all the property, and allow the water previously devoted to the public use to run to waste, unless there are circumstances which absolve it from the duty to furnish water.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by William Fellows against the city of Los Angeles and others. From a judgment for defendants, plaintiff appeals. Reversed.

Hazard & Harpham, for appellant. W. B. Mathews and Herbert J. Goudge, for respondents.

SHAW, J. This is an action to enjoin the defendants from cutting off the water flowing in a certain pipe to the plaintiff's premises, and to compel the defendants to furnish water to certain other premises belonging to the plaintiff. The court below sustained a general demurrer to the complaint, and thereupon gave judgment in favor of the defendants, from which plaintiff appeals.

The facts upon which plaintiff relies are as follows: The city of Los Angeles was the owner of a tract of land inside the city limits near the east boundary thereof, and nearly two acres in extent, on which were flowing springs and which was permeated with water. In 1858 it sold and conveyed this land to one Elijah Moulton without reservation of any water rights. In 1887 Henry T. Hazard was the owner of about 200 acres of land outside of the city boundary, but adjacent thereto, which he had subdivided into blocks, lots and streets, known as "Hazard's East Side addition to the city of Los Angeles." Hazard agreed with certain other persons that he and they would incorporate a water company to buy the Moulton land and the waters thereof, construct a pumping plant thereon and a reservoir near by, and that they would pump and store said waters and lay pipes for and operate a water system for the distribution and sale of said water for public uses; that Hazard should superintend the work of construction and operation of said plant until it became profitable, and should furnish one-third of the money necessary to purchase the Moulton land, in consideration whereof it was further agreed between them that said corporation, when formed, would lay a pipe line from said reservoir or pumping station through said East Side addition, and would thereafter, by means thereof, furnish water from said system to purchasers of lots in said addition, at the regular rates to be fixed. In the year 1887 the corporation was formed under the name of the "East Side Spring Water Company," and it proceeded to purchase the Moulton land, construct the proposed water system, and lay the pipes to and through the said addition in certain streets thereof, and Hazard advanced from $12,000 to $15,000 to the corporation for that purpose and superintended the work of constructing and operating the water system, all in pursuance of the agreement aforesaid. It is not alleged that the $15,000 constituted one-third of the cost of the Moulton land. In 1888 the plaintiff purchased of Hazard lot 19 of block 20 of said East Side addition, built a residence thereon, in which he has ever since resided, and for which he requires water for domestic use. He has no other means of supply except by and through said water pipes. At the time he purchased the lot the East Side Spring Water Company, at his request, connected the lot with its pipe line, and thereafter furnished plaintiff with said water from said system. In 1892 a company known as the "Los Angeles City Water Company" became the owner of the entire capital stock of the East Side Spring Water Company, and was consequently in control of its action, but it did not technically acquire title to any of its property except as the owner of said capital stock. On February 3, 1902, the East Side Spring Water Company sold and conveyed to the city of Los Angeles all its property, including the pumping plant, reservoir, and pipe line aforesaid, and the city has ever since that time had the possession and management thereof. The East Side Spring Water Company thereupon dissolved and ceased to exist as a corporation. After the Los Angeles City Water Company obtained the capital stock of the other company, as aforesaid, and until the sale of the plant to the city by the other company in 1892, the Los Angeles City Water Company "furnished the plaintiff with water upon said lot," and since said sale of the plant the city has furnished it. It does not appear from the complaint whether the water furnished to the plaintiff's lot by the Los Angeles City Water Company, through said pipe, was water obtained from said Moulton land, or was from some other source; the allegation in that respect being in the ambiguous language above quoted. It is alleged that the water "in, on and flowing from" the Moulton land is now unused and going to waste, and that the said plant is lying idle and has not been used since the city came into possession of it, and, inferentially, that the city supplies water for said system from some other source than from the Moulton land. In 1900 the plaintiff purchased from Hazard lot 18 of block 20 in said East Side addition, upon which he now desires to build a house, and whch he desires to have connected with said water pipes for that purpose, in order to get water therefrom for the building operations.

Shortly before the complaint was filed, the plaintiff tendered to the city the legal charges for a water connection, offered to pay the established monthly rate in advance, and demanded that his said lot 18 of block 20 be connected with said pipe and be furnished with water by means thereof. The city refused to comply with said demand and refused to allow the plaintiff to make the connection himself. It also gave notice that it would cut off the supply of water for his residence on lot 19. It is alleged that it intends to and will, unless enjoined, cut off said supply, and that it claims that, because of the fact that said lots lie outside of the city, it is under no obligation to furnish water to them. It is alleged also that there is sufficient water available from the Moulton land to supply all the consumers of water along the pipe lines of the East Side Spring Water Company's system. It is to be observed that the Moulton land, and the reservoir in which the water therefrom was stored, were within the city limits, but that the East Side addition, including plaintiff's residence, was adjacent to, but outside, the city.

Under the provisions of the Constitution (article 14, § 1), and of sections 1, 8, and 10 of the act of March 12, 1885 (St. 1885, pp. 95, 97, 98, c. 115), the use to which the water obtained by the East Side Spring Water Company from the Moulton land was devoted was a public use, and its sale and distribution were subject to public control as in the act provided. Under sections 8 and 10 of the act corporations or persons engaged in furnishing water to the inhabitants of any county, which have appropriated water to that use (other than to the inhabitants of a city, or town, or city and county), are required to distribute such water at the rates fixed by the board of supervisors of the county, or as fixed by the corporation or person, and, upon tender of such rates and demand therefor by any inhabitant who is entitled to water from such system, such person or corporation is under an obligation and duty to supply such inhabitant with water to the extent of his reasonable share of the available supply belonging to the system. Hildreth v. Montecito Cr. W. Co., 139 Cal. 26, 72 Pac. 395; Merrill v. South Side I. Co., 112 Cal. 433, 44 Pac. 720; Price v. Riverside, etc., Co., 56 Cal. 431.

The respondents claim that by reason of the language of section 10 of the act, this provision does not apply to the present case. The section declares that "every person, company, association and corporation, having in any county in the state (other than in any city, city and county, or town therein) appropriated waters for sale, rental, or distribution, to the inhabitants of such county," shall be obliged, upon tender and demand, to distribute the water as above stated. It is argued that this language imposes the duty only where the appropriation of the water is made elsewhere than in a city, city and county, or town, and that, as the Moulton land, from which this water was derived, was situated in the city, the water was appropriated within the city, and hence that the case falls within the exception. The statute quoted, when properly considered, is not to be thus interpreted. At the time it was enacted the Constitution had provided for the fixing of water rates in cities and towns, but there was no law providing for such control or regulation in the case of water supplied for public use in places outside of cities and towns. The act of 1885 was intended to supply this omission. In the first clause of the title it is designated as "An act to regulate and control the sale, rental and distribution of appropriated water in this state, other than in any city, city and county, or town therein." The entire act relates to water supplied outside of cities and towns. In section 8 there is a clause inclosed in parentheses in the same words as the exception inclosed in parentheses in the above quoted part of section 10, but it occurs at a part of the sentence which leaves no doubt that the purpose of the exception in section 8 was to confine its operation to the subject expressed in the title; that is to say, to water sold, rented, or distributed for public use outside of any city, town, or city and county. In section 10 the exception is so placed in the sentence as to render its meaning in this respect somewhat ambiguous. According to the rules of statutory construction the ambiguity must, if possible, be so construed as to put the section in which it occurs in harmony with the title of the act and with the other sections on the same branch of the subject. Thus interpreted, the meaning is clear; and there is no difficulty in the interpretation. Its effect is that the place of the "appropriation," mentioned in the part of the section quoted, is the place where the water is used, and not necessarily the place where the source of supply, the pumping plant and waterworks, or the diverting dam, may be situated. Consequently, if the place of distribution and use is outside of any city, town, or city and county, the provisions of sections 8 and 10 apply to the system, although the supply of water may be obtained from a natural source situated within the limits of some city. It is the settled doctrine of this state that a water company engaged in the administration of the public use of distributing water to the inhabitants of a community or neighborhood, whether inside or outside of a city or town, is not only under a duty and obligation to supply the water in proper proportion to the persons composing the class for which the use was created, but, further, that if such company, upon proper demand and tender of the established rates, refuses to furnish the water, or threatens to cut off the supply, a proceeding in mandamus may be maintained, or an injunction issued, to compel the service, or prevent the deprivation thereof. See cases last cited. The facts alleged show that the plaintiff belongs to the class of persons to whose use the water from the Moulton land was appropriated. The predecessor of the defendant had agreed to furnish the water to the tract of land subdivided into lots in which plaintiff's lots were situated, and had laid pipes and established the water system for that purpose and for the sale of the water to any others who might desire it. It is not necessary to hold that the agreement above mentioned established a private obligation to supply water to these particular persons. Aside from that the case shows that the East Side Spring Water Company was under obligation, as the administrator of a public use, to furnish the plaintiff's lots with water.

It is unnecessary to determine whether or not a mandatory injunction could be issued, under the equity powers of the court, to compel the continuous operation of a pumping plant, or the establishing of a connection to the lot No. 18 which had not been previously connected. The superior court has full jurisdiction to give any relief warranted by the facts alleged and within the scope of the prayer of the complaint, whether that relief be equitable, or legal, or relief appropriate only in a special proceeding. It has such jurisdiction in this case, even if the relief asked is, in a certain sense, multifarious as, for instance, in part by injunction and consequently equitable, and in part by mandate, and therefore authorized under a special proceeding in mandamus. The demurrer is upon the sole ground that the complaint does not state facts sufficient to constitute a cause of action. The facts are sufficient to justify relief by injunction as to one lot, with additional relief by writ of mandate as to the other, and the proper parties defendant are before the court for both kinds of relief. The objection that there is a misjoinder of causes, even if well taken, which we do not decide, is not made by the demurrer, and it is therefore for the purposes of the demurrer waived. Code Civ. Proc. § 434. Therefore, if a mandamus or injunction, or both, would give complete relief, it is within the power of the court to give it in this action.

We perceive no ground upon which the right to the injunction as to one lot, and to the mandamus as to the other, can be denied, unless it be by reason of the fact that the source of the water supply is in the city of Los Angeles and the premises to be supplied lie without its limits, or by reason of the fact that the city of Los Angeles is now in charge of the property devoted to the public use, or that the plant or system whereby this water was formerly distributed has been allowed to become idle and its operation discontinued.

So far as the East Side Spring Water Company and the Los Angeles City Water Company were concerned, there can be no reasonable doubt that the respective locations of the source of supply and the place of use, as stated, would be wholly immaterial. They were both, so far as appears, corporations organized under the laws of this state for the purpose of distributing water for public use. There is nothing to indicate that their powers or duties were limited to the administration of such public use within the city of Los Angeles. They each, in turn, undertook to supply, and did supply, the particular public use of which the plaintiff, as the owner of the described lots, was the beneficiary. If either of them had continued in charge of the use and continued the operation of the plant, and had cut off or refused to supply water to the plaintiff's lots, an appropriate action would lie in favor of the plaintiff for the proper relief. The fact that the water was obtained within the city, or even that it was taken from the Los Angeles river, which by the special dedication created by the Spanish law for the founding of pueblos was set apart for the exclusive use of the city of Los Angeles, would be no defense in their behalf to such an action, so long as they were able to obtain the water from that source for that use. If the city had prevented them from taking the water for such use, or if, without their fault, from any cause, their supply for such use had been cut off, or had failed, it would perhaps have been a defense; but not so with the mere fact of the different relative situations of the source of supply and the place of use.

The defendants claim exemption from the obligations and liabilities of their predecessors in interest on the ground that all the waters existing within the city of Los Angeles are dedicated to the exclusive use of the inhabitants of the city; that these waters are held by the city subject to the public trust of continuously distributing the same to such inhabitants in just proportion, and that the corresponding duty rests upon the city; that the city is not authorized to make concessions of the perpetual or exclusive use of any part of such waters to individuals, nor to communities outside the limits of the city; and that, whatever may have been the acts, obligations, and liabilities of the East Side Spring Water Company and the Los Angeles City Water Company, with respect to the waters of the Moulton land, while the city suffered these companies to take these waters and devote them to uses outside the city limits, the municipality itself, now that it has possession and control of them, is bound to hold them in accordance with the original trust upon which it received them and devote them only to the use of the urban inhabitants to whose use they were dedicated. In support of these contentions they cite Lux v. Haggin, 69 Cal. 329, 10 Pac. 674; Vernon I. Co. v. Los Angeles, 106 Cal. 247, 39 Pac. 762; and Feliz v. Los Angeles, 58 Cal. 73. They also cite the provisions of the city charter to the effect that the city shall not in any wise dispose of its rights in the waters of the Los Angeles river, nor grant or lease to any person or corporation any right or privilege to use or control the same, or any part thereof, for any purpose, public or private, nor, without the consent of the electors of the city, dispose of any other water or water rights owned by the city, except for the ordinary uses of the city and its inhabitants, as elsewhere defined in the charter.

It does not appear that the water of the Moulton land composed a part of, or was tributary to, the Los Angeles river. The respondents do not claim that it is, and, for the purposes of this case, we assume that it is not, and that, if it is impressed with a trust for the exclusive use of the inhabitants of the city at all, it is because it comes within the description of "fuentes—springs of water appropriated to the supply of a town"—which, as is stated in Vernon I. Co. v. Los Angeles, supra, were by the Spanish law considered as communal property. But this class of pueblo property, unlike the rivers, was subject to sale to private persons by the pueblo. The case just cited contains a full discussion of the Spanish and Mexican law upon the subject of pueblo property and rights. In the course of his opinion in that case, Justice Temple says with regard to this class of property—that is, public land used in common by the inhabitants for its waters, its wood, and its pastures—"I do not understand that these properties were commons in the common-law sense. They were communal property, subject to be administered by the pueblo authorities. The public could be dispossessed, and the character of the lands changed. They might be sold or converted into solares or suertes, which could be reduced to private ownership. They were not dedicated to the public." (Page 247 of 106 Cal., page 765 of 39 Pac.) Concerning the river, he proceeds to say in contradistinction: "Now the waters of all rivers were, under the Spanish and Mexican rule, public property, to be administered and distributed for the use of the inhabitants." And in the succeeding part of the opinion it is shown that the pueblo of Los Angeles was located near the river and its waters dedicated to the public use for the inhabitants of that pueblo. Of this the court takes judicial notice. Los Angeles v. Pomeroy, 124 Cal. 641, 57 Pac. 585. From the complaint it appears that the Moulton land was sold by the city nearly 50 years ago without reservation of any water or water right pertaining thereto, that some 20 years ago, and for several years thereafter, the water thereon, or a part of it, was devoted to public use outside the city, and that the city, after it again acquired the land, allowed the waters thereof to go to waste. This sufficiently shows, prima facie at least, that the water upon this land had been reduced to private ownership and was not owned by the city, nor subject to the public use as part of the public waters of the city, prior to and at the time of its purchase of the land and water system from the East Side Spring Water Company. Its purchase from that company did not free the property conveyed from the burden put upon it by virtue of the appropriation of the water to public use. to which it was then subject in the hands of that company. If it is claimed that this water is tributary to the river, or necessary to its support as a part of its underground supply, or that it has otherwise become free from the burden to which it was previously subject, the facts must be shown in defense. The charter of Los Angeles gives it power to acquire water and water rights, within or without the city, for the use of its inhabitants. St. 1889, pp. 457, 458, c. 1, § 2, subds. 7, 15. In the exercise of this power, it would have the right to buy from any corporation or person engaged in supplying water for public use outside the city any surplus water which such corporation or person might possess. If it were necessary in order to obtain such surplus, the city might, under this power, purchase the entire water supply of such person or corporation and the water plant or system used in connection with it, so that, after operating the system and supplying the persons entitled to use the water, it could devote the surplus to the use of the inhabitants of the city. Hewitt v. San Jacinto Irr. D., 124 Cal. 192, 56 Pac. 893. The acquirement of this water plant and the operation of the system, if necessary, was not beyond the power of the city, and for the purposes of this decision we must presume that the necessity existed.

The question thus presented is whether or not, under the circumstances of this case as presented in the complaint, the city, after thus acquiring this water system, can now discontinue its operation, cease to furnish the water, or any water, to the persons theretofore receiving and entitled to receive it from said system, retain title, possession, control, and management of all the property composing the system, and allow the water previously devoted to the public use to run to waste. It is clear that this cannot be allowed. If there are facts or circumstances which absolve it from the duty to continue the water service, they must be shown in defense. The water, as we have seen, was appropriated to a public use, of which plaintiff was and is a beneficiary. The city cannot thus continue to hold and control property so appropriated to public use and at the same time refuse to perform the public duty which such possession and control imposes.

We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit, or without substantial loss; or, it may conclude, without reason which the law would consider sufficient, that it will not continue. In case of a natural person it might become physically impossible. We do not intend to declare that in any such case mandatory process would be issued to compel the personal performance of the duty. These questions are not now involved, and we express no opinion concerning them. But in such a case it cannot continue in absolute control of the water and waterworks appropriated to the public service. If a proper demand, by a person entitled, is made upon it for the continuance of the service, it must either comply or permit the use of the property and plant in previous use and necessary for the service by the demandant, or by the persons beneficially interested, to the end that he, or they, may continue to devote the property to the public service to which it is dedicated. If such permission has been given, or if the city is willing to make an effectual tender of such use in court, or if the service has become impossible from failure of the supply, or if a part only of the property is required for the administration of the service and the necessary part has been offered, or if any other lawful reason exists to excuse the city from continuing the performance of the water service, it will be necessary for it to state the facts in its answer by way of defense. Upon the face of the complaint the plaintiff is entitled to an injunction against the cutting off of the water from his residence lot, and to a writ of mandate to compel the city to connect the other lot with the pipes and supply it with water from said system, or to an injunction to prevent the city from interfering with his own reasonable efforts to establish such connection therewith.

The judgment is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

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5 Cal. App 288

## HUNTINGTON v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Cr. 353.)

(Court of Appeal, First District, California. March 28, 1907.)

1. Homicide—Trial—Verdict—Operation.

Where defendant was tried for the crime of murder and convicted of manslaughter, this amounted to an acquittal of the crime of murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 682, 689; vol. 14, Criminal Law, § 394.]

2. CRIMINAL LAW—FORMER JEOPARDY—NEW TRIAL.

Where an information charged the accused with the crime of murder, and he was convicted of manslaughter and on appeal a new trial was ordered, on the second trial he could only be tried upon the charge of manslaughter, since he had been acquitted of the charge of murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 394; vol. 26, Homicide, § 689.]

3. HOMICIDE — MANSLAUGHTER — STATUTORY PROVISIONS.

Pen. Code, § 192, defines manslaughter as the unlawful killing of a human being without malice, first, voluntary, upon a sudden quarrel or heat of passion; second, involuntary, in the commission of an unlawful act which might produce death in an unlawful manner or without due care and circumspection. *Held*, that the causing of death while attempting to commit a felony, to wit, an abortion, does not constitute manslaughter under the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 89.]

4. PROHIBITION—ACTS OF COURTS—WANT OF JURISDICTION—CRIMINAL PROCEEDINGS.

Where an information charged the accused with murder, and he was convicted of manslaughter, and on appeal a new trial was ordered, the trial court has no jurisdiction to try accused for any other crime than that of manslaughter, and a writ of prohibition will lie to prevent his trial on the charge of murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 15.]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Application by Ralph A. Huntington for a writ of prohibition against the superior court of the city and county of San Francisco and Honorable William P. Lawlor, judge thereof, to prohibit the superior court from proceeding with the trial of petitioner for the crime of murder. Respondents allowed 10 days in which to show cause why the writ should not be made peremptory, and in default thereof the writ to become absolute.

Peter F. Dunne and Robt. Ferral, for appellant. John O'Gara, Deputy Dist. Atty., for respondents.

COOPER, P. J. This is an application for a writ of prohibition to the superior court of the city and county of San Francisco and Hon. William P. Lawlor, judge thereof, for the purpose of prohibiting the said superior court from proceeding with the trial of petitioner for the crime of murder. The facts as stated in the petition, and which must be taken as true for the purposes of this case, are substantially as follows:

In December, 1900, an information was filed in said superior court charging petitioner with the crime of murder, in having feloniously killed one Jennie McKown with malice aforethought on the 27th day of October, 1900. The defendant was tried before a jury in said superior court, and the trial resulted in a verdict finding petitioner guilty of manslaughter, upon which judgment was accordingly entered, and the defendant was sentenced to imprisonment in the state prison at San Quentin for the term of 10 years. Thereafter the case was appealed to the Supreme Court, and on the 3d day of January, 1903, that court rendered its decision, reversing the case and remanding it to the superior court for a new trial. People v. Huntington, 138 Cal. 261, 70 Pac. 284. In the opinion in said case the court said: "The opening statement of the district attorney to the jury was that the deceased was pregnant, and that appellant, while knowingly and intentionally attempting to produce an abortion, caused her death. Counsel for the appellant in his opening statement, denied that appellant knew deceased was pregnant, or had any intent to produce abortion, but was treating her for supposed disease, and that she died under a surgical operation, probably from the effect of an anæsthetic which had been administered. The issue thus presented was the only one suggested at the trial, and the evidence introduced was to the one or the other side of that issue; the only contention of the prosecution being that death occurred while the defendant was trying to produce the abortion. * * * Under the circumstances of the case at bar there should have been no instruction on the subject of manslaughter. The only question legitimately before the jury was whether the appellant had caused death while attempting to produce abortion. If that was the fact, he was guilty of murder, and there was no element of manslaughter present; but the jury, under the instruction, found him guilty of manslaughter, and he was therefore tried for one crime, and convicted of an entirely different crime." The remittitur duly issued from the Supreme Court, and was filed in the superior court and spread upon its minutes. Thereupon, in the regular course of proceedings, said cause was set for trial for Monday, the 4th day of March, 1907, in said department No. 11 of the superior court, before the Honorable William P. Lawlor. Upon calling the case for the second trial in the superior court the district attorney answered that he was ready to proceed with the trial, and then and there stated and announced that he would proceed under the information and try the defendant upon the charge of murder in the second degree; and upon his theory being so announced, and upon objection being made by the defendant, the court then and there announced, ruled, and determined that the former verdict of the jury in this case did not curtail the power and the jurisdiction of the court to subject petitioner to a second trial upon the information for murder in the second degree, the court holding that the effect of the former verdict was limited to the penalty only, and that the defendant could be tried for murder in the second degree, but, if convicted, could only be sentenced for the crime of manslaughter. The petition further states that the said Hon. William P. Lawlor "announced, ruled, and determined that this petitioner would and should be proceeded against on his said second trial under said information for the crime of murder by abortion as aforesaid, and that evidence of his guilt thereof would be admitted by this court; the jury would be instructed that the issue as to his guilt or innocence of said murder by abortion as aforesaid was triable and determinable by them; that, in the event that they should determine him to have been guilty of said offense, it would be their duty, by force of the former verdict in this case, to return a verdict of guilty of manslaughter." Is is further alleged in the petition that, by reason of the former verdict and judgment in this case, the defendant has been acquitted of the crime of murder either in the first degree or in the second degree, and that the court will exceed its jurisdiction and power in proceeding against this defendant, and trying him for the crime of murder. To the above petition the district attorney, on behalf of the respondents, has filed a demurrer, alleging that the petition does not state facts sufficient to constitute any ground for the issuance of the writ, and that it does not show want of jurisdiction, or excess of jurisdiction, in the superior court, and therefore the writ should not issue. While the case is thus presented upon the demurrer to the petition, it is evidently the intention of the parties to have the gist of the matter determined on the demurrer.

The theory of the prosecution in the former trial was that defendant was guilty of murder in the second degree by causing the death of deceased while he was feloniously performing the operation of abortion upon a pregnant woman. The effect of the former verdict of manslaughter was to acquit the defendant of the crime of murder. People v. Gilmore, 4 Cal. 376, 60 Am. Dec. 620; People v. Backus, 5 Cal. 275; People v. Apgar, 35 Cal. 391; People v. Smith, 134 Cal. 454, 66 Pac. 669. We are therefore confronted with the proposition as to whether or not the superior court has jurisdiction to try the defendant for a crime of which he has been acquitted in that court and in the same proceeding. We apprehend that, if the crimes included in the information in this case had been charged separately—that if the law required it, and there had been three informations filed against defendant, one charging him with murder in the first degree, one with murder in the second degree, and one with manslaughter—the matter would not be contested by the district attorney. Or if defendant had been charged in three several counts in one information with murder in the first degree, murder in the second degree, and manslaughter, and had been acquitted on the counts charging murder, and convicted on the count charging manslaughter, and a new trial granted, that no lawyer would contend that he could be again tried except on the charge of manslaughter. If the information charged manslaughter only, the court would have no power to try defendant for any other or different crime, whether it be murder, arson, larceny, or any other crime mentioned in the Penal Code. It is conceded that defendant cannot be convicted of any other crime than manslaughter under the law in the present status of the case. If he cannot be convicted of any other crime than manslaughter, he should not be tried for any other crime. Evidence should not be received of any other crime than the one under investigation. It is an old rule that the evidence should be confined to the point in issue. A man should not be tried for one crime and found guilty of another and different crime, unless the different crime is included in the charge for which he is being legally tried. Now in the charge of murder is included the lesser offense of manslaughter, and in a proper case, where the defendant is being tried for the crime of murder, a jury may find the lesser offense of manslaughter; but it does not follow that a defendant can be tried for the same murder of which he has been acquitted. The lesser offense is included in the greater, and may be by the jury carved out of the greater where the trial is legally conducted and for the greater offense; but we know of no case in which it has been held that the court could proceed to try a defendant for an offense of which he has been acquitted. If the contention of the respondents is correct, the evidence in this case might be such as to show beyond doubt that defendant is guilty of murder in the second degree, of which he has been acquitted, and that he is not guilty of manslaughter, but yet the jury may be told that they can find him guilty of manslaughter. He may be convicted of a crime which the evidence shows he did not commit, for the reason that the evidence shows he did commit another crime of which he has been acquitted. Such is not the law.

In People v. Apgar, supra, in which the Supreme Court were discussing the question as to the conviction of a lesser offense being an acquittal of a higher one, the court said: "Upon the principle of these cases the defendant is acquitted of the higher offense charged, and cannot be again tried for it, so that the case as to that offense is wholly ended. He was only convicted of the lower offense embraced in the indictment, and if the judgment were reversed he could only be tried for that offense." In the case of People v. Bennett, 114 Cal. 56, 45 Pac. 1013, which is relied upon by the respondents, the Chief Justice filed a dissenting opinion, in which the authorities are very fully and logically reviewed, and to which attention is called. The dissenting opinion is not reported in the California Reports, but is found in 50 Pacific Reporter, p. 704. The Chief Justice, in discussing the question that a defendant, having been convicted of an assault with a deadly weapon, could not upon a new trial be tried for the higher offense of assault with intent to commit murder, said: "As an original proposition it would seem to be beyond dispute that a court of record and of superior jurisdiction ought to be held to know what the issue is which it has empaneled a jury to try, and that it is its duty to confine the trial to that issue. The only authority for a new trial is the order made in that very case for a new trial. When that order is limited, either in terms or in legal effect, to one issue, it seems absurd to say that the court must shut its eyes to its own order, and open the case for trial upon all the issues. If this view is correct—as I shall show that it is both upon principle and authority—it follows that there was not upon the second trial of this defendant any question of former jeopardy involved. He was only on trial for assault with a deadly weapon. The charge of assault for murder, of which he had been acquitted, was out of the case as much as if it never had been in the indictment, and so the jury should have been instructed. * * *" And in commenting upon People v. Gilmore, supra, the Chief Justice said: "An examination of the whole opinion and of the authorities cited in support of the conclusion reached shows that the language in which the questions for decision were stated was carefully and advisedly chosen; that the point decided was not that the plea of former acquittal should be accepted, and evidence allowed to go to the jury in support of it at the new trial which was ordered, but that the new trial must be confined to the charge of manslaughter." And the learned Chief Justice in conclusion states: "And from it are deduced the effect and consequence of an order for a new trial in such case, viz., that such order extends only to so much of the issue as is embraced in the charge of which there was a conviction." While the dissenting opinion of the Chief Justice in the Bennett Case did not become the law of that case, the views and reasoning were afterwards adopted, and became the law, in People v. Smith, supra, where the opinion was delivered by the Chief Justice, and it was held that where defendant was charged with murder and convicted of manslaughter he was as thereby acquitted of the crime of murder, and, upon the conviction of manslaughter being reversed, he could only on the second trial be tried upon the charge of manslaughter, and was only entitled to 10 peremptory challenges, and not to 20, which he would have been allowed in a trial where the charge was murder. Attention is called to the many cases cited in this later opinion, and to the language of the Chief Justice, in which he said: "The information had, as above stated, originally charged the crime of murder, which, of course, included a charge of the lesser grade of homicide—manslaughter. But the verdict and judgment convicting the defendant of manslaughter was in legal effect an acquittal of the crime of murder, and eliminated that part of the charge from the information, leaving only the accusation of manslaughter pending; and, when a new trial was ordered by this court, it was only a new trial of the pending issue that was intended, and its only effect was to subject the defendant to a new trial on the charge of manslaughter." If the law as stated by the court, speaking through the Chief Justice, is correct, it is difficult to conceive upon what theory a defendant can be tried for a crime which has been eliminated from the information.

Reliance is placed upon the later case of People v. McFarland, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245, in which the opinion was delivered by Mr. Commissioner Chipman. There are some expressions in that opinion that, taken by themselves, are in conflict with what has here been said; but it will be noted in that case that the opinion commences by stating that the defendant pleaded "not guilty," a former acquittal of the offense of murder, and also that he had been once in jeopardy. The opinion further states that the circumstances show a conflict as to who was the aggressor, and the facts are divergent as to whether the deceased or the defendant fired the first shot. In such case it is very clear that the facts and circumstances connected with the homicide would have to be given in evidence, whether the defendant was charged with murder or manslaughter, which plainly distinguishes the case from the case at bar. In the case at bar the defendant, as stated in People v. Huntington, supra, which has become the law of this case, is charged with murder by reason of causing death while attempting to commit a felony, to wit, an abortion. We think that causing death in such manner would not come within the definition of manslaughter as contained in the Penal Code, § 192. Manslaughter is there defined to be the unlawful killing of a human being without malice, and is divided into two kinds: First, voluntary, upon a sudden quarrel or heat of passion; second, involuntary, in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due care and circumspection. As the charge of murder in the second degree includes that of death caused by a defendant while committing or attempting to commit a felony, it does not necessarily include death caused in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act in an unlawful manner without due care or circumspection, or inflicted in a sudden quarrel or heat of passion. It was accordingly held in People v. Balkwell, 143 Cal. 259, 76 Pac. 1017, that the lower court in the trial of the case, which was a charge of murder claimed to have been committed in performing an abortion, did not err in refusing to give an instruction to the effect that the jury could convict of manslaughter. The court by holding the refusal of the instruction not to be error in effect held that manslaughter was not included in the charge under consideration.

It is contended that the writ of prohibition will not lie because the superior court of the city and county of San Francisco has jurisdiction to try the defendant for the crime charged in the information. This is true as to the crime of manslaughter which is now charged in the information. As to that charge, and the evidence and the rulings to be made by the court, we cannot and will not interfere by the writ of prohibition; but the court has no jurisdiction to try the defendant for any other or different crime than that of manslaughter. In Hayne v. Justice's Court, 82 Cal. 284, 23 Pac. 125, 16 Am. St. Rep. 114, it was held that a writ of prohibition would lie to prevent the justice's court from proceeding to the trial of a cause against the express prohibition of a statute. The justice's court in that case had jurisdiction of the parties and the subject-matter; but the statute provided that an order of adjudication in insolvency should stay proceedings in all actions pending in the justice's court. The court held that the prohibition of the statute extended to the justice's court, notwithstanding the fact that it had jurisdiction of the person and of the cause of action. The court said, in speaking of the statute: "This is a plain and direct prohibition against any further proceedings in the justice's court." Equally mandatory is the language in People v. Smith that the "only effect was to subject the defendant to a new trial on the charge of manslaughter." In North Bloomfield G. M. Co. v. Keyer, 58 Cal. 315, it was held that the writ of prohibition would lie to restrain a judge from proceeding in an action in which he is disqualified by reason of interest, although the court over which he presided had jurisdiction of the cause. The case was decided upon the theory that the judge, by reason of his interest, was prohibited by the statute from trying the case.

By analogy we conclude that the superior court is prohibited by reason of the law from trying the defendant for any other offense than that of manslaughter. It follows that the demurrer to the petition must be overruled, and it is so ordered.

The respondents will be allowed 10 days in which to show cause by answer why the writ should not be made peremptory, and in default of such answer on the part of the respondents the writ to become absolute.

We concur: HALL, J.; KERRIGAN, J.

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5 Cal. App. 296

## KNIGHT v. COHEN et al. (Civ. 332.)

(Court of Appeal, Second District, California. March 29, 1907.)

1. INJUNCTION—PRELIMINARY INJUNCTION.

The purpose of a preliminary injunction is to preserve a subject in controversy in its then existing condition, and, without determining any question of right, merely to prevent a further perpetration of wrong, or the doing of an act whereby the right in controversy may be materially injured or endangered, until a full and deliberate investigation of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 302.]

2. SAME—DISSOLUTION—JUDICIAL DISCRETION.

Where defendant admitted the existence of a pipe line, the use of the water for irrigating purposes, and its necessity to plaintiff, but claimed that it existed under a license which had been revoked, and it appeared that the vacation of an order restraining defendants from removing the pipe or interfering with its use would be far more detrimental to plaintiff than the refusal of the vacation would be to defendant, the court properly refused to dissolve the restraining order before hearing the case on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 347-359.]

3. SAME.

Where, subsequent to a temporary restraining order, an injunction is granted or refused, an order dissolving or discharging the restraining order is not necessary; the same falling with a denial of the motion for an injunction, or becoming merged in the latter, if granted.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Jesse Knight, trustee, against Emilie G. Cohen and another. From certain orders, defendants appeal. Affirmed.

J. J. Scrivner, Alfred H. Cohen (Lawler, Allen & Van Dyke, of counsel), for appellants. Munson & Barclay, W. S. Wright, and Anderson & Anderson, for respondent.

TAGGART, J. An appeal from four orders relating to applications for provisional injunctions made by both plaintiff and defendants, to wit: (1) From an order denying defendants' motion to dissolve a temporary restraining order issued on plaintiff's ex parte application; (2) from an order denying defendants' motion to discharge said restraining order; (3) from an order denying defendants' application for an injunction pendente lite; and (4) from an order granting plaintiff a preliminary injunction pendente lite.

Plaintiff is the owner of certain lands lying in Snover Canyon, immediately above and adjoining certain lands owned or claimed by defendants. In his verified complaint plaintiff alleges that he is the owner of and holds in trust for certain persons named said lands and a certain pipe line used in conducting waters from his said lands over and across the lands of defendants to the farming neighborhood in and about La Canada, there to be used by plaintiff and other beneficiaries of said trust and to be sold for irrigating purposes and domestic uses to the farmers and ranchers of that place; and that he has maintained said pipe line across defendants' land, adversely to them, for more than six years. That plaintiff and the other parties for whom he holds said land, pipe line, and water in trust own orange groves in and about La Canada, and the use of said water is essential to the proper care and growth of said orange groves and the maturing of the fruits thereof. That defendants threaten to and will, if not restrained, cut said pipe line and prevent the said waters from flowing through the same to the said orange groves, thus causing the destruction of the latter. On this verified complaint and an affidavit of plaintiff the superior court issued a temporary restraining order and an order to defendants to show cause why a preliminary injunction restraining them from interfering with plaintiff's said pipe line during the pendency of the litigation should not issue from said court. Prior to the hearing on the order to show cause, defendants filed and served a notice of motion to dissolve the said restraining order and to grant defendants an injunction pendente lite enjoining plaintiff from maintaining the pipe line across defendants' land or using the waters on plaintiff's land, which were being conducted through said pipe line, or entering upon defendants' land to repair or remove said pipe line therefrom. In support of these motions, defendants served and filed an answer and cross-complaint on behalf of said defendant Emilie G. Cohen. By the answer the ownership of the pipe line on defendants' land and the adverse maintenance thereof by plaintiff are denied, and it is averred that the carrying of said waters through said pipe line by plaintiff was by license and permission of defendants, which license and permission have been revoked. That the said waters are carried to nonriparian lands to the injury and detriment of defendants' riparian rights to the waters of said Snover Canyon. By her cross-complaint said defendant Emilie G. Cohen sets up an ownership of the waters of the spring upon plaintiff's land (being the waters conducted by him through his said pipe line) by virtue of a prior appropriation made while said lands were unoccupied lands of the United States government, and that the same are necessary for the irrigation of her agricultural lands and for her domestic use. That plaintiff acquires the said waters by diverting the same from the said spring by means of a tunnel projected into the formation underneath said spring. That plaintiff's said pipe line across defendants' land was constructed and maintained under a license and permission from said defendant and her predecessors in interest, and that on the 15th day of April, 1905, defendant revoked said license and notified plaintiff that he might remove said pipe line if removed before April 22, 1905. That plaintiff did not so remove said pipe line or cease to use such right of way across the lands of cross-complainant, but threatens to continue to maintain the pipe line and use the right of way without consent or permission of defendant. That the further maintenance of said pipe line by said plaintiff and his associates is highly detrimental and injurious to the riparian rights of the cross-complainant. An injunction is asked restraining plaintiff from maintaining the pipe line, carrying away the waters of the spring, or removing the pipe line from defendants' land. A number of affidavits accompany the answer and cross-complaint setting out cross-complainant's source of claim to said waters; and statements, proceedings, occurrences, and conditions tending to show that plaintiff never claimed any right to maintain said pipe line adverse to cross-complainant. Plaintiff answered said cross-complaint and filed certain affidavits contradictory of the material averments in the affidavits filed by defendants in support of their motion for a temporary injunction.

These matters and motions were all presented to the superior court at one hearing, the pleadings, affidavits and papers were read and submitted to the court, and the act of the court assigned as error is thus set out in the record: "Counsel for the defendants proceeded to argue said cause upon its merits, both as to the fact and the law of the case, and that, after defendants' counsel had proceeded at some length, the court interrupted counsel for the defendants in his said argument, and stated that, after the reading of said papers, it appeared to the court that it was not necessary or expedient that he should consider and determine the merits of the case, either as to the law or the fact, for that it appeared to him that the plaintiff would be damaged in a far greater degree by the granting of the motion to dissolve the restraining order, or by discharging the order to show cause, or by refusing to grant plaintiff's temporary injunction pendente lite, than the defendants would be if the motions of the defendants and the relief sought by them were granted," and thereupon made the ruling excepted to and appealed from.

That the course pursued by the superior court and the reasons assigned by it for its acts show a proper exercise of discretion does not require the citation of authority to sustain. Provisional remedies of all kinds are intended by the law to be used for the maintenance and preservation of the status of the property or person involved in the litigation, so that the judgment of the court when given or made may be effectually carried into execution. A preliminary injunction is no exception to the rule. It was not necessary for the court to decide the merits of the controversy in favor of the plaintiff to support its order granting him a preliminary injunction. Cases are not tried on their merits upon pleading and affidavits. A preliminary injunction is granted before a hearing on the merits has been had, and its purpose and sole object is to preserve the subject in controversy in its then existing condition, and, without determining any question of right, merely to prevent a further perpetration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered until a full and deliberate investigation of the case is afforded to the party. 16 Am. & Eng. Ency. of Law, p. 345.

Here the defendant admits the existence of the pipe line, the use of the water, and its necessity to plaintiff, but says it all existed under her license, and that she has revoked this. Whether the right exists by adverse user or by permission is the question at issue, and its destruction preliminary to a hearing on the merits by regular trial in court would have been an abuse of discretion by the trial court. Therefore, the rulings of the trial court on the motions made should be affirmed. We do not by this ruling, however, desire to be understood as holding, even impliedly, that an appeal will lie from the order denying the motion to dissolve the temporary restraining order, or that the order which is designated as an order denying defendant's motion to discharge said restraining order is appealable. Neither of these are expressly made appealable by the Code. Upon the hearing of the order to show cause and the action of the court thereon, the restraining order ceased to have any effect. An order dissolving or discharging a restraining order in such a case is not necessary, and it falls with a denial of the motion for a preliminary injunction, or becomes merged in the latter, if granted. San Diego W. Co. v. Steamship Co., 101 Cal. 218, 35 Pac. 651.

Orders appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J.

151 Cal. 96

## SARTHOU et al. v. REESE et al. (S. F. 4,723.)

(Supreme Court of California. April 23, 1907.)

APPEAL—STAY—UNLAWFUL DETAINER—JUDGMENT OF RESTITUTION.

Where, in an action of unlawful detainer, defendant by cross-bill sues for specific performance of a contract for a new lease, and decision is against him on the cross-bill as well as on the issues tendered by the original complaint, and there is judgment for immediate restitution, there can be no stay on appeal by defendant without direction therefor by the trial court; this being necessary under Code Civ. Proc. § 1176, on appeal from a judgment of restitution, and there being nothing to stay so far as any judgment on the cross-bill is concerned.

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Marie Jeanne Sarthou and others against C. T. Reese and others. From a judgment for plaintiffs, defendant A. A. McCoy appealed, and he now petitions for supersedeas. Petition denied.

Samuel M. Shortridge and W. C. Sharpstein, for appellant. P. A. Bergerot and Edward Lander (S. A. Riley, of counsel), for respondents.

BEATTY, C. J. This is an action of unlawful detainer after default in payment of rent. The appellant McCoy, in addition to denials of the matters alleged in the complaint, filed a cross-bill claiming affirmative relief upon equitable grounds. The decision was against him upon the matters alleged in his cross-complaint, as well as upon the issues tendered by the original complaint, and judgment was entered for immediate restitution of the demised premises. He has appealed from the judgment, but the judge of the superior court before whom the action was tried has refused to fix the amount of an undertaking to stay proceedings pending his appeal. He now applies to this court for such an order and for a supersedeas.

There can be no stay of proceedings upon an appeal from a judgment of restitution in an action of unlawful detainer unless the trial judge so directs. Code Civ. Proc. § 1176; Cluness v. Bowen, 135 Cal. 660, 67 Pac. 1048.

But appellant contends that this is not an appeal from a judgment of restitution in unlawful detainer, because the plaintiffs, without objection to his right to interpose an equitable defense by cross-complaint, joined issue upon the matters therein alleged, and thereby changed the nature of the action—changed it, that is to say, into an action in equity for the specific performance of a contract to make a new lease, in which a stay of proceedings pending appeal is a matter of right.

We do not find it necessary to decide the question whether defendant had a right to interpose the cross-complaint, or whether the plaintiff has waived the right to object at this stage of the proceedings that an equitable defense is inadmissible in this class of actions. Conceding that in unlawful detainer there is the same right to set up equitable defenses by cross-complaint as in ejectment, the fact remains that when the court has found against the defendant on the matters alleged in his cross-complaint, and in favor of the plaintiff on the issues tendered by his complaint, a judgment of restitution of the demised premises necessarily follows and execution of that judgment cannot be stayed without the consent of the trial judge. If it be said that there is also a judgment in the cross-action, and that as to that judgment a stay of proceedings pending appeal is matter of right, the answer is that so far as that judgment or that part of the judgment is concerned there is nothing to stay. By it the defendant has simply been denied the affirmative relief which he sought. The judgment may be erroneous, it may be reversed, and he may ultimately secure the relief which he prays, but until there is a judgment in his favor upon his cross-complaint there can be no process for its enforcement, and, when that time comes, it will be the plaintiff, and not he, that will be in need of a stay of proceedings.

In the meantime, the plaintiff having prevailed in her action in unlawful detainer, and the trial court having refused a stay of execution, this court cannot interfere.

Petition for supersedeas denied.

We concur: SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.

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151 Cal. 102

MARSTON v. KUHLAND. (Sac. 1,459.)

(Supreme Court of California. May 1, 1907.)

LIMITATION OF ACTIONS—LIMITATIONS APPLICABLE—EQUITABLE REMEDIES.

A life policy was made payable to insured's son, with the understanding, shown by writing signed by insured and son, that the son on collecting the insurance should pay a certain part of it to insured's daughter. Afterwards the insured and the son modified this by provision that $500 of the insurance directed to be paid the daughter should be paid the son, on condition of his erecting a monument. The son made payment to the daughter as directed by the modified instrument, and erected the monument. At the time of the payment, the daughter, knowing all the facts, acknowledged in writing receipt from the son in full of all demands all money due her on account of her father's life policy, and he stated to her: "Now, you and I are released in this and our business is ended." *Held*, that an action, commenced by her seven years thereafter, to recover the $500, on the ground that the original direction as to payment could not be modified without her written consent, was barred; the trust relation being ended by the writing given by the daughter and the statement made by the son at the time of payment, and any ordinary action founded on the former relation being barred, under Code Civ. Proc. §§ 337, 338, subds. 1, 4, and section 343, in at most four years thereafter.

Department 2. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Mary A. Marston against Louis W. Kuhland. Judgment for defendant. Plaintiff appeals. Affirmed.

Chas. J. Hasman and Alexander & Church, for appellant. Frank R. Devlin and Mr. Goodwin, for respondent.

McFARLAND, J. This is an appeal by plaintiff from a judgment in favor of defendant.

Plaintiff is the sister of the defendant, and the two are children of William Kuhland, now deceased. In his lifetime, and on or about February 18, 1892, the said William Kuhland procured several life insurance policies on his life to be issued and made payable to the son, Louis W., defendant herein. They were made payable to defendant, however, with the understanding that, upon the death of the father, defendant was to collect the amounts due on the policies and pay a certain named part thereof to the plaintiff herein, a certain part to a couple of grandchildren of the insured, and to retain the balance for himself; and on February 18, 1892, said father, William, and the son, defendant herein, executed a written instrument, in which the duties of defendant with respect to the policies, as above stated, were fully declared. Afterwards, on November 1, 1895, the father and son executed in writing a modification of said written instrument of February 18, 1892, in which the father recited that he had "made certain advances in money to my daughter, Mary Marston," and directed that $500 of the insurance money directed to be paid her by the first instrument should be paid to the defendant herein on condition that he should place a suitable monument on the grave of two deceased daughters. William Kuhland died on or about December 5, 1895. Thereafter the defendant collected the amounts due on said policies, and paid to plaintiff the part thereof given to her under the instrument of February, 1892, less the said $500 directed by said modification, and he erected the monuments mentioned therein, which cost about $500. Upon the payment of said money to plaintiff, she, on June 3, 1897, executed to defendant the following instrument in writing: "Received from L. W. Kuhland, in full of all demands, all moneys due me on account of life insurance policies of my father, William Kuhland." And plaintiff testified that at the time she executed that instrument her brother said: "Now, you and I are released in this, and our business is ended." Nothing more was done by either party touching the matter of the insurance money until seven years afterwards, when plaintiff brought this action to recover the $500 and interest, upon the theory that the original instrument of 1892 could not be legally modified without the written consent of plaintiff as beneficiary therein. She avers in her complaint that she did not discover the facts of the execution of said instrument of 1892 and its modifications until within a short time, less than three years, before the commencement of this action. The court found, however—and upon sufficient evidence to sustain the finding—that plaintiff "was present when said direction was given for said modification being made in writing, and consented to such modification and alteration relating to the amount of money to be paid her from said funds." The court also found that "it is not true that plaintiff never discovered the true facts in this case until on or about the 1st day of September, 1903; but immediately after the death of said William Kuhland, to wit, on or about the 5th day of December, 1895, defendant informed plaintiff, and plaintiff has ever since had full knowledge of all the facts and circumstances in connection with this trust."

Defendant pleaded, among other things, various sections of the statute of limitations, and particularly section 337, subdivisions 1 and 4 of section 338, and section 343 of the Code of Civil Procedure; and this plea of the statute of limitations constituted a perfect defense to this action. The giving of the written instrument by plaintiff to defendant on June 3, 1897, and the statement then made by defendant, as above set forth, clearly ended the trust relation, and any ordinary action by plaintiff founded on the former relation was barred unless brought within at least four years thereafter. Of course, when there is a good cause of action founded upon a recent discovery of fraud or mistake, it may be brought within three years after such discovery; but in the case at bar the court found, upon sufficient evidence, that there was no such recent discovery of mistake, and that plaintiff knew all the facts of the case more than seven years before the commencement of this action.

The foregoing facts make it unnecessary to consider other points made by appellant; and certain exceptions taken by her to rulings of the court touching the admissibility of evidence are of no importance.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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151 Cal. 65

GATES v. GREEN et ux. (L. A. 1,739.)

(Supreme Court of California. April 5, 1907.)

1. VENDOR AND PURCHASER—ENFORCEMENT OF LIEN.

Where the vendee in a contract for the sale of land secured payment of his note for the price by a chattel mortgage, in an action to compel performance of the contract, by requiring the vendee to pay the balance of the price, the vendee was entitled to have the security afforded by the mortgage exhausted before resort was had to his interest in the land.

2. PAYMENT—PART PAYMENT PENDING SUIT—WAIVER OF CAUSE OF ACTION.

The fact that, pending the action, the vendor accepted certain payments on account from the vendee, did not amount to a waiver of the cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 142.]

3. VENDOR AND PURCHASER—VENDOR'S LIEN—ENFORCEMENT—JUDGMENT.

Where, in an action by a vendor to compel performance by requiring the vendee to pay the balance of the price, a judgment was entered for a sale of the property and application of the proceeds to the debt, the judgment was not erroneous, in that it did not allow a reasonable time before sale within which the vendee might perform.

4. JUDGMENT—CONFORMITY TO PREVIOUS PROCEEDINGS.

Where, at the conclusion of the trial, the court announced orally that it would make certain provisions in the decision and judgment, the fact that the court failed to insert such provisions did not affect the correctness of the decision and judgment rendered.

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by W. W. Gates against G. R. Green and wife. Appeal by defendants from a judgment in favor of plaintiff, and from an order denying a motion for a new trial. Affirmed.

See 84 Pac. 37.

Will D. Gould and E. C. Oggel, for appellants. Flint & Barker, for respondent.

ANGELLOTTI, J. The defendants appeal from a judgment in favor of plaintiff, and from an order denying their motion for a new trial. The action is one brought by the vendor in an executory agreement for the sale of real estate, under which the vendee went into and continues in possession, to compel the performance of his contract by the vendee, by requiring him to pay the balance of the agreed purchase price. As a means to this end, foreclosure of a chattel mortgage given as a part of the transaction to secure the payment of a promissory note evidencing the indebtedness, and the application of the proceeds of the sale to the payment thereof, was sought, as was also a sale of the vendee's interest in the land under the contract, if necessary, and personal judgment was asked for any deficiency remaining after the application of the proceeds of sale. The trial court granted substantially this relief, finding the amount due under the contract on September 21, 1904, to be $3,310, and directing, for the payment of this amount with interest from that date at 7 per cent. per annum, costs, expenses, and attorney's fees: (1) The sale by the sheriff of the personal property covered by the chattel mortgage and the proper application of the proceeds; and (2) if any deficiency then remained, the sale by the sheriff of the interest of the vendee in the land, and the application of the proceeds so far as necessary; and (3) personal judgment for any deficiency remaining after such sales. It was further provided that any surplus of proceeds remaining after satisfying the claim, costs, etc., should be delivered to the vendee.

1. It is claimed by defendants that the action is one for specific performance, and, for the purposes of the decision, this may be conceded. See White v. Sage (Cal. Sup.) 87 Pac. 193. It is not contended that the complaint fails to state a cause of action in this behalf, or that the facts found by the court do not entitle plaintiff to have what is practically a decree of specific performance, unless the existence of the chattel mortgage given as security for the balance of the purchase price precludes any such action until separate and independent proceedings shall have first been had upon the chattel mortgage, and the security thereby afforded exhausted. This appears to be the main contention of plaintiff on this appeal. It may be conceded that the vendee was entitled to have the security afforded by the mortgage exhausted, before resort was had to his interest in the land, and this is fully accomplished by the judgment, which directs the sale of the land only in the event that the sale of the personal property does not bring enough to satisfy the claim. We can see no other merit in defendants' claim. The existence of the mortgage in no degree affected the right of the vendee to specific performance. It was purely ancillary to the contract of sale, standing simply as security for the performance of his contract by the vendee. In an action to compel such performance, it was entirely proper, and probably incumbent on the vendor, to have a foreclosure of this mortgage before resorting to the vendee's interest in the land, or other property owned by him. This, as we have seen, was had, and we are unable to understand the contention of defendants' counsel to the contrary.

2. It is claimed that, in ascertaining the amount due, the trial court failed to credit certain amounts paid by the vendee. A careful examination of the record in this regard shows that the evidence was entirely sufficient to sustain the conclusion as to the amount remaining due from the vendee.

3. It is urged that specific performance will not be decreed where it would produce hardship or injustice, but we see no place herein for the application of this rule. It was both alleged and found upon sufficient evidence that the defendants received an adequate consideration for the contract; that, as to them, it was just and reasonable; that their assent was not obtained by misrepresentation, concealment, or unfair practice of any party thereto, or by any promise of such party which has not been substantially fulfilled, nor given under the influence of mistake, misapprehension, or surprise; and that plaintiff has fully and fairly performed all of the conditions of said contract upon his part.

4. After the commencement of this action, the vendee made certain payments on account of the amount due, all of which were duly credited and taken into consideration in determining the balance due at the time of judgment. It is claimed that the acceptance of these payments operated as a waiver of the cause of action. It was alleged in the amended answer that these payments were made in part satisfaction, and the trial court found, upon sufficient evidence, that they were accepted by plaintiff without any agreement to waive his cause of action. In the absence of some agreement to that effect, the acceptance of these partial payments by plaintiff cannot be held to have constituted a waiver of any of his rights as to the balance still due.

5. Citing Keller v. Lewis, 53 Cal. 113, and Odd Fellows Sav. Bank v. Brander, 124 Cal. 255, 56 Pac. 1109, defendants claim that the judgment is erroneous, in that it did not allow a reasonable time before sale, within which they might perform their agreement and avoid a sale. Those, and other cases of like character to be found in our reports, were cases where it was sought simply to obtain a decree barring and foreclosing the right of the vendee to obtain a conveyance under his contract; no sale of the premises being sought or directed. In such cases, it is settled by our decisions that the judgment should fix a reasonable time within which the vendee may pay the balance due on the contract, before he is forever foreclosed of all right or interest in the hands, or to a conveyance thereof. Keller v. Lewis, supra. No reason for the application of any such rule is apparent in a case where the vendor is simply seeking to recover the money due under the contract, and in aid thereof obtains a judgment for a sale of the property upon which he has a lien for the unpaid purchase money. No case has been cited which holds this rule applicable under such circumstances, and we know of no principle that would justify its application.

6. At the conclusion of the trial, the trial court orally announced that it would make certain provisions in its decision and judgment thereafter to be given, and complaint is made that the court failed to insert such provisions in the written decision and judgment subsequently given. Obviously, the correctness of such decision and judgment can, in no degree, be made to depend upon such oral statements by the court as to its intention.

7. The allowance of attorney's fees was fully authorized by the express provisions relative thereto contained in the contract and in the chattel mortgage.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

151 Cal. 98

## ZOBEL v. ZOBEL. (L. A. 1,737.)

(Supreme Court of California. May 1, 1907.)

1. JUDGMENT—OPENING — STATUTORY PROVISIONS.

Where a defendant who was personally served with summons outside of the state appears by attorney prior to the rendition of judgment, he is not afterwards entitled to have the judgment set aside under Code Civ. Proc. § 473, which provides that, where summons has not been personally served on a defendant, the court may within one year after judgment set it aside and allow him to answer on the merits, since the purpose of the provision is to afford one who has only constructive notice an opportunity to defend upon the merits of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 253.]

2. APPEARANCE—PROCEEDINGS CONSTITUTING APPEARANCE.

Where defendant appeared by attorney and asked for a continuance of a motion by plaintiff to strike from the files pleadings of the defendant which had not been served on plaintiff's attorney, such appearance was equivalent to personal service, since the relief could only be asked on the theory that defendant was submitting to the general jurisdiction of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, §§ 32, 48, 87.]

3. SAME—GENERAL APPEARANCE.

An appearance for any other purpose than to question the jurisdiction of the court is general.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, § 42.]

4. SAME—ORAL MOTION.

The fact that a motion for a continuance is made orally does not affect the question of its constituting an appearance.

5. SAME—MOTION FOR CONTINUANCE.

An appearance to apply for a continuance of a matter pending before a court is just as general as though for the purpose of invoking the action of the court in any other matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, §§ 32, 48, 87.]

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Leanna Zobel against Fred Zobel. From an order setting aside a judgment at default and permitting defendant to file an answer, plaintiff appeals. Reversed.

W. J. Mossholmes, for appellant. Mills & Hizar, M. B. Anderson, and Reese M. Ling, for respondent.

LORIGAN, J. This is an appeal from an order vacating a judgment entered upon default and granting defendant leave to answer.

The record shows that on May 28, 1904, plaintiff commenced an action in the superior court of San Diego county to quiet title to a lot of land in the city of San Diego. An affidavit and order for publication of summons were thereafter made and service of summons had on defendant by giving him a copy of the summons and complaint in Prescott, Ariz., on June 13, 1904. On June 24, 1904, defendant filed a general demurrer and answer to the complaint, but omitted to serve copies thereof upon counsel for plaintiff. Thereafter, on November 4, 1904, and upon 18 days' notice thereof served on defendant in Prescott, plaintiff moved the court to strike said demurrer and answer from the files, on the ground that no service of the same was made on plaintiff. When said motion came up for hearing, J. C. Hizar, Esq., one of the attorneys for defendant herein, appeared in court, and on behalf of defendant asked the trial court to postpone the hearing of said motion, which the court refused to do, but proceeded to hear the same and made an order striking such pleadings from the files. On the same day the default of defendant was entered, and on the 10th of November, 1904, the cause was brought on before the court for hearing and a decree rendered in favor of plaintiff. After the entry of the decree and on December 23, 1904, the defendant moved the court to set aside said decree on the ground that the summons in the action had not been personally served on him, and that he had a good and meritorious defense to the action. The answer, profert of which accompanied the motion, set up as such defense that he had a valid and subsisting lien upon the premises described in the complaint, consisting of the mortgage claim for $3,000. The court granted the motion and made an order setting aside and vacating the judgment and default, and allowing defendant to file the answer he presented on the motion. The validity of this order is the only question presented on this appeal.

It is provided by section 473 of the Code of Civil Procedure that, when for any cause the summons in an action has not been personally served on a defendant, the court may, at any time within one year after the rendition of judgment, upon such terms as are just, set it aside and allow him to answer upon the merits of the original action. The obvious and sole purpose of this particular provision of section 473 is to afford one who has only constructive notice of a suit brought against him an opportunity within the time designated to invoke the benefit of the section and defend upon the merits. Where, however, at any time prior to the judgment, the defendant personally appears in the action, this, of course, establishes his personal knowledge of its pendency, and so removes him from the class to which the section affords relief. Now, the motion made by defendant was based solely upon the ground that present service of the summons had not been made upon him; that he had only constructive notice of the action brought against him. The discretion of the court was not invoked upon any other ground; no showing or suggestion that the judgment was taken against defendant through mistake, surprise, inadvertence, or excusable neglect. He based his application solely on want of personal service, and the validity of the order is to be determined by considering whether the evidence sustained that claim. We are satisfied that it did not, because it appears from the record that the defendant, notwithstanding he was originally served outside of the state, personally appeared in the action prior to the rendition of judgment, and hence was not entitled to have the judgment set aside under the provision of the section upon which his application was based.

Without at all considering whether the filing of the demurrer and answer by defendant constituted personal appearance in the action by him which was unaffected by the order of court striking them from the files, still we think that when defendant appeared at the hearing of the motion to strike these pleadings out, and asked for a continuance of the hearing, it was a general personal appearance in the action under which the court acquired jurisdiction of the person of defendant as effectually as if he had been actually served within the state with a copy of the summons and complaint. Such appearance was equivalent to personal service. The general rule is that an appearance for any other purpose than to question the jurisdiction of the court is general. 2 Ency. of Pl. & Pr. 632. It is difficult to perceive how the application of the defendant for a continuance of the hearing could operate other than as a personal appearance in the case. He was invoking the action of the court in his behalf, and that his application was unsuccessful was immaterial as far as his voluntary appearance therein was concerned. He could not consistently apply for the relief asked on any other theory than that he was submitting himself to the general jurisdiction of the court in the action. While the application made by him for a continuance was oral, this could not affect the question of its constituting an appearance. Had a written motion in that behalf been made based on affidavits, no question could possibly arise, but that it constituted a personal appearance in the action, and the fact that it was made orally only rendered the method of appearance different. It did not affect the fact that it was an appearance. We hardly think it necessary to cite authorities on this proposition. The general rule is laid down in Security, etc., Co. v. Boston, etc., 126 Cal. 422, 58 Pac. 942, 59 Pac. 296, where authorities are collated and discussed that "the principle to be extracted from the decisions on the subject is that, where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process. * * * If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection. * * * If he appears and asks for any relief which could only be given to a party in a pending case, it is a general appearance." The rule that the appearance is general applies in all cases where some action or relief is applied for, and it is just as effectually made when the appearance is to make application for a continuance or postponement of some matter pending before the court as when invoking the action of the court in other matters concededly constituting an appearance. In Honeycutt v. Nyquist, 74 Pac. 90, 12 Wyo. 183, 109 Am. St. Rep. 975, it is said: "It has frequently been held, and we think it is the recognized rule, that a request for a continuance of a cause or an agreement to that effect either orally in open court or by a writing filed in the cause operates as a voluntary appearance."

We think, therefore, that when the defendant appeared and applied for a continuance of the hearing on the motion to strike out his pleadings it was a general voluntary personal appearance in the cause, and hence he was not entitled to apply to have the judgment entered against him set aside upon the ground that he had not been personally served with summons in the action. By personally appearing he lost any right which he might otherwise have had under the section had he not so appeared.

Under the circumstances the order setting aside the judgment was not warranted, and is reversed.

We concur: HENSHAW, J.; McFARLAND, J.

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## In re PLUMEL'S ESTATE. (S. F. 4,616.)

(Supreme Court of California. April 10, 1907.)

1. Wills—Not Attested—Validity.

An unattested will is not admissible to probate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 277–279.]

2. Same—Holographic Will.

Under the express provisions of Civ. Code, § 1277, a will not entirely written, dated, and signed by the testator is not admissible to probate as a holographic will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 341, 343.]

3. Same—Incorporation by Reference.

Where a will leaving property to the wife was unattested and invalid as a holographic will because not entirely written, dated, and signed by testator, but upon the back of the same sheet of paper there was a properly executed codicil providing that, in the event of his death and his wife's at the same time, the property should go to his sisters, the codicil incorporated the terms of the will by reference, and both documents were properly admitted to probate as testamentary acts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 234.]

4. Same—Evidence.

That a codicil is written upon the same piece of paper as a purported will, and that no other will is produced, may be considered as tending to identify the purported will as the one referred to by the codicil.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of J. F. Plumel, deceased. From an order admitting decedent's will to probate, certain heirs appeal. Affirmed.

C. A. Bergerot and W. I. Brobeck, for appellants. Bradley & McKinstry, for respondent.

SLOSS, J. J. F. Plumel, a resident of the city and county of San Francisco, died on July 11, 1905, leaving an estate consisting of his separate property. His sole heirs at law were three sisters, the appellants here, and his widow, Annie Plumel, the respondent. Two instruments, written respectively on the obverse and reverse sides of a single sheet of paper, were offered for probate as the will and codicil of the decedent, and both were admitted to probate. From the order admitting the alleged will to probate, the sisters prosecute this appeal.

The will was dated January 12, 1904. By its terms, the residue of the estate, after certain bequests to the sisters and others, was given to the respondent, who is named as executrix. This instrument was not attested. It was entirely written, dated, and signed by the hand of the decedent, with the exception of the figures "190" in the date 1904. The figures "190" were printed. Upon the back of the same sheet of paper the codicil was written. It complied with the requirements of the law regarding holographic wills, being entirely written, dated, and signed by the hand of the testator, and read as follows: "Codicil. Jan. 14, 1904. In case of railway or steamship disaster in which both myself and wife should be killed, I will and bequeath all property real or personal to my sisters resident in France, share and share alike. J. F. Plumel." The will of January 12, 1904, being unattested and being invalid as a holographic will, because not entirely written, dated, and signed by the hand of the testator, was not, standing alone, entitled to be admitted to probate. Civ. Code, § 1277; Estate of Billings, 64 Cal. 427, 1 Pac. 701. But the contention of the respondent is that the codicil incorporated in itself the terms of the will, and that, on proof of the due execution of the codicil, both documents were properly admitted to probate as the testamentary act of the decedent. This position is not, as the appellants assume, based on section 1287 of the Civil Code, which provides that "the execution of a codicil, referring to a previous will, has the effect to republish the will as modified by the codicil." It is not necessary here to consider whether this section has any application to the facts of this case. Apart from its terms, it has long been settled that a will or codicil executed in accordance with the requirements of statute may, by an appropriate reference, incorporate within itself a document or paper not so executed. 30 Am. & Eng. Ency. of Law (2d Ed.) 578; Habergham v. Vincent, 2 Ves. Jr. 204, 228; Smart v. Prujean, 6 Id. 560; Allen v. Maddock, 11 Moore's P. C. 427; Brown v. Clark, 77 N. Y. 369. In Estate of Willey, 128 Cal. 1, 60 Pac. 471, this court quoted with approval the following language from 1 Redfield on the Law of Wills, page *264: "The cases already referred to show very clearly that a will required to be witnessed by two or more persons, or executed with any other prescribed formalities, may nevertheless adopt an existing paper by reference. * * * This 'incorporation' of the paper referred to into the will so makes it a part of the instrument that no distinct proof of the paper is required, or even filing, in the probate court. The proof of the will sets up and establishes the paper, as a portion of itself, by proof of the reference to the consequent incorporation." And the court went on to say: "The principle is also substantially declared in the case of In re Soher, 78 Cal. 481, 21 Pac. 8. Of course, the reference must be certain, and to an instrument then in existence."

It is no doubt true, as is stated in the Willey Case, that in order to make out a case for the application of the doctrine of incorporation by reference, the paper referred to must not only be in existence at the time of the execution of the attested or properly executed paper, but that it must be referred to in the latter as an existent paper, so as to be capable of identification. But we think that in the present case there was a sufficient reference in the codicil to identify the will upon the obverse of the same sheet of paper as the instrument referred to. The later paper is designated by the testator as a "codicil" a term which in itself implies that it is an addition to or modification of some existing testamentary paper. "A codicil is some addition to or qualification of a last will and testament. A codicil is part of a will to which it is attached or referred, and both must be taken and construed together as one instrument." Proctor v. Clarke, 3 Redf. Sur. (N. Y.) 445, 448. By its very definition, the word "codicil" imports a reference to some prior paper as a will. And the fact that the codicil is written upon a sheet of paper containing a writing which purports to be testamentary in character is sufficient to justify the inference that such writing is the will referred to by the codicil.

In Jarman on Wills, *153, it is said: "It seems to have been considered, in the ecclesiastical courts at least, that the fact of the codicil being written on the same piece of paper as the prior will (though it does not in terms refer to such will) sufficiently indicates an intention to treat that as the subsisting will." In Hobart v. Hobart, 39 N. E. 581, 154 Ill. 610, 45 Am. St. Rep. 151, the court said: "Where the codicil is written on the same paper as the will, or clearly and unmistakably refers to the will, so as to preclude all doubt of its identity, proof of the codicil establishes the will without further proof, except such portions thereof as are revoked or altered by the codicil." In Goods of Heathcote, 6 P. D. 30, an invalid will was offered, together with a codicil upon the same sheet of paper, beginning with the words: "This is a codicil to the last will and testament of me." There was no further or other reference to any will, and there was no later will than the one contained upon the same sheet of paper as the codicil. It was held that there was a sufficient reference to allow the will to be probated. In view of the meaning of the word "codicil," the language of the testatrix in the case just cited has no greater force as a reference to a prior will than has the single word "codicil" in the case at bar. In Harvy v. Chouteau, 14 Mo. 588, 55 Am. Dec. 120, where the paper incorporated was particularly described in the codicil, but not attached to it, the court said: "If the codicil had been attached by a wafer, * * * I presume there would have been no room for doubt. A list of decisions for more than 130 years sustains this point. What is the difference between this wafer annexation of a codicil, which may not mention the previous will, otherwise than by reciting that 'this is my codicil to my last will,' and the case before us?"

We are referred to no case holding that the fact that a codicil is physically attached to, or is written upon a paper containing a prior attempted testamentary disposition, is not to be considered as tending to establish that this prior writing is the one referred to in the codicil. It is urged that the reference must be certain so as to enable the identification of the paper sought to be incorporated without the aid of evidence outside of the codicil itself, and that parol evidence is required to show that the will and the codicil are written on the same sheet of paper. It is true that there is some language in Estate of Young, 123 Cal. 337, 55 Pac. 1011, which, taken literally, tends to sustain the view that the identification of the paper to be incorporated must be possible from the face of the will or codicil alone. In that case the reference in the will was merely to "two deeds" which were not described in any way. Any two deeds, whenever executed, would have satisfied the reference. It was held, and beyond question rightly, that parol evidence was not admissible to show that the testatrix had two particular deeds in mind. But it is to be remembered that no reference, however explicit on its face, can identify a separate paper without the production of evidence to show that the particular paper offered does correspond to the descriptive particulars named in the will. We think the correct rule was stated by this court in Re Shillaber, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433, quoting from Allen v. Maddock, supra: "A reference in a will may be in such terms as to exclude oral testimony as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that, where there is a reference to any written document, described as then existing in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question is, whether the evidence is sufficient for the purpose." Similarly, in Brown v. Clark, supra, the Court of Appeals of New York said: "It is established by a long line of authorities that any testamentary document in existence at the execution of a will may, by reference, be incorporated into and become a part of the will, provided the reference in the will is distinct and clearly identifies, or renders capable of identification, by the aid of extrinsic proof, the document to which reference is made." See, also, Dickenson v. Stidolph, 11 C. B. (N. S.) 341.

As we have said, the use of the word "codicil" imports a reference to some already existing document, regarded by the testator as his will. To identify that instrument, and to interpret the reference as applying to it, the surrounding circumstances may be shown. We think there is nothing in the decision in Estate of Young which conflicts with the conclusion drawn from the authorities above cited—i. e., that the facts (1) that the codicil is written upon the same piece of paper as a writing purporting to be a will; and (2) that no other will is produced—may be considered as tending to identify the purported will as the one referred to.

The order appealed from is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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## ODELL v. COX. (L. A. 1,758.)

(Supreme Court of California. April 5, 1907.)

1. Execution — Sale — Vacation — Inadequacy of Price.

Though mere inadequacy of price is not sufficient ground for vacating an execution sale, it is a circumstance to be considered in connection with other circumstances. Where property worth $2,000 was sold at execution sale to the creditor for $26.50, and the execution debtor's ignorance of the levy and sale was excusable, the sale will be vacated, though statutory notice of the sale was given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 703, 709.]

2. Same — Laches — Attack on Execution Sale.

Where corporate stock was sold under execution levy November 12th, the writ was not returned until February 18th, and the debtor did not learn of the levy and sale for several months thereafter, his ignorance being excusable, he was not estopped by laches July 23d to sue to vacate the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 721.]

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by J. H. Odell against W. J. Cox. From a judgment for plaintiff, defendant appeals. Affirmed.

John E. Daly, E. W. Freeman, A. B. McCutchen, and A. D. McLaughlin, for appellant. H. T. Gordon and J. S. Chapman, for respondent.

ANGELLOTTI, J. On August 5, 1901, in an action for damages pending in the superior court of Los Angeles county, defendant, Cox, recovered judgment against plaintiff, Odell, for $480.65, and $103.35 costs. One John E. Daly was the attorney for Cox in the bringing of said action, and has ever since continued to act as attorney for Cox therein, although another attorney has been associated with him. A motion for a new trial was regularly made by Odell. On October 15, 1902, the motion for new trial was heard and ordered denied. On November 12, 1902, Odell served and filed his notice of appeal from said order, and on November 15, 1902, filed an undertaking on appeal and stay bond. In the meantime Daly, for Cox, had on October 24, 1902, caused a writ of execution to be issued on the judgment, which on October 27, 1902, was placed in the hands of the sheriff of Los Angeles county, with instructions from the attorneys of Cox to levy the same upon 15 shares of the corporate stock of the Glendora-Azusa Water Company and $2^3/_{10}$ shares of the corporate stock of the Azusa Valley Bank, belonging to Odell. The first mentioned of these corporations had its principal place of business in the town of Glendora, some 28 miles from the city of Los Angeles, and the place of business of the Azusa Valley Bank was in the town of Azusa, 25 miles from said city, neither of which places was in the township including such city. Odell, Cox, and Daly at the time of the levy all resided in the vicinity of the towns of Azusa and Glendora; Odell and Cox owning and residing upon adjoining tracts of land. The certificates evidencing the shares of stock owned by plaintiff were at such time and ever since have been in his possession. For a long time prior to such levy and ever since, this stock has had a market value of over $100 per share, being worth in the market $2,000. Daly was the secretary of the Glendora-Azusa Water Company, and a director and the attorney of the Azusa Valley Bank, and Cox was a director of the water company. The execution was levied in the manner prescribed by statute (section 542, subd. 4, Code Civ. Proc.) by leaving copies of the writ with a notice of attachment with the secretary of the water company, Daly, and with the cashier of the bank. Daly, as secretary of the water company, gave to the sheriff a written statement that he had under his control the 15 shares of stock of said company. The levy having been made, the sheriff gave notice on November 6, 1902, that he would sell the property on November 12, 1902, at public auction, at the Broadway entrance of the county courthouse in the city of Los Angeles. The only notice given was by posting notices at three of the doors of the said courthouse, the law providing that notice of sale in such cases shall be given by posting notice in three public places in the township or city where the sale is to take place, for not less than five nor more than ten days. Code Civ. Proc. subd. 2, § 692. Neither Daly, Cox, nor any one else ever notified or informed Odell of the levy or proposed sale, and he was entirely ignorant of any of the proceedings had until long after the sale. At the time fixed for the sale no one was present but the deputy sheriff who made the sale, Cox, and an attorney associated with Daly in the case. The sale was then made, Cox being the only bidder, and offering what he himself testified was a nominal sum only, $1 per share for the water company's stock and $5 per share for the bank stock, making a total of $26.50. The stock was thereupon sold to him for that amount, $14.66 was paid to the sheriff for his fees, etc., and the remainder credited on the judgment. The writ of execution was not returned by the sheriff until February 18, 1903. Odell did not learn of the proceedings until several months after the sale, and after investigating the matter consulted attorneys with reference to his remedy and employed them to proceed in the matter, and they on July 23, 1903, instituted this proceeding, which is an action to vacate said execution sale against Cox and the two corporations. In his complaint Odell declared his willingness to pay Cox the sum of $14.66 paid to the sheriff, and consented to the cancellation of the credit made on the judgment by reason of said sale, as a condition to the vacating of the same, and deposited with the clerk of the court the $14.66. No transfer of said stock has ever been made on the books of either of the corporations.

All the facts hereinbefore set forth were substantially alleged in the complaint, and either admitted by the evidence or found by the trial court, upon sufficient evidence, to be true. Plaintiff further alleged that the writ was issued and the levy and sale were made in the manner described with the intent to prevent all knowledge thereof on the part of Odell until after the sale, and that all of said things were intentionally concealed from Odell for the purpose of depriving him of his property for a mere nominal sum, but the trial court found against this allegation. Doubtless, the specific facts hereinbefore enumerated would have supported, if they did not compel, a contrary conclusion, but we deem it unnecessary to discuss this matter, as we are satisfied that such facts amply warranted the vacating of the sale, even if the actual intent to defraud did not exist to the extent alleged. The trial court gave judgment vacating the sale, enjoining the corporations from making any transfer of such stock upon their books under said sale, enjoining Cox from claiming any title to said stock under said sale, and directing the clerk of the court to pay to Cox the $14.66 deposited at the commencement of the action, and to cancel the credit of $11.84 upon the judgment in favor of Cox against Odell, made on account of said sale.

This is an appeal by Cox from said judgment, and from an order denying his motion for a new trial.

It is apparent that the price for which the stock was sold was grossly inadequate. The amount bid, $26.50, when considered in connection with property having a cash value of $2,000 in the market, was a mere nominal sum, and the purchaser acquired this valuable property for practically nothing. It is true that it has been said over and over again by the courts that mere inadequacy of price is not a sufficient ground for refusing to confirm or vacating an execution sale. Although declarations to the contrary are to be found in some cases, this is the general rule, supported by the great weight of authority (see Freeman on Executions, §§ 304i and 309) and it has often been announced by this court, though never in a case of such glaring inadequacy as is here presented (see Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475; Connick v. Hill, 127 Cal. 162, 59 Pac. 832; Anglo-Californian Bank v. Cerf, 142 Cal. 303, 75 Pac. 902; Summerville v. March, 142 Cal. 558, 76 Pac. 388, 100 Am. St. Rep. 145; Lacy v. Gunn, 144 Cal. 511; Mayberry v. Whittier, 144 Cal. 322, 327, 78 Pac. 16; C. P. R. R. v. Creed, 70 Cal. 497, 11 Pac. 772). By the term "mere inadequacy of price" is meant simply an inequality in value between the subject-matter and the price. The effect of this rule is that where such inadequacy stands alone, unaccompanied by any unfairness or other inequitable incident, it will not authorize the vacating of the sale. But it is universally recognized that inadequacy of price is a circumstance of greater or less weight to be considered in connection with other circumstances impeaching the fairness of the transaction as a cause of vacating it, and that, where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought. In fact, according to very respectable authority, inadequacy of price may be so gross as in itself to furnish satisfactory evidence of fraud or misconduct on the part of the officer or purchaser, and justify the vacating of the sale. Graffam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839; Pomeroy's Eq. Jur. § 927; Freeman on Executions, § 309. In the section last cited, Mr. Freeman also says: "Where the inadequacy is palpable, the purchaser can retain his advantage only by showing that the proceedings are free from fault or irregularity. If the inadequacy can be connected with or shown to result from any mistake, accident, surprise, misconduct, fraud, or irregularity, the sale will generally be vacated, unless the complainant was himself in fault, or the rights of innocent third parties have become dependent on the sale." Numerous cases are there cited in support of the text. In Griffam v. Burgess, supra, the Supreme Court of the United States declared that if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness or has taken any undue advantage, or if the owner of the property or party interested in it has been for any reason misled or surprised, the sale will be regarded as fraudulent and void, and the party injured permitted to redeem; and said: "Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud." The same court in the later case of Schroeder v. Young, 161 U. S. 334, 6 Sup. Ct. 512, 40 L. Ed. 721, after saying that courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause of vacating it, especially if the inadequacy be so gross as to shock the conscience, said: "If the sale has been attended by any irregularity, as if several lots had been * * * sold in such manner that their full value could not be realized; if bidders have been kept away; *if any undue advantage has been taken to the prejudice of the owner of the property,* or he has been lulled into a false security; or if the sale has been collusively or in any other manner conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price—the sale may be set aside, and the owner may be permitted to redeem." (The italics are ours.) We think there can be no doubt under the authorities that where, in addition to gross inadequacy of price, the purchaser has, in the language of the United States Supreme Court, "been guilty of any unfairness or has taken any undue advantage," resulting in such gross inadequacy and consequent injury to the owner of the property, he will be deemed guilty of fraud warranting the interposition of a court of equity in favor of the owner who is himself without fault.

In the case at bar we have an absolute lack of knowledge on the part of the owner of the property of any levy or proposed sale. This lack of knowledge on his part was entirely excusable. Probably neither he nor his attorneys had any reason to anticipate, in view of his solvency and the appeal about to be taken, that an execution would be obtained to enforce the judgment. The manner of levy, while authorized by law, was such that the owner of the property could learn of the levy in time only from such information as might be given him by the officers of the respective corporations, or the notices of sale, or casually by some one who did know the fact. No one saw fit to enlighten the owner. It may be conceded, as contended by Cox, that the notices of sale were given in the manner required by the letter of the law.

It is not surprising, however, that they did not come to the knowledge of Odell, or, so far as appears, to any one else of those best acquainted with the property and its value, except Cox. No notice at all was posted in the town or neighborhood where all the parties lived, and where the corporations did their business and were thoroughly well known, but all were posted in a large city, at a point over 20 miles away from the legal situs of the property and the home of the parties. Again, it may be conceded that the sale of the property might, under the strict letter of the law, be had at such place, so far removed from the situs of the property, and the neighborhood of the parties and likely bidders. These circumstances, however, even if they do not warrant the inference of an intent to suppress, as far as the mere forms of law would permit, all notice to Odell of the proposed sale, furnish satisfactory reasons for his actual ignorance thereof.

We also have the judgment creditor taking advantage of the absence of the owner of the property, caused by his excusable ignorance of the levy and proposed sale, and the absence of other bidders, by attempting to finally take such property from the owner for what is and what he knows to be a mere nominal consideration. It must be borne in mind that in the case of such property as is here involved, there is no right of redemption in the owner, and the sale, if valid, effectually cuts off all his rights in regard thereto. It is urged in the brief of one of the counsel for Cox that it was not alleged in terms in the complaint that Cox knew the value of this stock, but the specific facts therein alleged in regard to the water stock were such as to clearly indicate such knowledge, so far as that particular stock was concerned. Cox in his testimony acknowledged that he bid a nominal sum only, and the trial court found very clearly and specifically as to his knowledge of the value of all the stock. We think there can be no doubt that this amounted to unfairness and the taking of an undue advantage on the part of Cox, and constituted sufficient ground, under the authorities, for the vacating of the sale, unless the plaintiff was guilty of laches in seeking this remedy. Under the circumstances appearing it devolved on Cox, if he proposed to purchase the stock at this practically secret sale, in the exercise of that degree of fairness which both law and common honesty required, to offer a price bearing some semblance to what he knew to be its value, or at least to refrain from taking it for what he knew to be practically nothing. Using the language of the Supreme Court of the United States in Schroeder v. Young, supra, "it would be a reproach to a court of equity, if it could not lay hold of such a transaction as this is shown to be, and set aside a sale of property acquired under the forms of law and in defiance of natural rights." Upon the plea of laches, the finding in favor of plaintiff is sufficiently supported by the evidence.

Much of appellant's argument for reversal is based upon the assumption that there can be no question of fraud in the case, in view of the finding against the allegation of the complaint as to an intentional concealment by Cox and Daly of the proceedings for the sale on execution, for the purpose of obtaining the property for a mere nominal sum. This finding, however, although negativing the existence of the actual fraud alleged, did not entirely dispose of all questions of fraud. Other findings of fact, taken in connection with admitted allegations of the complaint, showed, as already indicated, unfairness and undue advantage constituting constructive fraud. See Pomeroy's Eq. Jur. § 922 et seq.

The complaint sufficiently stated a cause of action as against a general demurrer for want of facts.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

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151 Cal. 90

## HAIGHT v. HAIGHT. (Sac. 1,467.)

(Supreme Court of California. April 11, 1907.)

1. Trial — Findings of Court — Construction.

Findings are to be liberally construed in support of the judgment, and all of the findings are to be considered together, and, if possible, reconciled so as to prevent any conflict on material points.

2. Partnership—Accounting—Findings.

In an action for a partnership accounting, a finding that there was a partial settlement as to a portion of the personal property was not in conflict with a finding that there was no settlement, made in answer to the question that, if there was a settlement of the partnership affairs and a division of the property, was one of the partners at the time afflicted with weakness of mind, it appearing from all the findings together that the question and finding in answer thereto referred only to a full and complete settlement.

3. Same.

In an action for a partnership accounting, findings that certain conveyances by one partner to another were made solely for partnership purposes were not in conflict with findings, made in answer to questions as to whether any consideration or any adequate consideration was received, that there was "No adequate consideration," "No," and that the consideration, if any, "was grossly disproportionate to its real value," since, assuming that, if there was a consideration, that fact would be in conflict with the findings that the conveyances were solely for partnership purposes, yet the language of the findings would not warrant the inference of the fact of consideration for the purpose of creating a conflict.

4. Same.

In an action for partnership accounting, findings, in answer to questions whether one partner was afflicted with "great or any weakness of mind," etc., "Yes," and "Yes, to some extent," were not in conflict with a finding that a partial settlement was made of the partnership affairs; the fact that there was some slight weakness of mind not precluding a valid settlement.

5. SAME.

In an action for a partnership accounting a finding of "No," in answer to the question whether one of the partners "at his death" owned any real estate in his own right, and, if he did, to state what improvements were placed thereon and paid for with partnership funds, and whether the same were repaid, was not in conflict with a finding that at a previous date such partner erected a house on a tract of land owned by him at an expense of about $1,500, which was paid for with partnership funds; nor, assuming that it was material, was there any conflict with the further findings that this money was never directly repaid, but that this property had an annual value of at least $150, and had been used for more than 10 years both for the family of such partner and the benefit of the partnership.

6. SAME—CONDITION PRECEDENT.

Where, in an action for a partnership accounting, while it was claimed that conveyances made by one partner to another were solely for partnership purposes, it was sought simply not to set the conveyances aside, but to have the property subjected to the purposes for which it was so conveyed, the rule relative to the restoration of the consideration of a conveyance sought to be set aside was inapplicable.

Department 1. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by George E. Haight as administrator of the estate of Cornelius Haight, deceased, against Charles Haight. From a judgment for plaintiff, defendant appeals. Affirmed.

R. S. Taylor and G. A. Teblee, for appellant. Gillis & Tapscott, for respondent.

ANGELLOTTI, J. This is an action for an accounting of the affairs of an alleged partnership existing between plaintiff intestate and defendant.

The allegations of the complaint were substantially as follows: The deceased and defendant were at the time of the death of deceased, January 2, 1902, partners in the business of farming and stock raising, and had been such for 30 years next preceding such death. Defendant kept the partnership accounts and handled the partnership funds. They acquired as such partners both real and personal property, the legal title thereto standing, however, in the name of either one or the other of the partners for long periods of time, until, finally, by deeds dated February 15, 1901, and March 23, 1901, deceased, for the better management and control of the partnership affairs, conveyed to defendant the legal title of all his undivided one-half of certain of the real property. On October 14, 1901, he conveyed to defendant his undivided one-half of some 848 acres of land, upon the representation of defendant that it was necessary for him to have such title in order to make suitable arrangements to pay the indebtedness of the firm. No settlement of the partnership affairs was ever had, and at the time of the death of deceased all the land described in the complaint was in the name of defendant on the records, and this, with certain personal property, also described in the complaint, constituted the property of such partnership. The claim of defendant, as asserted by his answer, was substantially that, while there had been a partnership, it had been finally dissolved by mutual agreement on October 14, 1901, at which time there had been a full settlement between the partners, and a delivery to each of the property belonging to him; that the property conveyed to defendant by the deeds of February 15 and March 23, 1901, was conveyed in exchange for certain real estate conveyed to deceased by defendant, and that the deed of October 14, 1901, was made in the settlement of the partnership affairs and upon a consideration; that all of the real and personal property described in the complaint was at the time of the death of deceased his own property. The findings and decree were in favor of plaintiff upon these matters. The decree adjudges the partnership to be the owner of all said property, and the plaintiff as the representative of the deceased to be entitled to a full accounting from defendant, and requires defendant to so account, and further directs that he render and file within 30 days an itemized statement of the partnership transactions, and that upon the final settlement thereof the balance remaining on hand shall be divided equally between plaintiff and defendant. Defendant has appealed from the judgment upon the judgment roll alone.

The trial court called in an advisory jury, and submitted to it certain issues of fact for determination; the questions submitted to the jury numbering 25. The court adopted as its own the findings of the jury upon the questions submitted, making also certain additional findings of its own.

It is contended that the findings are inconsistent in several particulars. In considering this claim, we must continually bear in mind the well-settled rule that the findings are to be liberally construed in support of a judgment; that all of the findings are to be read and considered together, and, if possible, are to be reconciled so as to prevent any conflict on material points, and that, unless the conflict is clear and the findings incapable of being harmoniously construed, a judgment will not be reversed on the ground of a conflict in the findings. See Ames v. City of San Diego, 101 Cal. 390, 395, 35 Pac. 1005; Murray v. Tulare Irr. Co., 120 Cal. 311, 315, 49 Pac. 563, 52 Pac. 586; People's Home Sav. Bank v. Rickard, 139 Cal. 285, 291, 73 Pac. 858; Mitchell v. Hutchinson, 142 Cal. 404, 409, 76 Pac. 55; Heaton, etc., v. Arper, 145 Cal. 282, 285, 78 Pac. 721.

The jury explicitly found, in response to four questions, that the only settlement between the partners was on October 14, 1901, and that such settlement was only a partial settlement, and covered only a portion of the personal property, and that at this settlement the personal property affected thereby was divided between the partners and the respective portions assigned to the partners delivered to them. In answer to the final question submitted to it, which was substantially, if you find that there was a settlement of partnership affairs, and a division of the partnership, was Cornelius Haight at such time afflicted with weakness of mind, etc., the jury answered: "We find there was no settlement." It is urged that this answer is inconsistent with the others before noted. It is clearly apparent, taking all the findings together, that the last question and answer had reference solely to the full and complete settlement alleged in the answer, and, under these circumstances, there is no inconsistency whatever.

In answer to certain other questions the jury found that the real property conveyed to defendant by the deeds of February 15 and March 23, 1901, was so conveyed for the purpose of enabling defendant to manage the affairs of the partnership and to be used as partnership property, and that it was not conveyed to him for his sole use or benefit, or in exchange for real estate conveyed to Cornelius by defendant, and that the property conveyed by the deed of October 14, 1901, was intended to be used as partnership property at all times until a final settlement should be had. It further explicitly found that, at the time of death of Cornelius, all of the property described in the complaint, both real and personal, was owned by the partnership. In answer to certain other questions asked as to whether Cornelius received any consideration, or any consideration proportionate to its value, for any of the property so conveyed to defendant, the jury answered, "No adequate consideration," "No," and the consideration, if any, "was grossly disproportionate to its real value." It is urged that this presents a material conflict. It is apparent that the latter questions and answers were material only in the event that it was found that the allegations of the complaint as to the property being transferred to defendant solely as partnership property for partnership purposes were not sustained. As suggested by learned counsel for defendant, if those allegations were true, there was no room for any question as to consideration. The findings upon the questions as to the purposes and objects of the conveyances are clear and explicit in support of the allegations of the complaint, and fully cover the issues in that behalf. There is nothing in the other findings referred to that necessarily conflicts with these findings. There is no finding in terms of any consideration moving from defendant to Cornelius for any of these conveyances, and such a conclusion is not necessarily inferable from the findings made. Assuming that, if there was a consideration moving from defendant to Cornelius for the making of these conveyances, that fact would be in conflict with the other findings as to the objects and purposes of such conveyances, we would not be warranted in drawing an inference of the fact of consideration from the language of the findings for the purpose of creating a conflict. See Paine v. San Bernardino, etc., 143 Cal. 654, 656, 77 Pac. 659. It is, however, entirely consistent with the fact of a transfer of property to the partnership solely for partnership purposes that a consideration should have been given to the grantor by the other partner or partners.

Certain answers of the jury, adopted as findings, relate to the mental condition of Cornelius on February 15, 1901, March 23, 1901, and October 14, 1901, the question in each case being as to whether he was afflicted with "great or any weakness of mind either from old age, sickness, disease, use of morphine, or other cause or causes," and the answer was in one case, "Yes," and in the others, "Yes, to some extent." There is absolutely nothing in this that is in conflict with any other finding. It is suggested that the finding of a partial settlement on October 14, 1901, is in conflict with these answers, but, of course, the mere fact that there was some slight weakness of mind on the part of Cornelius, which is all that the answers show, would not preclude a valid settlement. The jury was asked to state whether Cornelius, at the time of his death, owned any real estate in his individual right, and, if he did, to state what improvements, if any, were placed thereon and paid for from the funds of the partnership, and, if so, whether the same were repaid or refunded. The answer was simply "No," being evidently to the first part of the question, viz., as to whether Cornelius owned any property in his individual right at the time of his death, January 2, 1902. The court, in its additional findings, found that in 1890 Cornelius had erected a dwelling house upon a tract of land of 30 acres owned by him in his individual right at an expense of about $1,500, which was paid from partnership funds, and had never been directly repaid, but that this separate property had an annual value of at least $150, and had been used for more than 10 years both for the support of his family and the benefit of the partnership. There is no conflict between the answer of the jury and the additional finding of the court, the answer of the jury having reference solely to the question of ownership at the time of the death of Cornelius in 1902. Nor, assuming that the matter is at all material, do we see any conflict in the additional findings of the court as to the purposes for which the income of this property was used.

In view of the claim made by the complaint and upheld by the findings that the conveyances were made solely for the better management of the partnership affairs, and for partnership purposes, and that the property was at all times thereafter purely partnership property, we fail to perceive the applicability of the rule relative to the necessity of restoring or offering to restore whatever of value one has received for a conveyance, before relief against a conveyance made by reason of fraud, mistake, etc., will be allowed. This is not an action to set aside a conveyance. Plaintiff is acquiescing in the conveyances made, seeking simply to have the property, thus put for the sake of convenience in the name of one of the partners, subjected to the uses and purposes for which it was so placed.

As we have seen, it is not the effect of the findings that there was a consideration moving from defendant to Cornelius for any of the conveyances thus made, and, in view of the issues and findings upon the questions as to the sole objects and purposes of these conveyances, we deem the allegation as to want of consideration contained in the complaint immaterial and superfluous. The findings are in all material respects sufficient to cover the allegations of the answer upon the subject of the purposes of the conveyances.

Upon the record before us, we see no ground for interfering with the judgment.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

151 Cal. 83

## SHORT v. FRINK. (Sac. 1,419.)

(Supreme Court of California. April 11, 1907.)

1. PHYSICIANS AND SURGEONS—ACTION FOR MALPRACTICE—EVIDENCE—RELEVANCY.

In an action for malpractice, it appeared that defendant had been discharged by plaintiff and another physician called. The second physician did not continue in charge of the case, but his deposition was taken for the plaintiff, and, in response to a question as to why he did not call again, answered that defendant had told the witness that he (defendant) had not been discharged from the case, and had not received payment for his services. *Held*, that the evidence was inadmissible.

2. APPEAL—PRESERVING QUESTIONS FOR REVIEW—SCOPE OF OBJECTIONS—GENERAL OBJECTIONS.

A general objection to a question, on the ground that it is irrelevant, incompetent, and immaterial, is sufficient to preserve the question for review, if the question is objectionable from every standpoint, and if on its face there appears no purpose for which the evidence asked could be admissible.

3. SAME—NECESSITY OF MOTION TO STRIKE.

The rule that a motion to strike out is essential to preserve the right to complain of a ruling admitting an answer to a question, over a general objection, is applicable only when it is not apparent from the question alone that the answer thereto will not be admissible, and the inadmissibility is disclosed for the first time by the answer itself.

4. SAME—HARMLESS ERROR—OBJECTION SUBSEQUENTLY REMOVED.

Where evidence had been improperly admitted, over defendant's objection, the error was not cured by defendant giving testimony materially differing therefrom on the same matter, purely in self-defense to meet and explain the objectionable evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4173.]

5. SAME—PREJUDICIAL EFFECT OF EVIDENCE IN GENERAL.

Where the tendency of evidence was to prejudicially affect defendant, by placing him in an unfavorable light, it will be presumed to have that effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4038.]

6. SAME—PRESERVING QUESTIONS FOR REVIEW—OBJECTION TO EVIDENCE—NECESSITY OF SPECIFIC OBJECTION.

If the objection to a question in a deposition which is susceptible of a proper answer is based on the answer given and recorded, the objector must frame his objection so as to specifically call the matter to the attention of the court, or he cannot take advantage of the ruling on appeal, since the court is no more called upon to heed a mere general objection to testimony read from a deposition than when the witness is testifying viva voce.

7. SAME — METHOD OF SAVING EXCEPTION AFTER ANSWER IS READ.

Where a general objection to a question in a deposition susceptible of an answer that may be properly given in evidence has been overruled, the objector's only remedy, after the answer is read, is a motion to strike out, and, in the absence of such motion, the question will not be considered on appeal, since, in the absence of actual knowledge, specific objection, or intimation to the contrary, a trial court has the right to assume that a question in a deposition susceptible of an answer properly admissible in evidence has been so answered.

8. DEPOSITIONS — REQUISITES OF CERTIFICATE —MATTERS CERTIFIED—CORRECTION BY WITNESS.

Under Code Civ. Proc. § 2032, providing that a deposition when completed must be read to the witness and corrected by him in any particular, if desired, and then signed by the witness and certified by the officer, a certificate of a notary to depositions, stating that the testimony was read over to the witness, "and being by him corrected, and was by him subscribed in my presence," is sufficient, if not otherwise objectionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, §§ 166, 167.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Charles M. Head, Judge.

Action by B. J. Short against George K. Frink. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Goodfellow & Eells, Sweeny & Tillotson, and Braynard & Shanahan, for appellant. Walter E. Herzinger, Bush & Perry, and Reid, Dozier & Carr, for respondent.

ANGELLOTTI, J. This is an appeal by defendant, a physician and surgeon, from a judgment for $8,000 given in favor of plaintiff, in an action brought to recover damages for alleged malpractice. The only matters presented for our consideration on this appeal are certain rulings of the trial court in the admission of evidence.

Plaintiff sustained a compound fracture of the tibia bone of his right leg on December 8, 1901. Defendant was immediately employed to treat plaintiff for this injury, and continued to attend him until December 31, 1901, when plaintiff became dissatisfied with him, and, having called in Dr. Bradshaw, discharged defendant, without, however, paying him for his services. Some days later, Dr. Pratt was called in, and he continued to attend plaintiff for some 15 months. On plaintiff's cross-examination, he was asked how many days he was without a doctor after Dr. Frink left, and said "something like six or seven days." The deposition of Dr. Bradshaw was taken without the attendance of any one on the part of the defendant. All the testimony given was elicited by questions asked by plaintiff's attorneys. It showed the results of his examination of the wound on December 31, 1901, and his opinion as to the treatment plaintiff had received. It also showed that he did what he could with the implements at hand to properly care for and relieve his suffering, and that he left with the intention of returning the following day. He stated, in reply to a question of plaintiff's attorney, that he did not again call on plaintiff. He was then asked: "Why did you not return or go back to see the plaintiff the following day?" When the deposition was read on the trial, defendant objected to this question, on the ground "that the same was irrelevant, immaterial, and incompetent, and not responsive to any issue in the case." The objection was overruled. The plaintiff then read the answer from the deposition as follows: "Because in a conversation with Dr. Frink the following morning over the telephone he informed me that he had neither been discharged from the case nor received payment for his services." Having further testified that he never returned to plaintiff, that he met Dr. Frink the following summer, and that Dr. Frink had a conversation with him in regard to plaintiff, he was asked: "What was that conversation, as near as you can give it, or the sum and substance of it?" This was objected to on the same general grounds, and the objection overruled, whereupon the answer was read as follows: "We did not discuss the plaintiff's injuries or the treatment of the same by Dr. Frink, but Dr. Frink thanked me for not interfering with his case or going to treat the plaintiff." There was no motion to strike out either of these answers. Dr. Frink, when subsequently testifying in his own behalf, said, on direct examination, that, after being discharged and told by plaintiff that Dr. Bradshaw had visited him, he told plaintiff that he would like to have his bill satisfied, and that thereafter he called up Dr. Bradshaw on the telephone, and told him that he would expect the courtesy extended from one physician to another, and would like to have the bill settled before Dr. Bradshaw took charge of the case, but that he also told him that he had been discharged. The only claim made by plaintiff's complaint was that defendant had been negligent in his treatment during the time he was attending plaintiff. There was no allegation of any act done by defendant to the injury of plaintiff subsequent to his discharge from the case, and no allegation of oppression, fraud, or malice on the part of defendant.

It is earnestly contended that the trial court erred, to the prejudice of defendant, in allowing the answers quoted from Dr. Bradshaw's deposition to be read in evidence. As to the first of these answers, we see no escape from the conclusion that the claim of defendant is well based. The question upon its face called for matter that was not within the issues made by the pleadings, and that was wholly immaterial and irrelevant. No possible answer favorable to plaintiff has been suggested, and none has occurred to us, that would be proper evidence, in view of the issues made by the pleadings and the evidence contained in the record, and certainly the trial court was not justified in assuming that the plaintiff was seeking matter unfavorable to his cause. We must assume that all the evidence in any way material to the ruling on this matter is contained in the record. That Dr. Bradshaw did not make any subsequent call on plaintiff, and his reasons for not doing so, were apparently matters entirely foreign to the controversy. If a question is objectionable from every standpoint, if on its face there appears no purpose whatever for which the evidence asked could be admissible, a general objection of irrelevancy, incompetency, and immateriality is sufficient. See 1 Wigmore on Evidence, § 18c [1]; Swan v. Thompson, 124 Cal. 193, 56 Pac. 878. We are satisfied that it must be held that the court erred in overruling the objection.

That the matter elicited by the question was of a nature most prejudicial to defendant cannot be doubted. Its inevitable tendency was to create a belief in the minds of the jurors that the defendant had attempted to prevent plaintiff from procuring necessary medical attendance, and to accomplish this had not only told Dr. Bradshaw that he had not as yet been paid for his own services, but had gone to the extent of falsely representing to him that he had not been discharged from the case, or, in effect, that he was still the regular attending physician therein. Such a statement, if believed, would naturally have the effect of restraining Dr. Bradshaw from interfering with his brother physician's case, until such time as defendant had abandoned the same or had been finally discharged. If the jury believed that defendant had endeavored to prevent a former patient, sorely in need of medical attendance, from procuring the same, such belief would naturally prejudice them against him, and, if they further believed that he had resorted to falsehood in order to accomplish this result, such belief could but enhance that prejudice and most unfavorably affect his cause. While defendant denied that he told Dr. Bradshaw that he had not been discharged, and said that he told him that he had been discharged, no one could tell which witness the jury believed, except in so far as the verdict against defendant may indicate. It was not necessary for defendant, in order to save this point, to make a motion to strike out the testimony after it was read. It is only where it is not apparent from the question itself that the response thereto will, upon any theory of the case, be inadmissible, and the inadmissible evidence is for the first time disclosed by the answer that the rule declared in People v. Lawrence, 143 Cal. 148, 155, 76 Pac. 893, 68 L. R. A. 193, is applicable, and a motion to strike out is essential to preserve the right of the objector to complain. Where the question upon its face shows that the testimony called for is necessarily inadmissible, the rights of a party are fully preserved by his objection to the proposed evidence, and his exception to the ruling admitting the same. In fact, this is the only way in which he can preserve his objection where the question is of such a character, and the answer is strictly responsive to the question. See People v. Long, 43 Cal. 444; People v. Scalamiero, 143 Cal. 345, 76 Pac. 1098.

Nor can we hold that the error was cured by the testimony subsequently given by defendant upon this matter, under the rule declared in Treat v. Reilly, 35 Cal. 129, that a party cannot be held to be injured by the admission or refusal to strike out objectionable testimony, if the same party afterwards introduces the same testimony. See, also, People v. Marseiler, 70 Cal. 98, 11 Pac. 503. In addition to the fact that what was said by plaintiff on this subject was said by him purely in self-defense solely to meet and explain the objectionable evidence as far as possible, and cannot well be held to have been voluntary (see 1 Wigmore on Evidence, § 18d, note), the testimony of defendant in relation to the interview between himself and Bradshaw differed materially from that given by Bradshaw, in that he said that he told Bradshaw that he had been discharged from the case, thus telling him the truth in the matter, instead of a falsehood.

It is impossible for us to say to what extent this objectionable evidence influenced the jury in rendering their verdict. Its direct tendency was to prejudicially affect defendant by placing him in a most unfavorable light, and we must presume that it had that effect. See Rulofson v. Billings, 140 Cal. 452, 460, 74 Pac. 35; Lathrope v. Flood, 135 Cal. 458, 461, 67 Pac. 683, 57 L. R. A. 215; San José, etc., Co. v. San José, etc., Co., 126 Cal. 322, 324, 58 Pac. 824; Helling v. Schindler, 145 Cal. 303, 314, 78 Pac. 710.

This error necessitates a reversal of the judgment.

For the purposes of a new trial, it is proper to state that the portion of the second answer of Dr. Bradshaw relative to the defendant thanking him for not interfering with the case, or going to visit the plaintiff, was clearly improper testimony tending to prejudicially affect defendant's cause. We think, however, that the court did not err in overruling the merely general objection made to the question, for it is not apparent from the question itself that the response would be inadmissible. As suggested by the Court of Appeal in the opinion heretofore filed herein, the answer to this question "might have shown a direct admission of culpability by defendant." It was only after the answer was brought to the knowledge of the court that the court could determine as to whether the evidence was proper. Under such circumstances, it is the well-settled rule applicable in a case of a viva voce examination of a witness that a party must move to strike out the objectionable evidence when it is disclosed, or he is precluded from subsequently complaining. People v. Lawrence, 143 Cal. 148, 155, 76 Pac. 1116, 68 L. R. A. 193. See, also, People v. Williams, 127 Cal. 212, 216, 59 Pac. 581; O'Callaghan v. Bode, 84 Cal. 495, 496, 24 Pac. 269; Elliott on Evidence, §§ 884, 891. We do not think that the mere fact that the answer to be given was already recorded in a deposition, and therefore available for examination by the court when the objection was made, and in advance of the ruling, made it incumbent on the trial court, in the absence of request in that behalf by defendant, or specific objection showing the inadmissibility of the evidence, to examine the answer before ruling. The trial court cannot be called upon to know the contents of depositions on file, and it devolves on the party objecting to any portion of the deposition to make it appear to the court wherein any valid objection exists. If objection to a question susceptible of a proper answer contained in the deposition is based on the nature of the answer given and recorded, it is the duty of the objector to so frame his objection as to specifically bring the matter to the attention of the court. The court is no more called upon to heed a mere general objection of incompetency, irrelevancy, and immateriality, where the testimony is being read from the deposition, than it is where the witness is testifying viva voce, as to which the well-settled rule has already been stated. In the absence of actual knowledge, specific objection, or intimation to the contrary, the trial court has the right to assume that a question in a deposition susceptible of an answer that may properly be given in evidence has been so answered, and the objector's utmost remedy, in the event that the answer is read, is, as stated in People v. Lawrence, supra, a motion to strike out objectionable evidence given in response to the question. Defendant should have moved to strike out this evidence, if he had desired to subsequently urge error in regard thereto, and, in the absence of such motion, we would not consider the matter on appeal.

It should further be stated that the trial court did not err in overruling the objection to the reading in evidence of the deposition of Dr. Bradshaw. The only objection specified thereto was that the certificate of the notary did not in terms state that the deposition, when completed and read to the witness, was corrected by the witness in every particular desired; the statement in the certificate being as follows: "That said deposition, and the testimony given by said witness, was reduced to writing by me, and, when completed, was by me carefully read to said witness, and, being by him corrected, was by him subscribed in my presence." The statute (Code Civ. Proc. § 2032) provides that the deposition, when completed, "must be carefully read to the witness and corrected by him in any particular, if desired," and then subscribed by the witness and certified by the officer. The precise form of the certificate to be made by the officer is nowhere prescribed by our law, and doubtless any certificate showing substantial compliance with the statutory provisions as to the mode of taking and certifying depositions is sufficient. See Higgins v. Wortell, 18 Cal. 330. It appears hypercritical to suggest that the certificate here did not show a substantial compliance with the provision as to the correction of the deposition by the witness. The statement that, after it was carefully read to the witness it was "by him corrected," necessarily implies to the reasonable mind that the witness was given full opportunity to correct the deposition, so as to make it truly set forth his testimony, and that he did correct it in every particular desired by him.

There is no other matter requiring attention.

The judgment is reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; SLOSS, J.

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5 Cal. App. 301

## WELLS, FARGO & CO. v. McCARTHY et al.

(Civ. 264.)

(Court of Appeal, Third District, California. March 30, 1907. Rehearing Denied May 29, 1907.)

1. MORTGAGES—FORECLOSURE—PLEADING—DERAIGNING TITLE.

Code Civ. Proc. § 1517, provides that no sale of the estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in the chapter. All sales must be under oath and confirmed by the court. A complaint in an action to foreclose a mortgage alleged that under an order in the matter of the estate of decedent the executrix of the estate executed and delivered to plaintiff an instrument, assigning a certain note and mortgage belonging to the estate, and that plaintiff was the owner and holder thereof. There was no allegation of a confirmation of the sale. *Held*, that in view of Code Civ. Proc. § 475, providing that the court must disregard any error or defect in the pleadings, which does not affect the substantial rights of the parties, the complaint was sufficient as against a general demurrer.

2. PLEADING—AMENDMENTS.

Where an action to foreclose a mortgage had been pending for five years, an amendment to the answer setting up an agreement of which defendants had all the time known and had failed to plead, the effect of which would be to defeat plaintiff's claim, and which the court was justified in treating as an application to amend in order to plead the statute of limitations, was properly denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 766, 767.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Wells, Fargo & Co., a corporation, against James P. McCarthy and others. From a judgment for plaintiff and from an order denying a motion for new trial, defendants appeal. Affirmed.

Bishop, Wheeler & Hoefler, for appellants.
E. S. Pillsbury, for respondent.

BURNETT, J. This action was brought to foreclose a mortgage. There were over 100 defendants. Judgment was rendered in favor of plaintiff for nearly $200,000 and for the sale of the property. The pleadings are numerous and quite voluminous, covering about 450 pages of the transcript. Certain of the defendants, not including McCarthy, the maker of the note, moved for a new trial on a bill of exceptions. The motion was denied. They appeal from the order denying their motion for a new trial and also from the judgment.

By appellants two points are urged for reversal. One relates to the sufficiency of the complaint, and must therefore be considered on the appeal from the judgment. Swift v. Occidental Mining, etc., Co., 141 Cal. 164, 74 Pac. 700; Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62; Jensen v. Will & Finck Co., 89 Pac. 113. The order point is involved in a ruling of the trial court made during the progress of the trial, denying the application of appellants to file an amended answer. We shall endeavor, as far as practicable within reasonable limits, to notice the suggestions and citations of counsel in support of their respective contentions. There was a demurrer to the complaint, general and special. The special demurrer, however, was not addressed to the particular defect herein ably and vigorously assailed by appellants. The portion of the complaint which is the "storm center" of the contention of the parties is as follows: "On or about the 1st day of February, 1894, pursuant to an order theretofore duly made by the said superior court in the matter of the estate of said Leland Stanford, deceased, the said Jane L. Stanford, as executrix of the last will and testament of Leland Stanford, deceased, for and in consideration of the sum of $121,030.36 paid to her by this plaintiff on the said 1st day of February, 1894, executed and delivered to this plaintiff an instrument in writing, whereby she assigned to this plaintiff the said fourth promissory note, and all moneys due and to grow due thereon, and the said mortgage executed and delivered to the said Leland Stanford on the 5th day of January, 1891, by the said James P. McCarthy, as aforesaid. Thereafter, to wit, on the same day, the said Jane L. Stanford, as such executrix, acknowledged the said assignment before Eugene W. Levy, a notary public in and for the city and county of San Francisco, so as to entitle the said assignment to be recorded, and thereafter, to wit, on the 13th day of February, 1894, the said assignment was recorded in the office of the county recorder of the said city and county, in Liber 16 of Assignments of Mortgages, beginning at page 330. At the same time with the execution and delivery to this plaintiff by the said Jane L. Stanford of the said assignment, as aforesaid, she also indorsed and delivered to this plaintiff the said fourth promissory note, without recourse, and this plaintiff ever since then has been, and now is, the holder and owner thereof."

It is contended by appellants that the facts alleged do not show that the estate of Stanford ever parted with the title to the obligation, and hence that no cause of action is stated in behalf of plaintiff. The proposition is sound and will not be gainsaid that there must be some allegation sufficient, according to the rules of pleading, to show title in plaintiff or else the general demurrer should have been sustained. The difficulty is in making an application of the elementary principles to the particular facts of the case. To be more specific, appellants urge that "where title to a chose in action is deraigned through a transfer alleged to have been made by an executrix, the complaint must show (1) a power of sale conferred by will, or by an order of sale; (2) a sale pursuant to the power; (3) a confirmation of sale." Assuming that the order of court to which reference is made in the complaint refers to the order of sale, then it follows, according to appellants' argument, that there is no allegation whatever of the order of confirmation and that therefore one of the essential links in the chain of title is lacking. Section 1517, Code of Civil Procedure, is involved, which provides: "No sale of any property of an estate of a decedent is valid unless made under order of the Superior Court, except as otherwise provided in this chapter. All sales must be under oath reported to and confirmed by the court before the title of the property sold passes." It is not controverted that the case at bar does not fall within the purview of the exception mentioned in said section.

In Lindsay v. McInerney, 41 Atl. 701, 62 N. J. Law, 524, it is declared: "With certain exceptions, not now pertinent, title and estate must always be pleaded with fullness and particularity. When claim is made by the assignee of a chose in action assignable at law by suit thereon in his own name, the fact of the assignment must be pleaded by direct averment." But, as well pointed out by respondent, in the Lindsay Case, the fact was as stated by the court in its opinion: "No assignment of the bond is averred or can be gathered even by inference. In the stating part of the pleading there is, generally, but not always, added to the name of Murphy, where occurring, the designation 'assignor as aforesaid,' and to that of the plaintiff the designation 'assignee as aforesaid,' but there is no averment direct or indirect of any assignment of the bond. * * * For want of such averment this declaration must fall." The principle of the case is undoubtedly sound, but the situation was manifestly different from what is disclosed by the complaint herein. The scope of Stevens v. Bowers, 16 N. J. Law, 16, is shown by the following quotation: "The plaintiff declares on a bond made to two and sets out a title to it derived from one of them only, without showing how he became the sole owner, or by what authority be undertook to assign the whole bond." In Smith et al. v. Dean, 19 Mo. 63, it is held that in an action upon a bond by an assignee a general allegation that the plaintiff is the legal holder is insufficient. The court said: "The plaintiff must state facts that give him the title to the bond, when, upon its face, the title appears to be in another." White v. Brown, 14 How. Prac. 282, is somewhat similar. It was an action upon a promissory note. The payee in the note was William Rork and the only allegation connecting the plaintiff with the obligation was that he was then the bona fide owner and holder of the said note. The court said: "The complaint in this action does not show any title in the plaintiff to the note set up in it, as an indorser, or a party to the note or any right as such to maintain an action upon it." Hence the demurrer was sustained. The last two cases are more directly in point than some of the others, but the allegations of the complaint in each were manifestly not so comprehensive as in the case at bar.

In this connection it is contended that the allegation of the execution of the assignment by the executrix is not sufficient because such execution by the executrix in the absence of an order of confirmation conveys no title. This doctrine is clearly established and must follow from the provisions of said section 1517, Code of Civil Procedure, and it has been so declared by the Supreme Court in Horton v. Jack, 115 Cal. 29, 46 Pac. 920: "No sale of any property of the estate of a deceased person passes any title unless it is confirmed by the probate court. * * * Whether or not, then, this sale was in fact made to satisfy a debt of the estate, it is clear that neither the sale nor the supposed payment was sanctioned by the probate court, and that, therefore, the title to the property remained in the estate." See, also, Wickersham v. Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118; Bovard v. Dickenson, 131 Cal. 162, 63 Pac. 162. Again, it is urged that the allegation as to the order—admitting it to refer either to the order of sale or of confirmation—is utterly insufficient because it is not a positive averment, but at most presents the facts by way of recital or as a legal conclusion. Certain cases are cited to show the insufficiency of this method of disclosing a material fact. In Christy v. Dana, 42 Cal. 178, the court said: "On examining the answer, we find no new matter which was material. It avers, it is true, that the plaintiff's debt was barred by the discharge in insolvency, but that is only a conclusion of law and not a fact." It is manifestly so, but that it was immaterial in that particular case is shown by the following declaration of the court: "It is evident the plaintiff was entitled to enforce his mortgage as against the land, notwithstanding the personal liability of Dana for the debt may have been barred by the discharge." In Wheeler v. West, 71 Cal. 127, 11 Pac. 871, the answer, among other things, averred: "That these defendants * * * were actually engaged in working and mining said part of said claim, pursuant to a contract and agreement between plaintiffs and themselves." In support of this averment, over the objection of plaintiffs, evidence was received of a verbal contract between the parties. The objection was made upon the ground "that no contract was pleaded in the answer, and no issue raised on any contract." The court said: "A contract relied upon as a cause of action or defense to an action should, where opportunity is afforded, be pleaded either in hæc verba or according to its legal intendment and effect. The attempted plea of the contract by defendant was by way of confession and avoidance of the wrongful acts charged in the amended complaint, and as pleaded amounted to no more than a conclusion of law. The objection to the evidence should therefore have been sustained." The circumstance that objection was made to the evidence differentiates that case from this. In the case at bar, all intendments being in favor of the judgment and the bill of exceptions not purporting to give the testimony or the proceedings except as bearing upon the question of amendment, hereafter considered, it must be presumed, if required to uphold the judgment, that it was shown without any objection whatever that an order of sale and an order confirming the sale were properly made by the superior court. It is true appellants filed a demurrer, but they should have objected to the evidence, in view of the nature of the defect complained of in the complaint, in order that plaintiff, if so advised, might have amended its pleading. Considering the condition of the record, it must be assumed that the cause was tried upon the theory that the complaint was sufficient, and it is proper to invoke the rule to the effect that technical objections raised for the first time on appeal must be disregarded. Greiss v. State Investment Co., 98 Cal. 242, 33 Pac. 195; Abner Doble Co. v. Keystone, 145 Cal. 490, 78 Pac. 1050. Appellants earnestly contend that this consideration injects into the case a false quantity, that the presumption, if indulged, is utterly without importance because nothing can aid a complaint which fails in a material and necessary averment. It is true that it is of no consequence whether such evidence was admitted without objection or not if there is an absolute failure and no attempt to allege some material fact; but it is held by the authorities that it does become of moment when there is an imperfect exhibition in the complaint of such fact, which is the case here.

In Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151, the rule is stated as follows: "Argumentative pleading is no more permissible under the Code than it was at common law. Matters of substance must be alleged in direct terms, and not by way of recital or reference. Whatever is an essential element to a cause of action must be presented by a distinct averment and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." In that case the demurrer was both general and special. It was sustained by the trial court and upheld by the Supreme Court. The complaint was radically defective in several respects and the ruling was undoubtedly correct. In People v. Jones, 123 Cal. 299, 55 Pac. 992, it is declared: "It is a rule of pleading, both in civil and criminal actions, that the lack of direct and positive averments of a fact cannot be supplied by intendment or implication, and, where the fact is stated only argumentatively, or by way of recital or reference, it is insufficient." In that case the recital condemned was: "R. A. Jones, acting as the agent of said Kempling and wife." No doubt the court stated the general rule correctly, but it seems that it was not necessary to the decision, because the court proceeds: "But, aside from this view of the matter, we cannot regard the answer of defendant as constituting perjury." So that the demurrer was, in view of the court, properly sustained independently of the formal defect in the allegation of the agency.

In the case of Knox v. Buckman Contracting Company, 139 Cal. 598, 73 Pac. 428, the Supreme Court enforces the rule in reference to the allegation of nonpayment of promissory notes which was held controlling in former cases. It is there stated: "The action is upon several promissory notes, but the only averment in the complaint as to a breach of appellant's contract to pay any one of the notes is this: 'That the whole of said note is owing from said defendants to said plaintiff.' It has been frequently held by this court that such an averment is not an averment of the fact of nonpayment, and that a complaint in such a case which contains no other averment as to nonpayment does not state facts sufficient to constitute a cause of action." No doubt the court felt constrained by its former decisions in that particular class of cases, although it must be admitted that the rule is greatly relaxed in the case of Penrose v. Winter, 135 Cal. 289, wherein, as stated in the syllabus, it is held that: "In an action to foreclose a mortgage, an averment in the complaint that a specified sum is 'now due and owing,' though the statement of a legal conclusion, in which the material fact of nonpayment is implied, is sufficient to sustain a judgment by default." And, furthermore, in the discussion of that case by the learned Chief Justice, he submits some reflections directly applicable to the case at bar: "The second objection to the judgment is that the complaint shows the note and mortgage to have been given to John S. Craig, described in both instruments as the guardian of Ora and Rebecca Eiler, minors, etc.; that this shows that Craig had the legal title to the note, and there is no allegation of an assignment to plaintiff. This objection, I think, is answered by the same reasoning that answers the objection that there is no allegation of nonpayment. It is true there is no direct allegation of an assignment, but there is an allegation which implies an assignment. It is alleged that the plaintiff, as the guardian of said minors, and as successor of Craig, etc., is now the lawful owner and holder of the note and mortgage. If an assignment was necessary to make plaintiff the lawful owner and holder of the mortgage, then he has alleged a legal conclusion which implies an assignment, and this after judgment by default is sufficient to support the judgment. It may be added that the objection last considered would come with more force from the maker of the note and mortgage than from the appellant." The logic of the opinion and of some others which will be considered is that under certain circumstances the allegation of what is usually regarded as a legal conclusion supplies the want of an averment of a material fact and renders the judgment "safe" from attack on the ground that the complaint does not state facts sufficient to constitute a cause of action. What difference in this respect can there be between a default judgment and a judgment after trial? It needs no citation of authorities to support this proposition, and, indeed, it is so implied in section 434, Code of Civil Procedure, that the objection of insufficiency of facts can be made at any time. The defendant is not required to appear in the trial court and file a demurrer in order to make the objection available, and, if the objection can be made at any time while the cause is in the course of adjudication, it can be made with equal force after judgment in the trial court as before. And, if the allegation of a legal conclusion is an answer to the objection when made after judgment by default, it must be a sufficient answer when the objection is raised by a general demurrer before trial. Mr. Justice McFarland was undoubtedly correct in his dissenting opinion in the Penrose Case, supra, in the following statement: "And, of course, the objection that a complaint does not state facts sufficient to constitute a cause of action may be taken at any time. Such an objection is not waived by default." Again, in the case at bar, it would seem to be sacrificing the spirit of the law to the letter to hold that the allegation that the plaintiff is the owner and holder of the note is simply a conclusion of law and must be entirely disregarded, because, perchance, the plaintiff has attempted, although ineffectually, to allege certain facts by virtue of which he has become such owner and holder. That course would be rather to allow technical objections to the judgment "to prevail against its substantial justice." Every purpose of orderly and correct procedure would be subserved by holding that the allegation of ownership is that of an ultimate fact, notwithstanding an attempt to deraign title. If necessary to inform the antagonist of the source or grounds of plaintiff's title, more specific allegations should be required when the complaint is challenged by a special demurrer or a motion to make more certain if the latter pleading is to be countenanced. The reason for holding that an allegation of ownership is sometimes regarded as a conclusion of law, as stated in Gruwell v. Seybolt, 82 Cal. 7, 22 Pac. 938, is as follows: "Where, however, the pleader sets forth specifically the links in his chain of title, a general allegation of ownership will be treated as a mere conclusion from the facts stated, and will not cure any defect in the chain relied upon. It will be presumed that every fact has been alleged which can be proven." If, when an attempt is made to deraign title the reason for holding that an allegation of ownership is a legal conclusion is based upon the presumption that every fact has been alleged which can be proved, the reason of the rule fails, and therefore the rule itself does not apply when, instead of facts, conclusions of law are alleged in the deraignment of title. There is here an attempt to allege the orders of the court. If the allegation respecting them should be considered a mere legal conclusion, then the allegation of ownership should be construed as an averment of a fact and sufficient to uphold the judgment.

The case of Marsh v. Superior Court, 88 Cal. 596, 26 Pac. 962, cited by appellants, is manifestly different. There it is held that "the averment that the petition filed in the superior court asking for the removal of the said Whiteside 'contained no allegation of any legal cause why said Whiteside should be removed' is but the statement of a conclusion of law, and is not equivalent to a direct allegation that said petitioner did not charge that said Whiteside had violated or was unfit to execute the duties of trustee under said deed of assignment." "Legal cause" is necessarily the deduction from some act, event, or circumstance, while "owning," and especially "holding" describe and imply an act, event, and circumstance. Can it be said here that there is an entire absence of averment of the transfer of title from the estate of Stanford to plaintiff so that no evidence could be received of that fact at the trial? We must answer that question in the affirmative to reverse the judgment on the ground of the insufficiency of the complaint. Respondent, in its opening brief, claims that "pursuant to an order therefor duly made," etc., does not refer to the order of sale, "but concisely pleads the ultimate fact of the order pursuant to which the transfer was and alone could be made, that is to say, the order of confirmation. In its supplementary brief the position is shifted, and it is contended that it refers to the order of sale. But it only illustrates the element of uncertainty involved in the form of expression. It is uncertain whether it refers to one or the other, and for that reason is subject to a special demurrer. But does the fact that it is in the form of a recital, or in the nature of a legal conclusion, preclude the court from considering it in order to uphold the judgment as against a general demurrer?

In Hill v. Haskin, 51 Cal. 177, it was contended by appellant that the complaint was radically defective because it did not aver an offer to account, on the ground that this was a condition precedent to the right to maintain an action. The Supreme Court said: "But, inasmuch as the plaintiff could not legally demand payment of the defendant until he had first offered to account, the averment that 'he made due demand' is a sufficient allegation, in the absence of a special demurrer, to let in proof of the offer to account. It was but a defective statement of a material fact. Instead of alleging the fact directly, it was stated only inferentially, and might have been demurred to on this ground. * * * But having proceeded to trial, without interposing the objections, it was too late afterwards for the defendant to raise the point that the offer to account ought to have been averred with greater precision and directness." It is somewhat difficult to see how an allegation that he made due demand is even an imperfect attempt to state that he "offered to account," but the decision indicates a just and wise purpose of the higher court to avoid technicalities in furtherance of justice. In Chase v. Evoy, 58 Cal. 352, an allegation that "the claim was duly verified by the oath of plaintiff in the form prescribed by law" was held to be sufficient as against a general demurrer. In Grant v. Sheerin, 84 Cal. 198, 23 Pac. 1094, it was alleged that "plaintiff as such executrix has demanded from defendant an accounting of said sale and the payment to her of the purchase price of said monument. And defendant has refused and still refuses to account for or pay the same or any part thereof." There was no allegation, except inferentially, of nonpayment. The Supreme Court, however, said: "In our opinion, the complaint in this case stated a cause of action, and it was sufficient when tested only by a general demurrer." From Alexander v. McDow, 108 Cal. 29, 41 Pac. 25, we make this quotation: "Thus, while a judgment will not relieve from the entire absence of a necessary averment, it will cure defects in all such averments as may by fair and reasonable intendment be found to have been pleaded although defectively. The gravamen of the charge against the complaint is that it fails to make the necessary averment of assignment to plaintiff. * * * Assignment of it [the note], therefore, became necessary to convey title. But such an instrument may be assigned by indorsement as fully as may a negotiable instrument. The assignment is pleaded in the complaint with Cæsarian brevity by the single word 'indorsed,' followed by the quotation ["Pay to Jules Alexander. Levy and Alexander"]. This, however, is aided by the subsequent statement that the principal and interest are due from defendant to plaintiff. By fair, if not by necessary, implication, we learn from this that Levy and Alexander assigned the instrument by indorsement and delivered it to plaintiff, and that plaintiff then became and now is the owner and holder of it. So construed, the complaint will support the judgment, although," Mr. Justice Henshaw somewhat facetiously, but significantly, remarks, "it must be added that the weight is about all it is capable of sustaining." The last statement, with equal propriety, might be addressed to the case at bar.

And in City of Santa Barbara v. Eldred, 108 Cal. 297, 41 Pac. 410, the Supreme Court, speaking through Mr. Justice Temple, states the rule as follows: "The action was brought to collect a municipal tax and to the complaint a general demurrer was interposed. It was overruled and defendant answered. He now specifies a great many alleged defects in the complaint. Many of them are, in effect, that the complaint is ambiguous or uncertain. Such objections cannot be reached on general demurrer. Nor can the other objections, which merely amount to criticisms upon the sufficiency of the statement, as that the essential facts appear only inferentially, or as conclusions of law or by way of recitals prevail on such demurrer. There must be a total absence of some material fact to justify us in sustaining a demurrer of this character." This decision is severely criticised by appellants. They declare it to be against every other authority in England or America in holding that a conclusion of law may protect a complaint from the attack of a general demurrer. It may be that other decisions do not so hold in so many words, but there are well-considered cases holding in effect that, where there is an ineffectual attempt to deraign title, the allegation of "holding and ownership" may be regarded in the determination of the question whether the complaint states a cause of action. We have already cited two of those cases from this state. There is, no doubt, some inconsistency shown in the judicial literature upon this subject, but the later cases hold as we have stated. In Estate of Behrens, 130 Cal. 416, 62 Pac. 603, as stated in the syllabus, it is held that, "upon the contest of the probate of a will, the description of the contestants as 'brother and sister and heirs at law' of the deceased, in the introducing sentence of their opposition to the probate, without any direct averment of their heirship, constitutes an inferential averment thereof, which, in the absence of a demurrer to the opposition, will be held sufficient after judgment." It is true there was no demurrer to the opposition, but the same result must have been reached in the presence of a general demurrer.

There are many other cases to the same effect. Admittedly, none of the decisions cited—and they have all been examined—presents identically the same phraseology as we find in the complaint before us. But a fair consideration of the authorities, keeping in view that "the court must," as provided in section 475, Code of Civil Procedure, "in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties," leads to the conclusion that the complaint is not so defective as to be insufficient to support the judgment. In view of the technical nature of the objections urged and the manifest justice of the determination of the cause reached by the lower trial judge, if deemed necessary to support the judgment, any appellate court should and could hold, without doing violence to any rule of pleading or principle of equity, that, as against a general demurrer, there was either a sufficient attempt to allege the orders of the probate court, or that, if the form of pleading adopted in that behalf constitutes simply a legal conclusion and such legal conclusion must be disregarded, then the defect is supplied by the averment of the ultimate fact that plaintiff is the owner and holder of the note in controversy. Any other view, it seems to us, would be a reproach to the law and almost a wanton infraction of the principles of equity.

To understand the significance of the other objection, the following facts must be observed: The complaint contains the usual allegation that certain defendants, including the appellants, claim some right or interest in the property, but that it is subsequent and subordinate to plaintiff's lien. Appellants answered this allegation as follows: "Defendants admit that they have and claim, and that each of them has and claims, an interest in certain portions of the property described in the said complaint, but deny that their said interest, or that the interest of any of them is subsequent or is subordinate or is subject to the lien of the said mortgage." The allegation of the indorsement and delivery of the promissory note contained in the complaint was denied in said answer as follows: "Defendants deny that on or about February 1, 1894, or at any other time, or at all, Jane L. Stanford indorsed and delivered or indorsed or delivered to the said plaintiff the said fourth promissory note, described and set forth in paragraph 15 of the said complaint, and that the said plaintiff ever since has been and now is the owner and holder or owner or holder of said note." The answer further denies "that there is any sum or amount whatever now due, unpaid or owing upon the said promissory note." By reason of the foregoing allegations and denials, appellants claimed the right at the trial to introduce evidence of a novation, or, as it appears in the bill of exceptions, "that while plaintiff was putting in its case the defendants hereinafter named repeatedly endeavored upon cross-examination to introduce in evidence the agreement set out in the proposed amended answer hereinafter contained, but objection being made by plaintiff on the ground that said matter was not cross-examination, the same was ruled out. That, after the close of the plaintiff's case, said defendants hereinafter named proceeded to and did offer in evidence, without any objection, their respective chains of title and claims to, in or upon the property involved in this action." Thereupon said defendants offered in evidence the agreement set out in said proposed amended answer, which was offered, so counsel stated, "for the purpose of showing that said note had been supplemented, changed, and modified and that the same is no longer a valid or existing obligation of any kind or character; that being a new and different agreement substituted in this suit." In response to a question by the court counsel for appellants stated that the paper in question constituted an agreement of the parties in interest whereby the amount due is $121,000 instead of $112,500, as provided in the note upon which the suit was brought, and that it was to bear a greater rate of interest and that the amount due was to be paid in two installments instead of one, etc. In other words, the instrument is one which shows a complete novation as to this promissory note. "First, as to the change in the amount of the note; and, second, as to the times of payment, and the payments, and the rate of interest which it shall bear, and as to the terms upon which this mortgage shall be released, and providing that the mortgage as modified shall stand as security for the new amount, and in the event of foreclosure interest shall be given at the rate indicated." Upon objection being made upon the ground that it was not addressed to any issue in the case, the court declined to admit the evidence, holding that it was not admissible under the pleadings and should be specially pleaded. Subsequently appellants asked leave to file an amended answer setting up this agreement and alleging in appropriate phraseology that it was executed as a novation and also setting up the bar of the statute of limitations against the enforcement of this new obligation. The court sustained plaintiff's objections.

Appellant Henshaw then made application to file an amended answer setting out the same agreement as a novation and alleging that by virtue of the novation his own mortgage became a first lien upon the premises, and that any claim, lien, or demand of the plaintiff was subsequent and subordinate thereto, and also "that on the 14th day of January, 1896, the defendant duly commenced an action in the superior court of the city and county of San Francisco against the plaintiff above named and against the defendants, James P. McCarthy and William Fitzhugh and others, for the purpose of foreclosing his aforesaid mortgage; that said action is still pending and undetermined." In support of the opposition to the application counsel for plaintiff stated: "This is the first time that this instrument has been brought into this action. The answer of these defendants was filed on the 2d day of April, 1899. This action was begun on the 4th day of January, 1898. Their answer was filed more than four years ago. In the meantime, if there has been a novation of this original obligation by reason of the execution of this agreement, any cause of action stated in this amendment on that new obligation has become barred by the statute of limitations." Besides, it was contended that it was unconscionable on their part—never having apprised the plaintiff of it—to set up a defense which would deprive plaintiff of its cause of action. The court, in sustaining the objection, stated: "Mr. Henshaw is not in privity with this contract, or with any of the parties to the contract. Whatever rights he acquired were acquired before this was executed. If a suit was brought upon this agreement and he was made a party, and he alleged that he had a mortgage prior to the making of the agreement, he would plead himself out of court. If the defense were allowed, it would have the effect of making his mortgage previous to the plaintiff's, and it would defeat the rights of all of the defendants. Now, here is a party who has known of this agreement and has not pleaded it, and now to ask to plead it would have the effect of giving him a prior lien, and I think it would be an inequitable thing to do." It would seem that any judge would take the same view of it. It is true, as contended by counsel, that courts should be liberal in allowing amendments for the purpose of aiding and facilitating the trial of causes upon their merits. Ordinarily an application to amend a pleading to present more fully or accurately a cause of action or a defense should be granted upon such terms as shall appear just. In Farmers' Nat. Gold Bank v. Stover, 60 Cal. 396, it is said: "An amendment of pleadings should be allowed at any stage of the trial when it is necessary for the purpose of justice." See, also, Guidery v. Green, 95 Cal. 630, 30 Pac. 786; Crosby v. Clark, 132 Cal. 1, 63 Pac. 1022; McDougald v. Hulet, 132 Cal. 155, 64 Pac. 278; Marr v. Rhodes, 131 Cal. 267, 63 Pac. 364; Carter v. Lothian, 133 Cal. 451, 65 Pac. 962. But it is clearly established by the authorities that the appellate court will not reverse an order denying leave to amend except for abuse of discretion. As said in San Joaquin Valley Bank v. Dodge, 125 Cal. 84, 57 Pac. 689: "Amendments to pleadings are left much to the discretion of the court below, and it is presumed that such discretion will always be exercised in furtherance of justice and with the end in view of disposing of cases upon their merits. We cannot interfere except in cases where such discretion is abused." Such amendments, as well observed, are allowed in the interests of justice and not simply to give the party a technical advantage. Section 473, Code Civ. Proc.

In Cooke v. Spears, 2 Cal. 412, 56 Am. Dec. 348, in discussing the refusal of the court below to allow an amendment to set up the bar of the statute of limitations, it is said: "If the statute of limitations had been pleaded in the first instance, there would have been no ground to have objected to it, and the court would have had no legal discretion to have ordered it to be stricken out. But, having been omitted when the application to amend was made, the first question certainly presented was: Will it be in furtherance of justice? Such is the language of the statute. Such clearly was the intent of the law. But we take it that the judge below was not bound to allow the amendment, unless it would further the ends of justice. He refused it, doubtless believing the contrary, and we think he did right." In Page v. Williams, 54 Cal. 563, the defendant in an action upon certain promissory notes, after the plaintiff had rested his case and the defendant had given some evidence, offered to show that the notes were given without consideration; and, upon the court refusing to hear such proof under the pleadings, defendant asked leave to file an amended answer alleging want of consideration. The court refused to permit it, on the ground that the case had been at issue nearly two years and the trial had already commenced and new issues would be tendered by the amendment. The Supreme Court said: "In our opinion, the court properly exercised its discretion in refusing to allow this amendment." See, also, Harding v. Minear, 54 Cal. 502; Bank of Woodland v. Heron, 122 Cal. 108, 54 Pac. 537. In the case at bar the effect of allowing the amendment, if supported by the evidence, would have been to defeat plaintiff's claim, and the court was justified in treating it as an application to amend in order to plead the statute of limitations.

Appellants contend that "the idea of administering rules of pleading with a view of reaching an end different from that attained by the substantive law and thus working out an indefinable justice, is illogical and absurd." But the vice of the statement is in the implication that the degree and quality of justice are determined by the method adopted in its pursuit. That there is a difference between legal and equitable rights and that a distinction is properly made between purely statutory and moral considerations in the enforcement of obligations and in the application of remedies no one will probably deny. If no such distinction exists, the judges will have to recant many errors and our whole judicial system will need reconstruction.

Appellants invite us to a discussion of the phrase "furtherance of justice." Obviously it is "such justice as the law administers when correctly applied." Stringer v. Davis, 30 Cal. 322. But that description does not and cannot prescribe what proceeding shall be taken by a trial court in every case where an amendment of a pleading is sought. In fact, the term "undefined" is probably defined the best as "beauty unadorned is adorned the most." Each particular case must be left to the wise discretion and enlightened conscience of the chancellor. Appellants seem to think that it is "in furtherance of justice" to promote their interest at whatever cost to some one else. They have apparently forgotten the qualification of the rule that amendments should be allowed in furtherance of justice when it can be done without prejudice to the substantial rights of others. Assuredly, after an action had been pending for five years, it was no abuse of discretion to refuse to allow an amendment and thereby preserve to plaintiff the right to enforce a just obligation to the amount of nearly $200,000 and to subject to the prior claim of plaintiff a mortgage executed subsequently, when the effect of granting the amendment might be to defeat plaintiff's claim altogether and to give appellants an advantage which the evidence does not show they needed. The ability and industry of counsel for appellants compel admiration, but to uphold their contention, in our opinion, would be a travesty of justice rather than in furtherance thereof.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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## WUTCHUMNA WATER CO. v. POGUE.

(Sac. 1,421.)

(Supreme Court of California. May 2, 1907.)

1. Evidence—Scope of Admission at Trial.

Where plaintiff diverted water from the K. river by ditch, applied part of it to land from the ditch, conducted the rest by said ditch to the S. river, and at a point lower in the S. river took therefrom by another ditch less water than he had taken into it, and applied it to land, but some time afterwards, instead of turning such water into the S. river, took it by a flume across it, and applied it to land, and by reason of these facts was claiming, in the action to determine priority of rights, a right to the water taken into the S. river and again taken from it by the lower ditch, as against one who, after such ditches were constructed, but before the construction of the flume, took water from the K. river by a ditch above that of plaintiff, the statement of plaintiff's counsel, made while a witness was testifying as to the condition of things after the construction of the flume, but many years before the action, that in such action plaintiff was not claiming any water from the S. river, will be *held* to apply only to the condition of affairs at the time of the action, when no water was being taken through the ditch from the S. river.

2. Pleading—Matters of Evidence—Ultimate Facts—Waters—Appropriations.

Where plaintiff constructed a ditch from the K. river, and thereby conducted water into the S. river, took from it less water than he had taken into it, and used it on land, but some time afterwards, instead of turning it into the S. river, took it by a flume from the lower end of the ditch from the K. river across the S. river and there used it on land, plaintiff, in an action to determine the rights of the parties to waters of the K. river, need not allege all these evidential facts, but may prove them under its allegations of the ultimate facts as existing at commencement of the action, its ownership of the ditch from the K. river, and its appropriation and diversion from such river by such ditch of a certain amount of water.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 31.]

3. Waters and Water Courses—Appropriation—Ditches over Government Land.

An appropriation of water may be made by a ditch over vacant government land.

4. Same—Manner of Appropriation.

One may appropriate water from a river by a ditch from it to another river, letting it flow down the latter, and then diverting it therefrom by a ditch.

5. Same—Riparian Rights—Pleading.

To authorize an award to defendant of the right to take water from a stream as a riparian owner, in an action by a lower appropriator against an upper appropriator to determine the rights of the parties to the use of the waters of the stream, defendant must properly plead his riparian rights, the amount of his irrigable riparian lands, and the amount of water reasonably necessary for his use thereon.

6. Same—Right to Dispose of Water.

One may not, by reason of being a riparian owner on a stream, take water from the stream and sell it.

Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Wutchumna Water Company against J. W C. Pogue. From the judgment, plaintiff appeals. Reversed and remanded.

E. O. Larkins, for appellant. Alfred Daggett, for respondent.

HENSHAW, J. In 1899 plaintiff and one Hyde filed their complaint against the defendant J. W. C. Pogue and others. The action was to determine the respective rights of the parties to the use of the waters of the Kaweah river. The differences as to the plaintiff Hyde were adjusted, and he is not before this court. The differences between the appellant and certain of the defendants were satisfactorily adjusted, and these defendants likewise disappear from the case. The conflicting claims of right of the plaintiff and of the defendant Pogue were tried and determined. So far as the parties here before the court are concerned, it is sufficient to state that as between them the court gave the plaintiff the first four cubic feet of water per second flowing in the river; to the defendant the next six cubic feet of water per second; after which plaintiff was allowed the remainder. Plaintiff appeals, contending that, not only under the evidence, but that under the findings as well, it is clearly entitled to more water than the court allowed, and that the defendant Pogue's use is, and should be decreed, subordinate in right to the appellant's prior claim to a vast amount more of water than the court awarded it.

The geographical situation, an understanding of which is necessary for a comprehension of the findings, is as follows: The Kaweah river, having its source in the Sierra Nevada mountains, flows down and across the plains as a single stream, until at a point some miles above the city of Visalia it divides, the left-hand branch or fork continuing under the name of the "Kaweah River" until near the city of Visalia, where it is known as "Mill Creek"; the right-hand branch being known as the "St. Johns River." For a long time prior to the year 1871, one Dillon had, by ditch constructed over unoccupied government land, appropriated four cubic feet per second of the waters of the Kaweah river, taking it at a point above the forks of the stream. In 1871 Barton and his associates, having acquired the Dillon rights, commenced the construction of a ditch, and afterward of a second ditch, which two ditches the court finds carried the waters of the Dillon appropriation "in addition to other waters" and devoted "the whole thereof to useful and beneficial purposes and for irrigating lands and watering live stock along the lines of said ditches." These Barton ditches, while devoting these waters to these useful purposes, carried other waters (just how much the court does not find) beyond the fork of the Keweah river and into the St. Johns branch thereof, a short distance below the point of the river's division. These waters, so carried out of the Kaweah river into the St. Johns fork thereof, commingled, of course, with such other waters as the stream carried, and flowed down to another ditch which the court finds was constructed in 1873, which ditch is known as the "Barton Cut." Through this Barton cut a large amount of water was taken and used for beneficial purposes near the city of Visalia. Thus, by the evidence, it is indisputably established that in the year 1874 59.4 cubic feet per second were used for mill purposes, after which the water was still further used for purposes of irrigation, and, in addition to this, some 8 cubic feet per second were used for irrigating lands along the course of the Barton cut. All of the water which the St. Johns river carries comes originally from the Kaweah river. The water taken out of the Kaweah river by the Barton ditch and afterward by the Wutchumna ditch, and which was carried below the point of division of the Kaweah and into the St. Johns channel, was so carried to increase the flow of the St. Johns channel, to prevent this water from going down the Mill creek channel, and thus to feed the Barton cut, the ultimate place of diversion. To whatever may have been the rights of Dillon, Barton, and his associates, the plaintiff has succeeded; the plaintiff being a corporation organized for the purpose of supplying water for useful purposes to its stockholders owning lands in the neighborhood of the city of Visalia. Barton cut was thus supplied with water as early as 1873, and the water from the upper Barton or Wutchumna ditch was thus turned into the St. Johns channel until 1879. In this year, the plaintiff, for the more economical conservation and distribution of its waters, ceased to allow them to flow down the channel of the St. Johns river these 12 or 13 miles, but impounded them and carried them in a flume across the St. Johns river, and so to the neighborhood of Visalia, where they were distributed. This being the condition of the affairs at the time of the commencement of the action, the complaint alleged: "That the Wutchumna Water Company is now, and ever since its incorporation, has been, the owner of that certain ditch known as the 'Wutchumna Ditch' which leads out of the Kaweah River at a point thereon," etc., "and runs thence westerly and southwesterly to a point about five miles southwest of the city of Visalia, * * * and that the plaintiff has appropriated and diverted from said Kaweah River, through said ditch at its head on section 34, about 133 cubic feet per second of the waters thereof," etc.

The significance of this is that it does not declare, nor does the complaint anywhere declare, any of the facts touching the Barton cut and the use thereof, which use, at the time of the commencement of this action, had been abandoned. Upon this respondent insists, and it would seem that the trial court must have adopted his view, that because of the absence of a pleading upon the earlier use made of these waters through the Barton cut, plaintiff was not entitled to recover under the allegations of its complaint, even if it established this use. Respondent reinforces its argument upon this point by an admission contained in the record. A witness was testifying to the condition of affairs in 1882 and as to water which was then discharged into the St. Johns river. This, it appears, was surplus waters which the plaintiff permitted to flow down the channel after its needs were supplied, and it will be remembered that at this time plaintiff was conducting the water which it used, by flume across the St. Johns river. The admission to which counsel for respondent refers took place when the witness was testifying as to this condition of affairs existing in 1882, and the record discloses the following: "A. About the 1st of May, I think it was, I turned the water in, and it ran until September, near the first of July, maybe a little before or after. The Court: Q. You turned the water in from the St. Johns? A. Yes, sir. Mr. Larkins (counsel for plaintiff): In this suit we are not claiming any water from the St. Johns. The Court: I understand." This admission is without force. It obviously had to do with the condition of affairs existing at the time of the filing of the complaint and at the trial of the action, at which time plaintiff was not taking any water through the Barton cut, and was using only the water which it took out of the Kaweah river above its point of division. In this sense, and in this sense only, is the statement of plaintiff's counsel to be understood, when he says that plaintiff is not claiming any of the waters of the St. Johns. For it is apparent that it was claiming—strenuously and assiduously claiming—that by reason of its having carried from the upper Kaweah some hundred or more cubic feet per second of water and emptied it in to feed the channel of the St. Johns, and permitted it to flow down the St. Johns to Barton cut, where it again appropriated it and devoted it to useful purposes, it was entitled to claim all such water; that the only change which it had made in its appropriation was a change in the method of lower diversion and use; that touching its upper ditch, from and through which its original appropriation was made, the conditions and plaintiff's rights remained the same. Nor is respondent correct in arguing that evidence concerning the use of the water through the

Barton cut was foreign to the pleading. Plaintiff, in its complaint, pleaded, as it should have pleaded, the ultimate facts as they existed at the time of the commencement of its action. The change in use, the original mode of conveyance, and the story of the abandonment of the Barton cut, were all probative matters in the establishment of the title and method of diversion of the plaintiff as they stood at the time when the litigation was begun. It was not only unnecessary, but it would have been surplusage, for plaintiff to have pleaded the historical deraignment of its title and the varying methods of its use. Heeser v. Miller, 77 Cal. 192, 19 Pac. 375; McCaughey v. Schuette, 117 Cal. 223, 46 Pac. 666, 48 Pac. 1088, 59 Am. St. Rep. 176.

It was in the spring of 1875 that respondent Pogue and his associates commenced the construction of their ditch, which also took water from the Kaweah river above the point of its diversion, and of the diversion of plaintiff, and of this water so taken the court finds and decrees, as has been said, that Pogue was entitled to divert six cubic feet per second, which right was superior to the plaintiff's right to divert any more than four cubic feet per second through its ditch. To sum up as to the findings, the court finds that the plaintiff, long prior to defendant's appropriation, was conducting through the Barton ditch four cubic feet of water per second (the Dillon right) in addition to other waters (quantity not mentioned), all of which were devoted to beneficial purposes. The court further finds that the predecessors in interest of the plaintiff connected the Barton ditches with the channel of the St. Johns river, and did in 1873 construct a ditch known as the "Barton Cut" from the St. Johns channel below and on the opposite side of the river, to the city of Visalia. The court does not find how much water the Barton ditches emptied into the St. Johns channel, nor how much of this water was taken out by the Barton cut. But the evidence shows that at least 67.4 inches were beneficially used through the Barton cut before defendant took the first step toward his appropriation, and it likewise shows that water in excess of this amount was carried by the Barton ditches into the St. Johns channel, and that the waters so carried into the St. Johns channel flowed down it until impounded at the intake of the Barton cut. Yet the court does find that the Wutchumna Water Company "*did not divert or appropriate, as required by law*, any further quantity of water from said river in addition to said four cubic feet of water per second, until the year 1879." The italicized excerpt from the findings just above quoted would seem to indicate that the trial court meant to convey the idea that the plaintiff did divert and appropriate more than four cubic feet of water per second, and this view certainly has the support of the evidence, from which it appears that from the year 1871 on the Barton or Wutchumna ditch turned into the St. Johns channel more water than was taken out through the Barton cut. The finding, therefore, must mean that this excess of water over four cubic feet per second was not appropriated as required by law. Wherein this finding derives support, excepting from the theory above adverted to, that the waters taken from the Barton cut could not be considered because of the alleged defect in the pleadings, we are unable to perceive. Because, as to plaintiff's title to the water, it is indisputable that the Wutchumna ditch was constructed over vacant government land prior to the time that Pogue acquired any of his rights either as an appropriator or as an owner of riparian lands, and, consequently, upon well-settled principles, the plaintiff's earlier rights of appropriation are superior to Pogue's later rights either as an appropriator or as riparian landowner. Osgood v. Eldorado Water Co., 56 Cal. 571; Senior v. Anderson, 115 Cal. 500, 47 Pac. 454; San Jose L. & W. Co. v. San Jose Ranch Co., 129 Cal. 673, 62 Pac. 269.

Moreover, plaintiff had the undoubted legal right to adopt and use its original method of appropriation, that is to say, to carry the water out of the Kaweah river and down to the St. Johns branch thereof, there permitting it to flow down the natural channel to its point of diversion. Such a right is recognized in Hoffman v. Stone, 7 Cal. 47; Paige v. Rocky Ford Canal Co., 83 Cal. 85, 21 Pac. 1102, 23 Pac. 875; Long on Irrigation, § 43; Black's Pomeroy on Water Rights, § 49. Nor can it be said, in view of the evidence, that the diversion by Barton cut was a mere appropriation of the natural waters flowing down the St. Johns river; because it is shown by the evidence, not only that more water was turned into the St. Johns river from the Kaweah than was taken out by the Barton cut, but additionally the reason is made plain why this was done. It was to preserve for use at the Barton cut this water, which otherwise, by lower owners and appropriators, might and would have been diverted into the other branch of the Kaweah, or taken out at the fork, and so lost entirely to the St. Johns channel. Nor do the pleadings and findings touching Pogue's title in and interest to the water serve to elucidate the difficulty. Pogue in his answer alleges both his right as appropriator through the Pogue, Wallace, and Crocker ditch—a ditch which defendant and his associates constructed and first drew water through in 1875—and also his ownership of certain lands riparian to the Kaweah river. The court awards him six cubic feet per second, without limitation upon its use, and it is unquestioned that he is carrying this water away from his riparian lands and there selling and disposing of it—a use, which, as a riparian owner, he is, of course, not entitled to make. Moreover, considering Pogue's claim as resting upon his riparian ownership, he nowhere properly pleads his riparian rights, nor the amount of his irrigable riparian lands, nor the amount of water reasonably necessary for his use upon such lands. Riverside Water Co. v. Gage, 89 Cal. 420, 26 Pac. 889; Wiggins v. Muscupiable L. & W. Co., 113 Cal. 194, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; San Luis Water Co. v. Estrada, 117 Cal. 182, 48 Pac. 1075. As the pleadings exist, it must be concluded that the court's award is based upon his claim as an appropriator through the Pogue, Wallace, and Crocker ditch. But, as an appropriator, the evidence leaves no doubt that he is later in time, and, therefore, subsequent in right to plaintiff, who, as has been said and shown, was certainly putting to beneficial use some 67 cubic feet of water per second in addition to the four cubic feet awarded long before the defendant ever commenced the construction of his ditch.

It follows herefrom that a new trial must be ordered, to the end that the court shall find upon these omitted matters, and determine the respective rights of the plaintiff and defendant as appropriators, for it is only as an appropriator that, in the present state of his answer, the defendant Pogue can be heard to assert any rights at all.

The judgment and order are therefore reversed, and the cause remanded.

We concur: McFARLAND, J.; LORIGAN, J.

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5 Cal. App. 344

## HALE BROS. v. MILLIKEN et al. (Civ. 258.)

(Court of Appeal, Third District, California. April 3, 1907. On Rehearing, May 3, 1907. Denied by Supreme Court May 31, 1907.)

1. APPEAL — REVIEW — VERDICTS — SETTING ASIDE.

Before a verdict may be set aside or the findings of the trial court disturbed upon the evidence on appeal, the evidence must be so plainly and palpably insufficient to support the verdict that it may be so declared as a matter of law.

2. CONTRACTS — ACTION FOR BREACH — EVIDENCE.

In an action for damages caused by delay in delivery of building material, evidence examined, and *held* sufficient to support a verdict for plaintiffs.

3. EVIDENCE — EXTRINSIC EVIDENCE AFFECTING WRITINGS—CIRCUMSTANCES SURROUNDING TRANSACTION.

Where there were peculiar circumstances surrounding the transaction leading up to the making and the manner of the execution of the contract which were fully made known to the other party, it was proper, in a suit against it for breach of the contract, to place the peculiar facts before the court and jury.

4. SAME—EVIDENCE OF CUSTOM—EFFECT OF STATUTE.

Pol. Code, § 3209, prescribes a standard of weights and measures. Section 3222 provides that "all contracts made in this state for work to be done, or for anything to be sold or delivered by weight or measure, must be construed by that standard. *Held* that, where the terms of a contract for the sale of structural steel at a certain price per pound were unambiguous, it was to be conclusively presumed that the parties made their contract in reference to the statute, and extrinsic evidence to show the existence of a usage among dealers in structural steel as to the manner of computing weight was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2104–2106.]

5. SAME—DOCUMENTARY EVIDENCE—LETTERS.

Code Civ. Proc. § 1854, provides that when a "detached * * * writing is given in evidence any other * * * writing which is necessary to make it understood" may also be given in evidence. *Held* that, when a letter had been introduced in evidence, it was proper to reject a letter in reply, offered by the opposite party, which was not necessary to make the original letter understood.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1498, 1676.]

6. APPEAL — REVIEW — STRIKING OUT EVIDENCE—HARMLESS ERROR.

In an action for breach of a contract, under which it was understood by the parties that building material should be delivered in any event so that the building could be occupied by the first of July, it was harmless error to strike out evidence offered by defendant's agent that in a conversation with one of the plaintiffs the latter had said that they would not hold defendants down strictly to February shipments.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4187–4193.]

7. TRIAL—CUMULATIVE EVIDENCE.

It was not error to sustain an objection to a question asked a witness where the fact sought to be brought out by the question had been stated by the witness before.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 131; vol. 50, Witnesses, §§ 827, 828.]

8. WITNESSES — RE-EXAMINATION — EXPLANATION OF TESTIMONY ON CROSS-EXAMINATION.

Where, in an action for damages caused by delay in furnishing building material, on cross-examination of one of the plaintiffs defendant introduced a letter received from plaintiffs fixing the time of delay at less than that claimed in the suit, it was proper to allow the witness on redirect examination to explain that the letter had fixed the time of delay at the minimum in an attempt to effect an amicable settlement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1000.]

9. APPEAL—INSTRUCTIONS—RIGHT TO OBJECT.

Where defendants had obtained an instruction in which it was stated that they do not deny the making of the contract as alleged in the complaint, except that they denied that they agreed to deliver the goods anywhere except in New York, they cannot complain of an instruction for the plaintiff setting out a provision of the contract that delivery was to be made during the month of February.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591–3610.]

Appeal from Superior Court, City and County of San Francisco; W. P. Lawlor, Judge.

Action by Hale Bros. against Edward F. Milliken and another. From a judgment for plaintiff, defendants appeal. Affirmed.

See 75 Pac. 653.

P. F. Dunne and W. H. Linforth, for appellants. Campbell, Metson & Campbell (Thomas H. Breeze, of counsel), for respondent.

HART, J. The plaintiff corporation brought this action to recover from the defendants the sum of $13,973 for damages alleged to have been sustained by it on account of the failure of defendants to deliver within the time agreed upon certain steel to be used in the erection of plaintiff's building in the city of San Francisco. The alleged damages consist of the following items: (1) The sum expended by plaintiff in the preparation of the steel for use after its delivery, $577.65, the pleaded agreement being that it should be delivered in condition so that it could be placed as received in the building; (2) ground rent at the rate of $1,400 per month for a period of three months; (3) interest on the money expended by plaintiff in the building independent of the steel work during the time of the delay, aggregating the sum of $396.32; (4) the loss to plaintiff of the use of the building for three months, alleged to be of the value of $3,000 per month, or a total of $9,000. On the 12th day of October, 1899, plaintiff leased from one David R. Jones, for a term of 10 years and 9 months, the said lease to commence and take effect on the 1st day of October, 1899, at a monthly rental of $1,400, a certain lot or piece of real property, situated in said city of San Francisco, and upon which it contemplated the erection of a large building to be used for carrying on and conducting its commercial business. Ground rent was not, however, to become payable under the lease until from and after the 1st of July, 1900. It is alleged by plaintiff that, with a knowledge of this lease and of its terms, defendants entered into a contract with plaintiff to furnish the steel necessary for the erection of said building and to deliver the same during the month of February, 1900. It is claimed by plaintiff that, if the steel had been delivered during said month of February, the building could have been "erected and completed so as to admit of occupancy on July 1, 1900, but that the building was not completed and ready for occupancy before the 1st of October, 1900, and that the delay was occasioned through the failure of the defendants to deliver the steel within the contract time and to deliver in such condition as to be immediately set up in the building upon its arrival in San Francisco." The complaint further alleges that during the negotiations between plaintiff and defendants for the furnishing of the steel for said building "defendants submitted to plaintiff two lists of prices at which they agreed to sell and deliver to plaintiff the steelwork required in said building. One of said list prices was for the delivery of said steelwork during the month of February, 1900, and the other for the delivery of said steelwork during the month of May, 1900; that the prices on the latter list were much lower than those on the other, and both lists of prices provided for f. o. b. delivery." In order to secure the delivery of the steel in the month of February, it is alleged, plaintiff, on the 10th day of January, 1900, agreed to pay defendants the prices demanded for the February delivery of the steel, the same being a sum in excess of that of the May delivery to the extent of $4,105.22. The complaint was verified. The answer specifically denies the averments of the complaint and pleads a counterclaim, and prays, among other things, for judgment against the plaintiff for the sum of $6,884.50, alleged to be the balance due defendants from plaintiff for the structural steel so furnished it by defendants. It may be here stated that the original balance claimed to be due defendants from plaintiff was the sum of $7,042.65, but that the sum of $156.15 was deducted by defendants from their claim because of extra labor imposed upon the steel setter by reason of "shop errors" imputed to the oversight or negligence of defendants in arranging the steel, preparatory to its erection as a part of the building. The cause was tried by jury, and a verdict returned in favor of plaintiff in the sum of $186.41, "after deducting the amount of defendants' counterclaim." Thereupon and in accordance with said verdict the court entered its judgment in favor of plaintiff in the sum of $186.41. Defendants appeal from said judgment and from an order refusing them a new trial.

Much space in the briefs of counsel is devoted to a discussion of the evidence; appellants attempting by a minute examination and analysis thereof to demonstrate that the jury awarded damages in favor of plaintiff far in excess of what the facts adduced justified. The contract for the purchase and sale of the steel for the building was made and entered into between Reid Bros., architects and agents of plaintiff, and N. L. Bell, the Pacific Coast agent of defendants. The place of business of defendants was at the time of the transaction in the city of New York, and the headquarters and office of their agent, Bell, were at the time of the making of the contract in the city of San Francisco.

The record consists of a transcript of 490 pages, of which the evidence takes up approximately 400 pages. It would be useless, we think, to undertake to discuss in detail the entire mass of evidence, or to attempt to present a satisfactory synopsis thereof, for the purpose of showing reasons why the verdict should or should not be disturbed. The record discloses the fact that most of the evidence is from witnesses produced by plaintiff, and that it points almost all one way. There is no dispute that a contract for the sale and purchase of the structural steel required for the erection of the building of plaintiff was made by the parties. The only questions in the case are, so far as the facts are concerned, whether there was on the part of the defendants a breach of the terms of the contract, and, if so, whether or not the damages awarded are excessive.

The plaintiff, having leased for a long term the ground upon which the building was to be erected at a monthly rental of $1,400, to become payable on and after the 1st day of July, 1900, was quite naturally anxious to secure the steel materials necessary for the construction of the structure at as early a date as possible, so as to enable the contractors to complete and have it in readiness for occupancy by the time at which payment of the ground rent was to begin. That this purpose was uppermost in the mind of plaintiff and well understood by defendants at the time of the making of the contract is, in our opinion, indubitably evidenced by the several conversations shown to have taken place between the parties relative to the steel contract. These conversations are testified to not alone by witnesses friendly to plaintiff, but by Mr. Bell himself. The telegraphic dispatches from Bell to the defendants concerning the contract also sustain this conclusion. Another significant circumstance bearing out the contention of respondent upon this point is the fact that the plaintiff was willing and agreed to pay for the steel the sum of a trifle over $4,000 demanded for February shipments in excess of the prices asked for May shipments. In other words, it agreed to pay $4,000 more for the steel in order to secure early shipments and delivery thereof than it would have been compelled to pay for the same material delivered in the month of May. The lease of the ground and the time at which the payment of the rent, by the provisions of said lease, was to commence, and the consequent anxiety of plaintiff to be in actual occupancy of the premises by the time the payment of the rent was to begin, were matters of full and frequent discussion between the parties, not only before the agreement of sale and purchase between them was reached, but throughout the entire course of the relations established between them by virtue of the contract. Telegrams were sent to defendants by their agent, explaining the circumstances under which the contract was made. While it may be correct to say that nothing was expressly said in these telegrams about the lease, the defendants nevertheless knew that haste and prompt delivery of the steel were important features of the contract, as is clearly shown by their replies to their agent. But whether the defendants themselves knew or did not know the reason for the requirement of prompt delivery, the fact is undisputed that their agent did know the reason and knew that that was the principal consideration controlling plaintiff in awarding the contract for the steel to the defendants. After the defendants, in response to a telegram from Bell, sent by wire the "February prices" for the steel required, the plaintiff, through its agents, Reid Bros., in a letter addressed to Bell, accepted the same, and requested the latter to inform defendants that the plans, specifications and drawings were with P. C. Hale, at 256 Church street, New York, and, in order (quoting from the letter to Bell) "to save time, to please ask your firm to call on P. C. Hale for the drawings and specifications * * * to look over carefully and wire you if everything is complete to proceed at once." In pursuance of this suggestion Bell sent the following telegram to defendants: "Get plans P. C. Hale, 256 Church street. Have secured contract. Prices quoted February delivery. Examine plans and wire immediately if everything is clearly shown thereon." The evidence shows that defendants, upon receipt of the last quoted dispatch, at once obtained from P. C. Hale the plans and specifications mentioned. On the following day Milliken Bros. wired their San Francisco agent as follows: "Plans received and are being carefully examined. * * * The specifications call for Carnegie sections. Our bid of course was not based on their sections. * * * We suggest, in order to secure *prompt delivery required* [italics are ours], that we be allowed to substitute equivalent areas of angles and plates, or channels and plates, whichever can be secured quickest, in column schedule." Reid Bros., having been notified by Bell of this telegram and the proposed substitution of "equivalent areas of angles and plates," etc., for the Carnegie sections called for by the plans and specifications, addressed the following letter to the agent of the defendants: "There is no objection to your people substituting equivalent areas of equal strength and not exceeding in weight those shown of Carnegie Steel Company. * * * Prompt delivery has secured you this work, and is a very essential feature of the contract, so do not fail to impress upon your people the importance of it, and also the importance of shipping in the regular order called for in the specifications." The order of shipments, contained in the specifications, provides: "In order to avoid delay in erection, material must be shipped in the order in which it is to be placed, i. e., beginning at the basement, each story and floor must be shipped in such complete manner as to allow each of said stories or floors to be entirely completed in its erection, and ready for immediate reception of masonry and walls." A few days after the 10th of January, according to the testimony of Mr. Bell himself, Mr Reid informed him that the first shipment of steel would be required the last of February or the 1st of March. This shipment was to include all the material necessary to complete the first tier, and Reid requested Bell to have the steel shipped "tier by tier at intervals approximately one week apart." By "tier" was meant a floor complete; that is, one story. The foundation work was finished during the month of February, and the construction had so far progressed that by the 1st of March the builders were prepared to begin the erection of the steel work.

The evidence shows that the building was not completed so that it could be occupied until about the 1st of October, 1900—approximately, if not actually, three months after the payment of ground rent, under the lease, had commenced. Witnesses for plaintiff, real estate dealers in San Francisco, testified as to the rental value of the premises from July 1, 1900, to October 1, 1900, and such value was by them variously estimated at from $2,500 to $3,200 per month. Witnesses for the defendants placed the rental value at a considerably lower figure.

The delay in the erection and completion of the building was occasioned, according to the testimony of Reid, the architect, Lang, the brick and wood contractor, and Arthur, the steel setter, to so-called "shop errors" (that is, errors made at the manufactory in the numbering of the columns and the adjustment of the connections of the steel), and to misshipments (that is to say, shipments out of order and in a haphazard manner). For illustration, it was stated by Mr. Reid that the first tier or floor was, as shipped, incomplete, and that tiers were shipped for floors not prepared or ready for steel erection in advance of those floors ready for the steel material. The delay thereby occasioned had, it is shown, and as would necessarily follow, a reactionary effect upon the work of masonry and carpentry. In other words, the brick and wood contractors were necessarily delayed by reason of the delay due to the misshipments. The building is not what is known strictly as a steel structure. Mr. Reid testified that the delay, caused by the manner in which the steel was shipped, covered a period of three months. Mr. Lang, the brick and wood contractor, stated that the delay in brick and carpentry work, occasioned by the nonarrival of the steel at the time and in the manner and order in which the contract called for its shipment, was 2 months and 18 days. There is no evidence in the record offered by the defendants directly contradictory of that of which we have presented a recapitulation. Counsel for defendants, however, undertake to show by an extensive argument based upon certain apparent discrepancies developed through the cross-examination of some of the principal witnesses for the plaintiff that the amount of damages assessed by the jury is unwarranted by the evidence. But, under the well-understood rule, where there appears a substantial conflict in the evidence (and, we think, as we have before suggested, that the testimony was pretty much all one one way upon the important points), we are precluded from going into the question thus presented. The evidence must be so plainly and palpably insufficient to support the verdict that it can be said that such is the case as a matter of law before this court is justified in setting aside a verdict upon the evidence or disturbing the findings of the trial court. The record here does not authorize us to make any such ruling. The discrepancies or inconsistencies which may have been brought out by an examination or by cross-examination of the witnesses are also matters for the jury to pass upon and settle to their own satisfaction. Their verdict, finding the facts in a particular way, forecloses us from any inquiry into the question as to whether certain witnesses declared the truth or otherwise, or whether inconsistent statements which may have been shown by their cross-examination were sufficient to have discredited their testimony or not. The statement thus made of this proposition is only a trite declaration of the rule by which appellate courts are uniformly governed in this country with respect to their power of reviewing questions of fact. It is enough to say, however, that we have given the record careful and painstaking examination, and our conclusion is, upon this point, that the verdict and judgment are abundantly supported by the evidence.

There were numerous objections interposed against the admission of certain evidence, some of which are not discussed in the briefs, and therefore not urged here. As to some of the objections, it may be said generally that in a case of the character of the one at bar, as disclosed by the pleadings, it is proper to show all the circumstances surrounding the transaction leading up to the making and the manner of the execution of the contract. The circumstances which led to the making of this contract were fully made known to the defendants, or their agent, who was acting within the scope of his authority as such in all his dealings with plaintiff, and it was, as we have declared, proper to place them before the court and jury. The lease between plaintiff and Jones, which explained the reason of the requirement of an early and prompt and proper delivery of the steel, and to the admission of which into the record objection was made, not only constituted relevant but important testimony. It, in fact, became a part of the contract, through other testimony, to the extent of fixing the time at which the steel should be delivered. Evidence of consequential delay —that is, the delay occasioned to the contractor of the masonry and woodwork and the delay caused to the steel setter—was proper to be received and considered by the jury in the determination of whether or not the contract was, in fact, broken through the negligence of defendants, and as finally aiding in the ascertainment of the amount of damages, if any, to which plaintiff was entitled by reason of the alleged breach of the contract. It would seem to require the citation of no authorities to uphold the position that special circumstances, if any, which might have entered into the making of the contract, or those attending its breach, if known to both parties, may be shown. The principle authorizing such evidence is quite elementary, and the books are replete with authorities illustrating its application. "If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and, thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of the contract under the special circumstances so known and communicated." Hadley v. Baxendale, 9 Exch. 341. See, also, Mitchell v. Clarke, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; Hawthorne v. Siegel, 88 Cal. 159 et seq., 25 Pac. 1114, 22 Am. St. Rep. 291; Booth v. Mill Co., 74 N. Y. 15; Long Island R. Co. v. Verree, 69 N. Y. 487; Richardson v. Chynoweth, 26 Wis. 656.

But the most important point presented is raised by the contention that the court below erred in refusing to permit defendants to show that there prevailed, and for many years had existed, in the city of San Francisco, "a general well-known usage among manufacturers of and dealers in structural iron and steel, similar to that furnished by defendants, as to the manner and way by which the weight of the material was determined and arrived at." The contract is silent, so far as express language is concerned, as to how the weight of the steel was to be determined—whether by what is known as "figured" or estimated weight, or by "scale" weight. The former, as we understand it, is the means of ascertaining the weight by a standard fixed and adopted by dealers in structural steel. For example, steel columns, girders, and other connections necessary for the steel part of the structure, according to their dimensions, are given a standard weight by manufacturers and dealers in such materials. "Scale weight" is the determination of the weight by what the material actually weighs in pounds. It is contended by appellants that if there existed in San Francisco at the time of the making of the contract among dealers in such material a custom, according to which the manner or method of ascertaining the weight of structural steel was determinable, then the contract is to be presumed to have been made with reference to such custom, and that it therefore became a part of said contract. Several California cases are cited in support of this view, but we do not think that they are exactly in point, or, at least, ought to be held applicable to the case here. The contract is evidenced by conversations, telegrams, letters, and the plans, specifications, and drawings. There is no controversy between the parties that the prices offered by defendants and accepted by plaintiff were for "so much per pound"; but it is claimed by appellants that the word "pound" "is of technical significance when used in connection with the sale of structural steel." But appellants first make the claim that their contention for figured weight is sustained by a certain clause in the specifications. The clause referred to reads: "Figured dimensions in all cases to be taken in preference to scale measurements, and no important dimensions shall at any time or under any circumstances be determined by scale, but should drawings not show all required dimensions in figures, the contractor is to apply to the architects for such figures, and shall all conform to them as a part of the contract." According to the interpretation of that clause by appellants, the contract itself, of which the specifications became a part, expressly points out that the quantity of steel furnished shall be determined by figured or dimension weight. But that clause is not open to such a construction. If it were, then certainly, as pertinently suggested by counsel for respondent, the court's ruling in excluding the proffered testimony relative to the alleged custom could not be error, since to prove by parol what in terms the contract already provides for would be the work of supererogation or the assumption of an unnecessary burden by defendants. The clause is manifestly addressed to the contractor for his guidance in the erection of the building. The real meaning of it is so clearly explained in the brief of respondent that we shall adopt the language of counsel in the statement of what we conceive to be its true construction: "The clause plainly means that lengths are not to be calculated from the lines of the plans which obviously were drawn on a reduced scale. If dimensions are noted on the plans in figures, they shall prevail over scale or measured dimensions. If on any line the length is not noted in figures, the contractor must not calculate its length by scale, but must apply to the architect for the figures." The contention as to the meaning of that clause being thus disposed of, the question remains: Did the court err in disallowing the testimony offered to prove the alleged usage?

The Legislature of this state has established a standard of weights and measures, according to which, by the provisions of section 3222 of the Political Code, "all contracts made in this state for work to be done or for anything to be sold or delivered by weight or measure," must be construed. The standard of weights and measures is thus fixed by section 3209, supra: "The standard of weights * * * now in charge of the Secretary of State, being the same that were furnished to this state by the government of the United States, and consisting of * * * nine avoirdupois weights of one, two, three, four, five, ten, twenty, twenty-five and fifty pounds, respectively, * * * are the standards of weights * * * throughout this state." There is no allegation in the answer, either in the denial of the averments of the complaint or in the paragraphs setting out the counterclaim that the word "pound," as used in the contract as pleaded, was understood by the parties in any other sense than its ordinary and primary and legal signification. It will, of course, be conceded that the phrase "avoirdupois pound," as used in the statute, and as commonly understood, means 16 ounces in weight. Section 3215, Pol. Code.

The case of Higgins v. Cal. Petroleum Co., 120 Cal. 629, 52 Pac. 1080, so much relied on by defendants, was where the plaintiff brought an action to recover "certain royalties on certain bituminous rock and liquid asphaltum mined by defendants," for which the latter agreed to pay "the sum of fifty cents per ton for each and every gross ton." The question there was: What did the parties mean by the word "gross"? Evidence was admitted at the trial for the purpose of showing that by usage at the place where the contract was made the word "gross" as used in the contract means a "long ton," or a ton consisting of "two thousand two hundred and forty pounds," and the court made a finding accordingly. The Supreme Court sustained the ruling, saying: "The contention of appellant is that the statute defines the meaning and use of the word 'ton' [Pol. Code, § 3222], and that the lease is unambiguous and cannot be explained or contradicted by parol evidence. Therefore, there could have been no evidence at the trial justifying the finding of the court that the phrase 'gross ton' used in the lease meant a long ton of 'two thousand two hundred and forty pounds.' Some decisions are cited apparently holding that a contract of this nature must be conclusively presumed to refer to the statutory weights and measures, at least, in the absence of a direct and express reference in the contract to a different standard, and in this connection it is argued that the adjective 'gross' does not refer to the measure—that is, to the number of pounds in the ton—but to the condition of the commodity when weighed, to wit, that the crude and unrefined asphalt is to be weighed, and not the refined product. I think the question is entirely settled by section 1861 of the Code of Civil Procedure, which reads as follows: 'The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.'" The same question was presented in the case of Higgins v. Cal. Petroleum Co., 109 Cal. 310, 41 Pac. 1087. There no evidence had been offered or received relative to the meaning of the word "gross." The court, in the latter case, held that "gross ton" meant the usual ton of 2,000 pounds avoirdupois, and that the word "gross" as used signified and was intended to describe the crude or unrefined product. In the case in 120 Cal., 52 Pac., subsequently tried, evidence was therefore admitted to show what must have been really intended by the use of the word "gross." It will thus be seen that the whole question in the Higgins Case turned upon the meaning of the word "gross" as employed.

The very purpose obviously of laws establishing standards of weights and measures is to render certain and unequivocal the meaning of the language of contracts involving matters to which such laws relate by a comparison of the language of the contracts to that of the law, and thus relieve the courts, in some measure at least, of the perplexing difficulties which must often confront them in seeking the actual intention of the parties to such contracts. The Legislature has wisely declared that it is the better policy that there should be a general law, effective and operative throughout the whole state, regulating such matters, and of which all persons are conclusively presumed to have knowledge, and through the assistance of which all contracts pertaining to the subject-matter of the statute may be satisfactorily construed. Viewed thus by the light of the written law, it is manifest that the opportunity for mistakes in an effort to ascertain what parties mean by the language of such contracts is at least minimized, if not altogether obviated. "If," as is well said in Evans v. Myers, 25 Pa. 114, "every section of the country may have its own weights and measures, to be established by its own customs, strangers would be entrapped into liabilities which they never intended to incur, and no one could know with precision the extent of his obligations." See, also, Green v. Moffett, 22 Mo. 529; Harris v. Rutledge, 19 Iowa, 399, 87 Am. Dec. 441. The Legislature certainly meant something by the enactment of the law regulating weights and measures, and the rule involved in section 1861, Code Civ. Proc., should not be so applied as to operate practically to repeal or nullify the entire chapter upon the subject of weights and measures. The law is founded upon experience and the soundest policy, and is, like all such enactments, designed for the better protection of the rights of parties acquired under such contracts. Is it to be doubted that the courts, in the construction of contracts, may feel an infinitely greater degree of assurance that they will arrive at a correct conclusion where, in the exercise of that all-important judicial function, they may be guided by the unflickering light of the written law rather than by some alleged usage of trade, proved, it may be, by conflicting evidence? We think the rule of construction of such contracts ought to be, as contemplated by the Legislature, that they are to be conclusively presumed to have been made in reference to the statute, unless the parties themselves have agreed or indicated in their contracts that their execution is to be governed by some usage of trade or custom prevailing in the community where they were made, or their terms are to be performed. Such a construction would give force and effect to the statute, and could not interfere with the operation in appropriate cases of section 1861 and other Code provisions established for the interpretation of contracts whose terms are expressed in doubtful or ambiguous language. And when we use the term "doubtful or ambiguous language" we mean language whose true meaning can find no exposition by reference alone to the language of the law itself, an end which we think can be attained in the cases of contracts of the kind under consideration.

Section 3222 of the Political Code is garbed in language as clear as a cloudless day, and, as observed, provides that "contracts made within this state for work to be done or for anything to be sold or delivered by weight or measure, must be construed according to the foregoing standards," referring to the preceding section establishing the standards of weights and measures. Is it to be held that that section means nothing? Is there to be found any enacted proviso qualifying the provisions of the law as to weights and measures in any particular so that they may be disregarded with impunity? In Rogers v. Mechanics' Ins. Co., 1 Story, 603, 608, Fed. Cas. No. 12,016, Judge Story uses the following language: "I own myself no friend to the indiscriminate admission of evidence of supposed usages and customs in a peculiar trade and business, and of the understanding of witnesses relative thereto, which has been in former times so freely resorted to; but which is now subjected by our courts to more exact and well-defined restrictions. Such evidence is often, very often, of a loose and indeterminate nature, founded upon very vague and indefinite notions of the subject; and therefore it should, as I think, be admitted with a cautious reluctance and scrupulous jealousy, as it may shift the whole grounds of the ordinary interpretation of policies of insurance and other contracts."

At page 656 of the second volume of his work on Contracts, Judge Parsons says: "Where certain things are to be done by the contract which the law has regulated in whole or in part, the contract will be held to mean that they should be so done as would be either required or indicated by the law." "The true office of usages of trade," says Greenleaf in section 251, volume 2, of his work on Evidence, "is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulation, but from mere implications, and acts of a doubtful and equivalent character; and to fix and explain the meaning of words and expressions of doubtful or various senses." "* * * But, although evidence of custom and usage may be introduced in a case to show what the meaning of the parties was in regard to the subject-matter of the contract, or to explain the meaning given in particular trades or occupations to certain words, yet evidence cannot be introduced of the custom when the same contradicts the plain and unambiguous words of the contract, or violates a settled legal rule of construction." Bigelow v. Legg, 102 N. Y. 652, 6 N. E. 107. The "settled legal rule of construction" in this state as to such contracts is to be found in the provisions of the law fixing the standard of weights and measures. The Legislature has said so in section 3222 of the Political Code. The word "pound," whose meaning is sought to be modified or changed, does not and cannot render the contract ambiguous, because it is a statutory word. "Evidence cannot be introduced of the custom when the same contradicts the plain and unambiguous words of the contract," says the court in Bigelow v. Legg, supra. There is no claim here, either expressly made, or deducible from the pleadings, the evidence or the briefs, that during the negotiations of the parties there was any discussion by or understanding between them that the word "pound" should be used in the contract in any other sense than the usual or statutory one. The contract, as pleaded, is clear and unambiguous. There is no obscurity in its language, and there can be shown no just reason why the word "pound" should be subjected to an interpretation by one of the parties peculiar to himself or his own views.

We are not to be understood as questioning the ruling in the Higgins Case, 120 Cal. 629, 52 Pac. 1080, in so far as it concerns the application of section 1861, Code Civ. Proc., to the peculiar circumstances of that case. But we do think that the decision unnecessarily lays down the rule too broadly, and we have no hesitation in declaring that if the language of the opinion is to be interpreted as holding the rule to be of such indiscriminate and universal application in the matter of the interpretation of express contracts as to embrace all manner of such instruments, regardless of the language in which they are expressed, and including those which, in certain respects, the Legislature has provided must be construed according to other rules adopted by it for that purpose, then we feel constrained to say that we cannot subscribe to it.

There is, however, no attempt made in the opinion in the Higgins Case, 120 Cal. 629, 52 Pac. 1080, to combat the authorities which it is therein stated were "cited apparently holding that a contract of this nature must be conclusively presumed to refer to the statutory weights and measures, at least in the absence of a direct and express reference in the contract to a different standard." Nor is there anything suggested in that case as to what disposition is to be made of section 3222 and the other sections of the Political Code fixing the standard of weights and measures. The conclusion we have reached, after a careful examination of the question under discussion, is that all contracts involving "work to be done, or anything to be sold or delivered by weight or measure," must be as required by section 3222, supra, construed by the light of the statute establishing in this state a standard of weights and measures, unless the parties have expressly agreed to, or used language fairly indicating an intention to be governed by, a different standard; that, if there ever existed anywhere in this state a custom or usage of trade in conflict with the sections of the Political Code referred to, it has been abrogated by those sections to the extent that the law shall prevail over such custom or usage of trade where the parties have not otherwise stipulated in their agreement. But we think that there are features in the Higgins Case which distinguish it from this. The word "gross" is not used in the statute, and has therefore acquired no legal signification, whereas, as shown, the word "pound" is so used and is defined. That the phrase "gross ton" has a peculiar meaning in commercial usage is shown by the declaration of Justice Temple in the Higgins Case "that the phrase 'gross ton' is often used in lieu of the phrase 'long ton' with which we are all familiar in commercial reports, and which always indicates a ton containing two thousand two hundred and forty pounds." The adoption of any other principle of construction than that by which we have been governed in reaching the conclusion here would, it seems to us, result in wiping off our statute books by judicial interpretation legislative provisions, against the wisdom of which no objection in our opinion can be made.

During the direct examination of James M. Reid the plaintiff offered, and the same was received in evidence by the court, a letter, under date of March 17, 1900, addressed to Bell, and written and signed by Reid Bros. This letter called to the attention of Bell the fact that the steel setters had experienced some difficulty in placing the steel columns, "the trouble resulting either from the improper placing of the brackets on the side columns, or the incorrect numbering of them." The inference from the letter was that the trouble and consequent delay was due to "shop errors" in adjusting the steel connections, or mistakes made in marking the plan numbers by which the steel setter should be governed in setting the steel, and for which errors and mistakes defendants were responsible. Testimony had been given on behalf of plaintiff that the steel materials had been marked with a shipping number which was plainly visible, and it also appeared that the plan numbers had been marked on the steel, but had been painted over so that they were somewhat obscure. The setter had undertaken to set the columns, etc., by the shipping number and thus had made the mistakes which caused the delay in this particular. During the cross-examination of Reid counsel attempted to put in evidence a letter from Bell to Reid Bros., dated April 6, 1900, upon the ground that it was a reply to the letter above referred to and explanatory thereof. The court sustained an objection to the admission of this letter. It is contended that the court erred in its ruling excluding the letter. The letter begins with, "I herewith return to you Mr. Arthur's bill of March 31st, and in reply will say that I have submitted a copy of this bill to the New York office, but, in the meantime, I do not consider Messrs. Milliken Brothers responsible for the mistake of Mr. Arthur in setting up the columns by the shipping number in place of the plan number." And then follows an explanation of how Mr. Arthur must have made the mistakes, and that the writer had pointed out the fact to him. The objection was that the letter was hearsay and self-serving. The offer was made, of course, under section 1854, Code Civ. Proc., which provides that "when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood, may also be given in evidence." The letter to which the one rejected is claimed to have been a reply is dated, it will be remembered, March 17th. The reference in the rejected letter to Mr. Arthur's "bill of March 31st" might indicate that it was not directly in reply to the letter of the 17th of March. There is, however, nothing in the excluded letter "which is necessary to make" the letter of March 17th "understood." There is but one theory upon which we can perceive that the letter might have been properly admitted, and that is that Reid Bros. in their 17th of March letter, having at least by insinuation charged defendants with the delay due to the mistakes of the steel setter, the refutation by the latter in the letter of April 6th of the charge would prevent the inference of acquiescence by apparent silence. But upon this theory the ruling is without prejudice to defendants, because Mr. Bell in his testimony (page 415, transcript) declared to the jury that the mistakes were due to the carelessness of the steel setter; that Arthur had set up the steel according to the shipping numbers, instead of the plan numbers; that the plan numbers were placed upon the materials so that they could easily be seen; that the shipping numbers upon the columns did not correspond with the setting numbers upon the plans, and that he had pointed these facts out to Mr. Arthur. Thus, it will be seen, defendants presented to the jury all that could by any possibility have been shown upon that question by the rejected letter.

The witness Bell, in detailing a conversation he had with one of the Reid brothers, said, among other things, "that they would not hold us down strictly to February shipments." Upon motion of plaintiff the quoted portion was stricken out by the court, on the ground that it was "incompetent, irrelevant and immaterial testimony." The claim of plaintiff is that the statement is only a conclusion of the witness. The part stricken out appears with an extended statement made by the witness of a conversation with Reid, and is presented in narrative form in the transcript, and it is somewhat difficult from the manner in which it thus appears to definitely say whether the language used by the witness was intended to represent what Reid actually said, or was only the witness' conclusion from what he said. The trial court was, of course, in a position to determine whether the part stricken out was a conclusion or not. But the ruling was harmless in any view, because, whether or not the shipments were to be made under the contract in the month of February, was immaterial, if, as we think the evidence conclusively shows, the understanding of the parties was that shipments were in any event to be so made that the building could be completed and occupied by the 1st of July, 1900.

Nor do we think the court committed error in sustaining the objection to the question propounded to the witness Arthur: "The amount of the bill which you rendered for all of this riveting and reframing amounted to $189, did it not?" The witness had already testified that the amount of the bill for the work referred to was the sum of $189, and therefore no injury could have resulted to defendants by the refusal of the court to allow a repetition of the statement. The fact was before the jury for all the purposes for which it might be pertinently used in the case.

While Mr. Reid was testifying, a letter, written by his firm to the defendants, under date of June 8, 1900, was called to his attention on cross-examination by appellants, and on their motion admitted in evidence. The letter related to the differences arising between plaintiff and defendants by reason of the delay in the completion of the building, and the causes thereof. On redirect examination, the witness, over the objection of counsel for defendants, was permitted to explain to the jury "under what circumstances that letter was written." The question elicited a statement to the effect that plaintiff was anxious to settle the trouble, and that witness had in view the purpose of "getting the lowest amount Hale would want to settle for, irrespective of figuring the damages, which it was impossible to do at that time." The letter fixed "the total time of delay at the minimum for the sake of amicable settlement, namely, one month and a half." As the time of delay suggested as the basis of settlement in said letter was considerably less than that to which the witness had testified in the case, it was important to present the reasons why and circumstances under which the letter was written. The objection was, we think, without merit. Defendants introduced the letter into the record, and, if there were any inconsistencies or apparent inconsistencies between the statements contained in the letter and the testimony previously given by the witness on any material point in the controversy, it was proper for the witness, who was the author of the letter, to explain them. A witness who has made at another time statements at variance with his testimony would have the undoubted right to explain or reconcile them with his evidence as given in the case, if he could do so. There can be no reason why the same principle should not apply where the explanation is as to a letter written by the witness, where, of course, there is not imported into such explanation a statement of extraneous matters, or facts foreign to a legitimate explanation. The explanation seems to have been well within the purpose for which it was offered, introducing nothing which could serve any other end than to show the reason why the proposition submitted in the letter was made.

The following instruction was given by the court at the request of plaintiff: "The contract of sale is admitted in the pleadings. It is admitted that on or about the 10th of January, 1900, the plaintiff, Hale Bros., purchased from the defendants, Milliken Bros., and Milliken Bros. sold to Hale Bros., certain steel for their building to be erected in San Francisco, at certain prices per pound. That said steel was to be delivered f. o. b. New York City, during the month of February, 1900. That said steel was to be prepared and shipped according to the plans and specifications prepared by Hale Bros.'s architects. One of the specifications which became a part of the contract was as follows. * * *" It is insisted by appellants that this instruction is erroneous for the reason that, as they contend, while the answer does not deny the contract for the sale of the steel, it does put in issue the allegation that such steel was to be delivered during the month of February, 1900, or during any specified month.

At the request of defendants the following instruction was given by the court: "Defendants, in their answer, do not deny the making of the contract, *as alleged in the complaint* [the italics are ours], other than they deny that they agreed to deliver the steel at any other place than the city of New York, in the state of New York."

The contract, as alleged in the complaint, is as follows: "Plaintiff agreed to purchase and defendants agreed to furnish and deliver all the steelwork required by the plans, specifications, and drawings made by the architects employed by plaintiff, to be used in the construction of a building to be erected by plaintiff on the lot of land leased, as aforesaid, by plaintiff from David R. Jones, at the following prices: * * * All of said steelwork to be delivered f. o. b. to plaintiff during the month of February, 1900, to enable plaintiff to complete and occupy said building on or before the 1st day of July, 1900, and all of said steelwork to be made and completed in conformity with the plans, specifications, and drawings prepared by the aforesaid architects and delivered in such condition as to be immediately set up in said building." The court submitted for determination by the jury the question as to the place at which the steel was to be delivered. The complaint nowhere by direct averment declares that the steel was to be delivered at any other place than New York City. We are of the opinion that the instruction complained of contained a fair statement of the contract admitted by the answer, and concerning the existence of which there was no controversy at the trial. The question at issue was not whether a contract had, in fact, been made by the parties, but whether or not there had been a breach of the terms thereof by one of the parties. The criticised instruction contains practically nothing more than was embraced in the instruction, from which we have presented an excerpt, given by the court at defendants' own request. It is true the answer denied that delivery was to be made in the month of February, but, even so, the appellants are not in a position to complain of an instruction which, in effect, only harmonizes with one given by the court upon their own suggestion. Besides, as we think we have shown, it is clear from the evidence that haste in the completion of the building was the controlling feature of the contract, as understood by both parties, and as pleaded. The complaint avers that the parties entered into the contract of sale with a plain understanding of the terms of the lease between Jones and plaintiff, and thus discloses the importance to the latter of the completion of the building so that it could be occupied by the 1st day of July, at which time payment of the rent for the ground was to begin. What we have said with reference to the ruling striking out certain portions of witness Bell's testimony applies with equal pertinency and force to the point under discussion. The important element of the contract was haste in the delivery of the steel; that is, such prompt delivery thereof as would insure the completion of the building by the time desired. Of what moment, then, could it be whether the steel was delivered in February or at a subsequent time, if the object sought by prompt delivery were nevertheless accomplished? Under the circumstances of the case as developed by the evidence the instruction could not have prejudiced the defendants.

There are many other errors assigned, some of which are referred to in the briefs of counsel as worthy of notice, but we deem it unnecessary to give them special attention. We have examined them all with care, and can see nothing in them impinging upon the substantial rights of defendants.

The judgment and order are affirmed.

We concur: BURNETT, J.; CHIPMAN, P. J.

### On Petition for Rehearing.

HART, J. We have given the petition for a rehearing of this cause careful consideration, and are unable to discover any reason for changing our views, as expressed in the main opinion, upon the questions discussed. It may be suggested that, since filing the original opinion in this case, there has come to our notice the recent case of Leonhart v. California Wine Association, Cal. App. Decs., vol. 12, No. 172 (Feb. 23, 1907), 89 Pac. 847, in which the court of the first appellate district discusses at some length the question of the resort to a custom or usage of trade for the purpose of interpreting the language of a written or other express contract. The authorities cited therein were not called to our attention by the attorneys in the case before us. We think some of them are applicable here. It appears to be the settled rule in this state, and ought to be, that where the contract is certain in its terms, parol proof of a usage is inadmissible. Withers v. Moore, 140 Cal. 591, 74 Pac. 159. We not only think that the rule thus stated is applicable here, but also reiterate our adherence to the position that, where a statute itself furnishes a rule of interpretation of certain contracts, as we think is the case here, that rule should be the sole guide of the courts in the interpretation of such contracts, unless the parties thereto, by said contract, have themselves interpreted the same, or furnished a rule by the stipulations of the contract for an interpretation different from that prescribed by the statute. The necessary effect of the application of the rule involved in section 1861 of the Code of Civil Procedure, to all cases of the interpretation of contracts, as contended for by counsel and as he insists is authorized by the opinion in the case of Higgins v. California Petroleum & Asphalt Co., 120 Cal. 629, 52 Pac. 1080, would be to provide easy means of varying the terms of any written contract by parol, however plain and well understood the language of such contract might be. We cannot conceive of a more dangerous application of a rule of construction or interpretation, and hardly think the court intended that section 1861, supra, should be pressed, in its application, to the extent to which the language in the Higgins Case may be construed as carrying it.

We feel satisfied with the conclusion reached upon all points made by counsel, and the petition for a rehearing will, therefore, be denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

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## In re DOMINICI'S ESTATE. (Sac. 1,442.)

(Supreme Court of California. May 9, 1907.)

1. Wills—Construction—Ambiguities—Evidence.

Testator gave his residuary estate to his sister J. and to his nephew S. "and his sister, my niece, all residing in" L., Germany. By codicil he recited that his sister J. was dead, and gave her share to "the other two residuary legatees therein named, S., and to his sister, my niece, whose name is K. and whose residence is S., Germany, share and share alike." S. had an only sister, who, at the time of the making of the will and codicil, was a resident of L., and the testator had a niece, the married daughter of another sister, whose name was K., and whose residence was S. *Held*, that the will presented a latent ambiguity within Civ. Code, § 1340, permitting extrinsic evidence to correct imperfect descriptions in wills, etc., and not a patent ambiguity within section 1318, requiring the court to ascertain the intention of a testator from the words of his will and the circumstances under which it was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1033-1036.]

2. Same.

Though extrinsic evidence is admissible to explain latent ambiguities in a will, and to perfect imperfect descriptions of beneficiaries or subject matter of gifts, no evidence is admissible to vary the testator's express intent; which must be decided from the will itself, assisted by such extrinsic evidence, and, where the evidence is to be employed merely as an aid to the court in determining the intent and that intent cannot be found, the gift must lapse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1033-1036.]

3. Same—Statutes—Construction.

Civ. Code, § 1340, providing that, where in a will there is an imperfect description or no personal property answers the description, mistakes and omissions may be corrected, but the declarations of the testator as to his intentions cannot be received, is a limitation on the general rule that, in case of a latent ambiguity in a will, the same may be removed by any evidence or declarations of testator, and it will not be extended beyond its actual language, and applies only to the incidental utterances or declarations of intent as distinguished from specific instructions given to an attorney in drawing a will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1023-1032.]

4. SAME.

Where a will without latent ambiguity expresses a clear intent, the declaration of testator to his attorney in drawing the will is inadmissible; such evidence being proper only where the description of the person or property by extrinsic evidence is shown to be doubtful or imperfect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1027.]

5. APPEAL — OBJECTIONS IN TRIAL COURT — ADMISSION OF EVIDENCE.

Where a party withdrew his objection to the admissibility of testimony, and asked the court to admit it subject to a subsequent motion to strike out, and no motion was made to strike, the admission of the testimony was not reviewable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1258.]

6. WITNESSES—PRIVILEGE OF ATTORNEY—INSTRUCTIONS AS TO WILL.

Code Civ. Proc. § 1881, subd. 2, prohibiting an attorney without the consent of his client from testifying as to any communication made by the client in the course of professional employment, does not prohibit an attorney who drew a will for his client from testifying in a suit involving the construction of the will to communications made by testator.

7. WILLS—CODICILS—EFFECT.

The disposition made by a will will not be disturbed by a codicil further than is absolutely necessary to give the codicil effect, and a clear disposition made by a will is not revoked by a doubtful expression or inconsistent disposition in a codicil.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 462.]

8. SAME.

Testator gave his residuary estate share and share alike to his sister J., nephew S., and his sister, testator's niece, all residing in L., Germany. By codicil he recited that his sister J. was dead, and gave her share to the other "two residuary legatees therein named, S., and to his sister, my niece, whose name is K., and whose residence is S., Germany, share and share alike." S. had an only sister who resided at L. Testator had a niece whose name was K., and who resided in S. Testator had been on terms of intimacy with the S. family, and there had been an absence of intimacy between him and K. and her parents. The attorney who prepared the will and codicil testified that in his discussion with the testator on the subject of family relationships he obtained the idea that the niece to whom the testator desired to leave one-third of the residuary estate was S.'s sister, and he supposed that K. was S.'s sister. *Held*, that S. acquired one-third of the residuary estate plus one-half of one-third, and his sister received one-third, and K. received one-half of one-third.

In Bank. Appeal from Superior Court, Stanislaus County; W. M. Conley, Judge.

In the matter of the estate of Joseph Dominici, deceased. From a decree distributing the estate pursuant to a construction given to the will of the deceased, Marie Kohler appeals. Reversed.

See 87 Pac. 389.

W. H. Hatton and L. J. Maddux, for appellant. W. O. Minor, J. W. Knox and Loewy & Gutsch, for respondents.

HENSHAW, J. Joseph Dominici died testate. Upon distribution question arose as to the interpretation of the provisions of his will and of a codicil thereto, and from the decree as ordered Marie Kohler appeals. The only matter here in controversy is a dispute over the conflicting claims of Marie Kohler and of Christiane Arndt.

The conflict arises under the following state of facts: By his will Dominici provided as follows: "Lastly, I give, bequeath and devise all the rest, residue and remainder of my property, real and personal, of whatsoever kind or character, or wheresoever situated, share and share alike, unto my sister, Louise Jahnke, and unto my nephew, Heinrich Schluter, and his sister, my niece, all residing in Luchow, Hanover, Germany." A codicil, made about three months thereafter, is as follows: "Whereas, it has come to my knowledge that my sister, Louise Jahnke, one of the residuary legatees therein named, is dead, I hereby bequeath, give and devise the share of my said estate in said will given, bequeathed and devised to my said sister to the other two residuary legatees therein named, Heinrich Schluter, and to his sister, my niece, whose name is Marie Kohler, and whose residence is Salzwedel, Altmark, Germany, share and share alike."

No doubt, ambiguity or uncertainty arises upon the face of these provisions. No conflict between them is disclosed; for, while the residence of the testator's niece, Schluter's sister, is given in the will as being Luchow, and in the codicil as Salzwedel, so far as appears from the face of the instrument, the facts might have been that her earlier residence was in Luchow, and her residence at the time of the codicil in Salzwedel. Nor does the name of Marie Kohler, described as the sister of Schluter and the niece of the testator, complicate matters upon the face of the writing, since Marie Kohler might have been the name of a married sister of Schluter. But, when it was attempted to make application of the residuary devisees and bequests to the persons designated, extrinsic evidence at once disclosed a difficulty. Heinrich Schluter did have a sister, and one sister only, who at the time of the making of the will and at the time of the making of the codicil was a resident of Luchow, Hanover. She never resided in Salzwedel. She was unmarried, and her name was Christiane Schluter. Upon the other hand, the deceased did leave a niece, the married daughter of another sister, whose name is Marie Kohler, and whose residence is Salzwedel, Altmark, Germany. There is thus disclosed a typical case of a latent ambiguity. It is not a patent ambiguity contemplated by section 1318 of the Civil Code, but a latent ambiguity, to which section 1340 of that Code is directed. That section provides as follows: "When applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received." In its effort, therefore, to determine the true intent of the testator, upon the disclosure of this latent mistake in description, the trial court took extrinsic evidence, as it was proper to do. It concluded that the testator intended to name three residuary legatees, namely, Heinrich Schluter, his sister, Christiane Schluter, and the testator's other niece, Marie Kohler, and so decreed distribution of the residuary third of the estate in equal portions to these three. But this does manifest violence to the expressed intention of Dominici. In terms the codicil declares that the residuary one-third originally left to Louise Jahnke is devised "to the other two residuary legatees" in the will named. There can be but two persons whom the testator had in mind, and, as Heinrich Schluter is indisputably one of these, it is to be determined whom he intended as the other. For even in cases where extrinsic evidence is admitted to explain latent ambiguities, and to perfect imperfect descriptions of beneficiaries, or the subject-matter of devises or bequests, no evidence is admissible to change or vary the testator's expressed intent. This must always be deduced from the will itself, assisted by such extrinsic evidence. The proofs afforded by such evidence are to be employed merely as an aid to the court in determining what in fact was the expressed intent of the testator; and, if that intent may not be so found, the devise or bequest must lapse, since it is not within the power of a court to make a new will. Estate of Young, 123 Cal. 337, 55 Pac. 1011.

The section of the Code above quoted forbids in the giving of such evidence the reception of mere declarations of the testator as to his intentions. This is a limitation upon the general rule which, as stated in 2 American & English Ency. of Law (2d Ed.) p. 298, is that in case of a latent ambiguity, where there are two persons or things equally answering the description, such ambiguity may be removed "by any evidence either of circumstances or declarations of the testator." The text of this citation will be found abundantly supported by authority, and our Code provision limiting the scope of the evidence which may be received appears to be at variance to the general rule. It will not be extended, therefore, beyond its actual language, and will be held to apply to the mere incidental fugitive utterances or declarations of intent, as distinguished from the specific instructions which it may be proved were given. There is, of course, a broad difference between testimony as to the casual remark of a man as to his intention to leave a portion of his estate to this person or the other, and the positive instructions which he has given to his attorney in the very performance of the testamentary act, and in any proper case such instructions may be received, without doing violence to section 1340 of the Civil Code. Thus, in Vernor v. Henry, 3 Watts (Pa.) 385, an ambiguity arose from a discrepancy between the name and the description of a devisee as here, and it was held that explanatory declarations made by the testator at the time of the execution of his will, indicative of his design to give his property in a particular way to a particular person, were admissible in evidence to explain the ambiguity. See, also, In re Gregory Settlement and Will, 34 Beav. 600. It should, of course, be unnecessary to add that, where a will without latent ambiguity expresses a clear intent, such evidence would never be permitted in an effort to show that the intent expressed was a mistaken one. It is only where the description of the person or property by extrinsic evidence is shown to be doubtful or imperfect that such evidence may be employed in the effort of the court to arrive at and declare the meaning and intent which the testator, by the terms of his will, attempted, however irregularly, to declare. This under the familiar rule of evidence that a doubt arising from extrinsic evidence may be removed by extrinsic evidence. In this case, with other testimony, that of the attorney who drew the will was taken upon the matter. By respondent it is objected, though the objection is not pressed with any earnestness, that it was error to receive the testimony of the attorney because it was the disclosure of privileged communications, forbidden by section 1881, subd. 2, of the Code of Civil Procedure. Doubtless the argument is not strongly urged because it appears from the record that, though respondent originally objected to the taking of the attorney's testimony, he withdrew his objection and asked the court to admit the testimony, subject to his subsequent motion to strike out. The testimony was so admitted, and respondent did not move to strike it out. Hence the evidence appears in the case, not only without objection upon her part, but absolutely by her invitation. In the second place, the reason for the rule prescribed in section 1881 ceases in a case such as this, and with the reason the rule itself ceases. Thus, in Doherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 727, 17 L. R. A. 188, 34 Am. St. Rep. 258, it is said: "Undoubtedly, while the testator lives, the attorney drawing his will would not be allowed without consent of the testator to testify to communications made to him concerning it, or to the contents of the will itself; but after his death, and when the will is presented for probate, we see no reason why, as a matter of public policy, the attorney should not be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator." See, also, In re Wax, 106 Cal. 348, 39 Pac. 624; Estate of Nelson, 132 Cal. 187, 64 Pac. 294. As said in Weeks on Attorneys at Law, § 165: "The privilege does not apply when the question arises as to the intention of a deceased person in respect to the disposition of his estate. * * * In the case of testamentary dispositions the very foundation of the rule appears to be wanting."

Coming, now, to consider the evidence in the case, it appears that Louise Jahnke was a sister of the deceased, and that Heinrich Schluter and his sister, Christiane Schluter, were children of another sister, and that Marie Kohler was a married daughter of a third sister. It further appears that the deceased had been on terms of intimacy with the Schluter family, corresponding with them and knowing them well; that he knew the name of Christiane Schluter as well as that of her brother Heinrich, and it is in evidence that he wrote to Christiane Schluter shortly before the making of the will. The testimony shows that he was in constant and regular communication with the members of the Schluter family, and that he was kept fully informed of their family affairs. The Schluter family resided at the birthplace of the deceased, in the house he had helped to build before he left Germany. It is in evidence, moreover, that he frequently talked about the Schluter family, calling the individual members of it by name, frequently speaking by name of his niece, Christiane Schluter. As respondent expresses it, "the evidence shows that the Schluters were in his mind all the time." There was an absence of intimacy between him and Marie Kohler and her parents, and there had been little communication between the deceased and the family to which Marie Kohler belongs in the last 20 years of his life. So much for the proofs of relationship and the attendant circumstances. Mr. Dennett, who drew the will and the codicil thereto, testified that at the time he drew the will Louise Jahnke and Heinrich Schluter, the other two residuary legatees, were named, the name of the third residuary legatee was omitted because deceased could not remember her name; that it was understood between the attorney and Dominici at the time the will was drawn that at some future time Dominici would bring his attorney the name of the person to whom he desired the remaining one-third of his property to go, and that, when Dominici obtained the name, a codicil should be written, or such change made in the will as would give the name of such third residuary legatee; that in accordance with this understanding Dominici subsequently came to Dennett's office, and the codicil was drawn; that the name and description of Marie Kohler, Salzwedel, Altmark, Germany, was furnished by Dominici to the attorney; that Dominici explained that he had received a letter from Germany giving the required name and residence. Mr. Dennett's recollection also was that Dominici wrote the name and address of Marie Kohler first in German and then in English; that the name "Marie Kohler, residing at Salzwedel, Altmark, Germany," was undoubtedly written in the codicil in accordance with Dominici's instructions; that Dominici never at any time during the execution of the will or of the codicil mentioned the name of Christiane Schluter. (It may be noted in this connection that the name "Christiane Schluter" nowhere appears in the will.) In the discussion of the family relationships, the attorney obtained the idea that the niece to whom Dominici desired to leave one-third of his property was Heinrich Schluter's sister, and that he supposed that Marie Kohler was, in fact, Heinrich Schluter's sister.

The intimacy between the deceased and the Schluters, and the fact that the Schluters were always in the deceased's mind, is, as a weapon in the hands of respondent, a two-edged sword. If the deceased really intended Christiane Schluter because of the family intimacy, there is no reason from the evidence why he should not have named her, and every reason why he should. Upon the other hand, if he really intended Marie Kohler, by reason of the estrangement between the families and the infrequent communications between them, it is reasonable to suppose that he might not recall the name and residence of the niece whom he actually designed and intended should share his bounty. There does not appear to have been any hostility between the deceased and Marie Kohler, and it is at least as natural that, in the prospect of death, he should have desired each of his sister's families to have shared in his estate, as to have supposed that he designed, for no real reason, to exclude one of them. If Marie Kohler be understood as a residuary devisee and legatee, then by his will he would have made provision that the residuary portion of his estate go in equal shares to the representatives of the families of each of his three sisters. Of even more significance is the fact that he brings to his lawyer and formally gives to him in writing the omitted name and address. If we can conceive that by some lapse of memory, he had at the time of the making of the will forgotten the name of Christiane Schluter, while remembering the name of Heinrich Schluter, her brother, it is not to be supposed that he would have come back, three months after, with the accurate name and address of one niece, under the mistaken supposition that he was really describing Christiane Schluter, who did live in Luchow, and who had never resided in Salzwedel, where Marie Kohler in fact did reside. From what has been said it is thus apparent that in the codicil either the words "his sister" is an error in description, and should be rejected, or the phrase "whose name is Marie Kohler and whose residence is Salzwedel, Altmark, Germany," is a misdescription and that it should be rejected. The circumstances and the evidence as heretofore set forth leave little room for doubt. The consequence attaching to the formal presentation of the name and address of Marie Kohler must be held to be the controlling and dominating circumstance, and, so far as the codicil is concerned, the words "his sister" and "above named" must be rejected as erroneous.

This conclusion, however, affects and can affect the codicil alone. The residuary clause in the body of the will is free from all doubt and uncertainty, latent or patent, and extrinsic evidence, therefore, cannot be admitted to change its terms. However strong the presumption may be that Marie Kohler was also intended in the body of the will, the presumption is one which may not be indulged and in support of which no evidence would be admissible, since the language of the will itself is free from doubt and from the need of construction. It leaves clearly and distinctly, and with no possibility for the play of construction, one residuary third of his estate to the sister of Heinrich Schluter, niece of the deceased, who resides in Luchow, Hanover, Germany. Christiane Schluter, now Christiane Arndt, completely and perfectly fills this description, and is entitled to take, and this, regardless of any disturbing effect which it may be thought that the codicil has upon it. It is a rule of construction that dispositions made by a will are not to be disturbed by a codicil further than is absolutely necessary in order to give that codicil effect, and a clear disposition made by a will is not revoked by a doubtful expression or inconsistent disposition in the codicil. In re Ladd, 94 Cal. 674, 30 Pac. 99; Kane v. Astor's Executors, 5 Sandf. (N. Y.) 533. Moreover, it is to be noted that the codicil itself does not attempt to overthrow the disposition made by the will, excepting as to the one-third of the residuum of the estate by the will devised and bequeathed to Louise Jahnke. It is upon this one-third alone that the codicil operates, and by its terms one-half of that one-third vests indisputably in Heinrich Schluter and the other moiety of the one-third vests in Marie Kohler. The residuary disposition then should be to Heinrich Schluter one-third plus one-half of one-third, or three-sixths; to Christiane Arndt one-third, or two-sixths; and to Marie Kohler one-half of one-third, or one-sixth.

It is ordered that the decree appealed from be reversed, and distribution ordered in accordance herewith.

We concur: BEATTY, C. J.; McFARLAND, J.; SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.

151 Cal. 176

## CITY OF REDONDO BEACH v. BARKLEY.
(S. F. 4,638.)

(Supreme Court of California. May 9, 1907.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS—RESOLUTION OF NECESSITY—ELECTION—MEETINGS OF BOARD OF TRUSTEES.

St. 1901, p. 27, c. 32, § 2, provides that whenever the legislative branch of any municipal corporation, by resolution passed by a two-thirds vote and approved by the executive, shall determine that the public necessity demands a municipal improvement, the cost of which will be too great to be paid out of the ordinary annual income of the municipality, it may at any "subsequent meeting" of such board call a special election, and submit the question of incurring a debt for the purpose. *Held*, that a resolution calling an election under such section, passed at an adjourned meeting of the board of trustees immediately succeeding the meeting at which the resolution of public necessity was adopted, was passed at a "subsequent" meeting as required.

2. SAME—CLASSIFICATION OF CITIES—"EXECUTIVE."

St. 1883, p. 268, c. 49, § 858, provides that in cities of the sixth class the trustees are to choose one of their number president; section 875 declares that such president shall preside over meetings of the board, and shall sign warrants drawn, written contracts, and conveyances made by the city or town; and section 863 declares that every ordinance shall be signed by the president of the board. *Held*, that the president of the board of trustees of a city of the sixth class was the "executive" of the city, within St. 1901, p. 27, c. 32, § 2, providing that resolutions of necessity for public improvements involving the creation of municipal indebtedness, and the ordinance calling a special election to obtain the consent of the voters, should be "approved by the executive" of the municipality.

In Bank. Application for mandamus by the city of Redondo Beach against S. D. Barkley, city clerk. Writ granted.

Arthur Wright, City Atty., for petitioner. O'Melveny & Stevens, for respondent.

SLOSS, J. The city of Redondo Beach, a municipal corporation organized as a city of the sixth class under the municipal incorporation act of March 13, 1883 (St. 1883, p. 93, c. 49), filed its application for a writ of mandate to compel the respondent, its city clerk, to countersign certain bonds which the petitioner proposes to issue. An alternative writ issued, whereupon the respondent demurred to the petition, and the only question is whether the statutory steps precedent to the issuance of the bonds were properly taken.

From the allegations of the petition, which are not disputed, it appears that the board of trustees of the city, at a regular meeting held on January 8, 1906, passed and adopted, by the unanimous vote of all its members, a resolution determining that the public interest and necessity demanded the construction by the city of a septic outfall sewer system; that the estimated cost of the said improvement was $80,000; and that said cost was too great to be paid out of the ordinary annual income and revenue of the city. This resolution was on the 8th day of January, 1906, approved by the president of the board of trustees, and was duly published. On said 8th day of January, 1906, the board of trustees adjourned the regular meeting to the 15th day of January, 1906, and on the latter day to the 29th day of January, at which time said board, by the unanimous vote of all its members, passed and adopted an ordinance calling a special election to submit to the qualified voters of the city the proposition of incurring a debt of $80,000 for the purpose of constructing such sewer system. This ordinance was, on the 29th day of January, 1906, approved by the president of the board of trustees, and was duly published. The special election was held as provided in the ordinance, and more than two-thirds of the voters voting at said election voted to authorize the issuance of the bonds. The board of trustees canvassed the returns, and declared that said bond issue had been carried by the requisite two-thirds vote. On April 30, 1906, the board sold the bonds for par. The respondent refuses to comply with repeated requests to countersign the bonds, and this proceeding is instituted to compel him to countersign them.

It is conceded that, except in two particulars, the steps required by the statute for the issuance of such bonds were properly taken. The objections urged are these:

1. The resolution determining that the public interest and necessity demanded the construction of the sewer system was passed at a regular meeting of the board held on January 8, 1906, and the ordinance calling the special election was passed at an adjournment of said meeting, on January 29, 1906. It is claimed that this was not a compliance with the statute under which the bonds were to be issued (St. 1901, p. 27, c. 32), in that said statute requires that the ordinance calling the special election be passed at a "subsequent meeting" to that at which the resolution of public interest and necessity was adopted. Section 2 of the act in question reads: "Whenever the legislative branch of any city, town or municipal corporation shall, by resolution passed by vote of two-thirds of all its members, and approved by the executive of said municipality, determine that the public interest or necessity demands the acquisition, construction or completion of any municipal improvement, * * * the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, it may at any subsequent meeting of such board, by the vote of two-thirds of all its members, and also approved by the said executive, call a special election and submit to the qualified voters * * * the question of incurring a debt for the purpose set forth in said resolution." The respondent argues that an adjourned meeting is not a "subsequent meeting"; that in contemplation of law the meeting which is held pursuant to adjournment is merely a continuation of the original meeting. It is, doubtless, true that an adjourned meeting is, in a sense, a part of the meeting which was adjourned, and we are cited to cases, not dissimilar to the present, in which it was so held. Thus, in Staates v. Borough of Washington, 44 N. J. Law, 605, 43 Am. Rep. 402, an ordinance was introduced at a meeting of the common council held on May 2d. The meeting was adjourned to May 9, 1868, at which time the ordinance was passed. It was held that this was not a compliance with a clause of the charter, providing that no ordinance (of the character of the one in question) "shall be enacted or passed, unless the same shall have been introduced before the common council at a previous meeting." To the same effect is Flood v. Atlantic City, 63 N. J. Law, 530, 42 Atl. 829. On the other hand, in Montgomery v. Dormer, 79 S. W. 913, 181 Mo. 5, the contestant in an election contest gave notice that he would contest the election of respondent at the next term of the circuit court, to be held on December 15, 1902. This was an adjourned session of the October term; the next regular term being in January. The notice was held to authorize a hearing at the December term under a statute providing that "the contest shall be determined at the first term of such court that shall be held * * * after service of notice of contest," etc. A similar ruling was made in Burkleo v. County Commissioners, 38 N. W. 108, 38 Minn. 441, under a statute providing that, when a petition for opening a road is presented to the board, the county auditor shall lay it before the board "at their next session thereafter." See, also, State v. Ross (Wash.) 89 Pac. 158. In none of these cases was the language of the statute or charter the same as that here involved, and we think the question is one that must be determined by a consideration of the precise terms employed by the Legislature, read in the light of the purposes sought to be accomplished. The statute of 1901, authorizing the issuance of bonds for municipal improvements, provides for a determination by the legislative branch of the municipality that the public interest or necessity demands the improvement in question. There is no requirement that this determination shall be published, or that notice of it shall be given in any way. All that is required is that the special election, at which the matter is to be submitted to the voters, shall be called at "any subsequent meeting of the board." Such subsequent meeting may be a stated or a special meeting, and no particular time is required to intervene. The purpose of the provision seems to be that some period shall elapse be-

tween the close of the session which declares the necessity of the meeting and the opening of the session at which the election is called. The council is not to bring up the question, pass on its necessity, and provide for its submission to the voters at a single meeting. There is to be some period for deliberation between the first step and the second; but, as no particular period is specified, we see no reason why the object of the statute is not accomplished as fully where the meeting is adjourned to a stated time, as where it is adjourned sine die, and a new meeting called. These views are confirmed by a consideration of the prior statute providing for the issuance of bonds for municipal improvements. Under that act (St. 1889, p. 399, c. 261), the legislative branch was required to determine the necessity, etc., of the proposed work by ordinance, which was to be published for at least two weeks. After such publication, they might "at their next regular meeting after such publication, or at an adjourned meeting," call a special election. The two statutes being in pari materia, the former may, under well-known principles, be considered in giving a construction to the latter. We see, then, that the later statute eliminates the provision for a two weeks' publication of the determination of necessity, and, in place of the requirement that the election may be called at the "next regular meeting after such publication or an adjourned meeting," substitutes the simpler and more general phrase "at any subsequent meeting." It seems clear that the Legislature, in making this change, did not intend to restrict the power which the common council had under the earlier act, but to enlarge it, and that any subsequent meeting, whether regular, special, or adjourned, comes within the terms of the law. See Adcock v. Lecompt, 66 Mo. 40.

2. Section 2 of the act of 1901 provides that both the resolution of necessity and the ordinance calling the special election shall be "approved by the executive" of the municipality. The approval in this instance was by the president of the board of trustees. It is argued that the municipal incorporation act does not make the president of the board of trustees of cities of the sixth class the executive of the municipality, and that, as to such cities, no executive is provided. There is no merit in this objection. The statute of 1901 provides for the incurring of bonded indebtedness by "any city, town or municipal corporation incorporated under the laws of this state." It was not intended that any class of cities should be denied this power, and, when the statute speaks of the "executive" of the city, it must, as to cities which have no mayor, be taken to refer to the officer whose duties approximate most closely to those of the mayor, or "executive," in cities which have such officer. In cities of the sixth class, the trustees are to choose one of their number president. Mun. Incorp. Act, § 858; St. 1883, p. 268, c. 49. Such president is to preside over meetings of the board, to sign warrants drawn on the treasurer, written contracts entered into by the city or town, and conveyances made by the city or town. Section 875. It is also provided (section 863) that every ordinance shall be signed by the president of the board of trustees. These functions correspond to those of the mayor in the classes of municipal corporations in which a mayor is elected as such. We are satisfied that the approval of the resolution by the president of the board met with the requirement of the act of 1901.

A peremptory writ of mandate will issue, as prayed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

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151 Cal. 143

## In re BOYES' ESTATE. (Sac. 1,430–1,437.)

(Supreme Court of California. May 9, 1907. Rehearing Denied June 8, 1907.)

1. GUARDIAN AND WARD—ACCOUNTING—ISSUES AND PROOF.

Under Code Civ. Proc. § 1635, providing that, on the hearing of an account, any person interested may appear and file his exceptions in writing to the account and contest the same, a hearing on objections to a guardian's account was limited to the issues raised by the account and the written objections filed, so that, in the absence of a written objection that there was a fund available for the wards' support other than the principal of their estates, evidence in support of such claim that the guardian might have obtained an order for a family allowance was inadmissible.

2. SAME—EXCEPTIONS.

Exceptions to a guardian's account, within Code Civ. Proc. § 1635, providing that, on the hearing of an account, any person interested may appear and file exceptions in writing to the account and contest the same, are not limited to a mere written statement of the points or matters wherein the credits or charges in the account are claimed to be objectionable, but may also include a statement of any affirmative matters of fact not appearing on the face of the account, which it may be claimed require additional charges in favor of the estate or the rejection of credits.

3. SAME—DUTY OF COURT.

In proceedings for the allowance of a guardian's account, it is the duty of the court, regardless of exceptions, to scrutinize the account, correct all errors, reject all items of credit which appear illegal or excessive, and generally to inquire into the truthfulness and accuracy of the items of charges and credits and of the facts alleged in the accompanying report.

4. APPEAL—ADMISSION OF EVIDENCE—PREJUDICE.

Where certain papers were admitted in proceedings for the judicial settlement of a guardian's account for the sole and express purpose of proving a question not within the issues, the ruling was not harmless because the papers or parts of them were competent evidence of other facts material to the case as finally developed.

5. GUARDIAN AND WARD—ACCOUNTING—HEARING—ADMISSION OF EVIDENCE—WAIVER OF ERROR.

The guardian did not waive the error by subsequently introducing evidence in rebuttal on the question sought to be proved by the erroneous introduction of the papers.

6. SAME—CHARGES—INTEREST.

Where a guardian delayed settlement of his final account after the ward arrived at age, there could be no valid objection to a charge voluntarily made against himself of 8 per cent. interest on the balance in his hands, in the absence of evidence that he received more.

7. SAME—EXPENDITURES AFTER MAJORITY.

Where a guardian after the ward became of age continued as before, with the ward's knowledge and consent, to support him and pay money to him out of the ward's estate received by the guardian during the ward's minority, and there was nothing unfair or unjust in the transactions, the guardian should be allowed credit in his account for the estate thus applied to the ward's use to the extent of the amount of the estate remaining in his hands, but was not entitled to a personal claim against the ward for any overpayment.

8. SAME—CREDIT FOR MAINTENANCE.

It was improper for a guardian to charge a ward's account for support of the ward as a member of a family consisting of the ward's mother and brothers and sisters for a year during which the ward was not at home.

9. SAME—DUTY OF GUARDIAN.

The fact that a guardian was one of the administrators of the estate of the wards' deceased father was immaterial to the determination, on the settlement of his accounts as guardian, of the question whether his duty as administrator required him to obtain a family allowance for the wards, since, if such was his duty, and he failed to perform it, the remedy must be sought in the administration proceedings or by suit against him for breach of such duty, and not by exceptions to his account as guardian.

10. SAME.

Where a guardian was one of the administrators of the estate of the wards' father, and if he had attempted to enforce his claims against the estate as a mortgagee, and had not borrowed from the estate of his wards to pay debts of the estate and had applied for a family allowance, the estate would have been rendered insolvent, the guardian did not abuse his discretion in failing to apply for such allowance and in using the wards' estate for their support.

11. ACCOUNT—FORM—ITEMIZED CREDITS.

Where a guardian was one of the administrators of the estate of the wards' deceased father, and as such borrowed money from their estate to pay debts of the father's estate under an agreement with the mother of the wards that they should live together as members of a family, and that there should be paid out of the funds of the father's estate for their maintenance a sum equal to the interest which would accrue on the money so borrowed, and that such sums paid for maintenance should be charged against the children by the guardian, and that he should credit them with the same sums in his accounts as guardian as interest collected on the money loaned, an account crediting the guardian with maintenance of the minors for a certain period with an amount exactly equal to a charge for interest so received was sufficiently specific.

12. SAME — ALLOWANCE — ORDER OF COURT — NECESSITY.

An order of court is not necessary to enable a guardian to charge a fixed reasonable sum by the week, month, or year for the maintenance of his wards.

13. SAME—APPORTIONMENT OF EXPENSE.

Where, after the death of the father of certain wards, it was arranged between their guardian and the mother that the mother should continue to support and maintain the wards in one family, it was no objection to the guardian's account that household expenses for the benefit of the family were apportioned numerically among the wards without reference to differences of actual consumption.

14. SAME—PAYMENT OF BALANCE.

Where it did not appear that a new guardian had been appointed to succeed an accounting guardian, an order discharging the accountant on paying the balance to another described as the guardian of the minors was erroneous.

15. SAME—SUPPORT OF CHILDREN—DUTY OF MOTHER.

While a mother ordinarily owes the duty of nurturing and caring for her children without compensation from their estate, circumstances may exist which might justify their guardian in paying the mother for her services in caring for such children out of their funds.

16. SAME—EXPENDITURE OF PRINCIPAL.

Where the income of a ward's estate is insufficient for his support, and expenditures from the principal are necessary and reasonable, and are made in good faith, the guardian may be allowed credit therefor without obtaining authority from the court in advance.

Department 1. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Judicial accounting by Jerome Churchill, as guardian of Alice Amelia Boyes and others, children of Charles B. Boyes, deceased. From an order settling the accounts, the guardian appeals. Reversed.

Gillis & Tapscott, for appellant. John H. Magoffey and R. S. Taylor, for respondents.

SHAW, J. On November 27, 1903, Jerome Churchill filed his accounts as guardian of the children of Charles B. Boyes, deceased. Although he was appointed as such guardian on July 10, 1890, this was the first account rendered to the court. There were eight of the children, and a separate account was filed for each child. At the time of filing the accounts five children, namely, Alice Amelia Boyes, Mattie Angeline Boyes, John Ethan Boyes, Fannie Jane Boyes, and Damie Elizabeth Boyes, had become of age. The five adults appeared, and each filed written objections to the account relating to him or her respectively. The attorneys for the adults were at the time of the hearing appointed by the court as attorneys to represent the three minors, but no written objections were filed in their behalf. The several accounts were heard together, and thereupon the court made a separate order settling each account. From each of these orders the guardian prosecutes a separate appeal. These appeals are numbered on the docket of this court for the Sacramento district, respectively, as follows: No. 1430, Alice Amelia Boyes; No. 1431, Mattie Angeline Boyes; No. 1432, John Ethan Boyes; No. 1433, Fannie Jane Boyes; No. 1434, Damie Elizabeth Boyes; No. 1435, Dora Maria Boyes; No. 1436, Lutie Anson Boyes; No. 1437, Charles Combs Boyes. The evidence is brought up in a consolidated bill of exceptions, and the appeals will be considered together.

1. The entire estate of the wards in the hands of the guardian consisted of the sum of $1,120 to each ward, derived from a life

insurance policy on the life of the father. The credits claimed by the guardian were almost wholly for money expended for their support, and it exhausted the respective estates, excepting those of the two eldest and the two youngest. The guardian, Jerome Churchill, and Margaret Jane Boyes, the mother of the children, were administrator and administratrix, respectively, of the estate of their deceased father, Charles B. Boyes. As such, they had filed three separate current accounts of their proceedings in said estate, which had been duly approved and settled by the court, and the estate still remained unsettled at the time of the hearing of the guardian's accounts. Upon the hearing of the latter, the contestants offered, and the court received in evidence over the objection and exception of the appellant, all the papers on file in the estate of John B. Boyes, deceased, including the three accounts rendered and settled, the inventory and appraisement, and proceedings resulting in a sale of real estate of the deceased. This evidence was offered to show the solvency of said estate and the value thereof, and expressly in support of the claim on behalf of the children; that there were sufficient assets of said estate to have supported the children during minority, if an order had been obtained for a family allowance for that purpose to the widow, or guardian; that it was the duty of the guardian to procure such an order; that he failed to do so; and that by reason of such failure he cannot, as guardian, be allowed any credit for payments out of the insurance money for such support. The objection of the guardian to the admission of this evidence was that it was incompetent, irrelevant, and immaterial.

We think the court erred in overruling this objection. In substance, the claim sought to be proven by the evidence was that there was another fund available for the support of the children which the guardian could have obtained for them, or for their use, that it was his duty to secure this fund, and that he had neglected to do so. The written objections to the guardian's accounts contained no suggestion of any such claim and tendered no such issue. One of the elemental rules of the law of evidence is that the evidence must correspond with the allegations and be confined to the point at issue. Code Civ. Proc. § 1868. If not, it is said to be irrelevant. 16 Cyc. 847, 1111; 1 Taylor on Evidence, § 217. The objection was therefore well taken, if the issues are to be considered as limited by the account and report on the one hand and the written objections on the other. That they are so limited and that the evidence is to be limited accordingly is the rule established by the Code and by the decisions of this court. Section 1635 of the Code of Civil Procedure provides that, upon the hearing of an account, any person interested may appear and file his exceptions in writing to the account, and contest the same. The word "exceptions" was probably used with reference to the equity practice of filing exceptions to the report of a master in chancery. But in the practice which has grown up in this state, under this section, the office of such exceptions has been much enlarged, and the word has come to include, not only a statement in writing of the points or matters wherein the credits or charges in an account are claimed to be deficient, defective, or erroneous in law, but also a statement of any affirmative matters of fact, not appearing on the face of the account, which, it may be claimed, require additional charges in favor of the estate, or the rejection of credits claimed against it. In the case of the Estate of More, 121 Cal. 639, 54 Pac. 148, the court says: "Under these provisions, if a person interested in an estate wishes to contest an account presented for settlement by the executor or administrator, he must file his exceptions in writing to the account, setting out specifically the grounds of his objections; and at the hearing he should be held limited to the exceptions so presented." In the same connection the court stated that, without any objections, it was the duty of the court to carefully examine the account and reject all unjust or illegal claims. These principles were again approved by the court in Estate of Marre, 127 Cal. 132, 59 Pac. 385, in which it is said that the rule that the exceptions must be in writing and the evidence limited thereto is a "salutary" one. We do not doubt, however, that, regardless of the filing of exceptions, the court has power, and it is its duty, to scrutinize the account, correct all errors therein, reject all items of credit which appear to be illegal or excessive, and generally to inquire into the truthfulness and accuracy of the items of charges and credits, and of the facts set forth in the accompanying report. And in the course of such investigation it may require and receive evidence to prove or disprove the several items and facts thus under inquiry, although no contest is made. But we are not dealing with an independent investigation set on foot by the court, for none was instituted. We are dealing with a contest created by the filing of written exceptions, and with the right of the contestant to introduce evidence in support of the objections therein set forth. As above stated, his right must be limited by the grounds of contest set forth in his exceptions, and the matters appearing on the face of the account and report. There was nothing in said account or report referring to such neglect of the guardian. It did not show whether the father's estate was solvent or insolvent, nor the amount of its assets, nor whether or not a family allowance had been made therein. The claim in support of which this evidence was offered and given was therefore affirmative matter which should have been stated in the exceptions, in order that the guardian might have notice and an opportunity to answer or avoid the same in any appropriate and legal manner.

We would not say that the admission of such evidence, under such state of the record, would in all cases be error so injurious as to require a reversal of the judgment or order. But in this case, as we shall presently see, the result of the admission of the evidence was substantially injurious to the appellant, and a reversal is necessary. In point of law these papers, or parts of them, were competent evidence of other facts material to the case as it finally developed. If they had been offered for the purpose of proving such facts, there would have been no error in admitting them. But the record shows that the papers were offered and admitted for the sole and express purpose of proving the solvency of the estate and thereby establishing the proposition that the appellant, as guardian, was not entitled to any credits whatever for any money of the wards received by him as guardian, and applied by him to their maintenance. Having been received and offered for that purpose over the objection and exception of the guardian, the fact that some of the papers might have been admissible, and could have been properly considered for some other purpose, would not constitute a waiver of the objection, nor preclude the guardian from asserting error in the admission of the papers for the purpose for which they were offered and considered. Nor did he waive the objection by his subsequent conduct in introducing evidence to rebut the fact of insolvency or counteract the effects of the papers in any other respect. Having made the objections, and the court having overruled them, and having made the proper exception thereto, the guardian was at liberty to accept the decision for the purposes of the future conduct of the case, and his doing so did not constitute a waiver.

2. The objections stated in the written exceptions filed were (1) that the charges, credits, and balances were not segregated and separately stated; (2) that the account was uncertain as to the items of charges against the respective wards, and as to the balances due each; (3) that the items of the expenditures were not shown; (4) that none of the items of expenditures for the wards were legal or proper charges against them; (5) that the balances and the computations of interest were inaccurate; and (6) that the guardian had used the principal of the estate without authority from the court. The court apparently found that none of these objections, except the fourth, were well taken. In each order settling the accounts it is recited that the account is incorrect in the following particulars: "(a) In the items of debits against said guardian after the time when said minor arrived at the age of majority. (b) In the items of credits taken by said guardian after the time said minor arrived at the age of majority. (c) In the items of credits and debits taken by said guardian before the time at which said minor arrived at the age of majority, for the reason that said minor should have been supported by the estate of her father, C. B. Boyes, deceased, until she arrived at the age of majority; that the amount with which said guardian should be charged is the sum of $1,120, which was received by him the first day of October, 1890, and interest thereon." In the orders settling the accounts of the wards not yet of age, the first two of the above recitals were omitted; otherwise they were all in the same form. These recitals are in the nature of findings, and they show the grounds upon which the orders settling the accounts were based. These were, first, that charges and credits accruing after the ward becomes of age cannot be allowed in settlement of a guardian's final account; and, second, that, having neglected to obtain an allowance for their support out of their father's estate in the hands of the administrators, Churchill cannot be allowed credit for actual expenses for that purpose out of the insurance money received by him as guardian. There is no finding that the sums claimed were not paid in support of the children, that there was any uncertainty or inaccuracy, that the accounts were not properly itemized, or that there was not authority to use the principal of the ward's money for their support. The only credits to the adult wards, accruing after they became of age, are items of interest on the money for each year thereafter, at 8 per cent. per annum. This was properly included in the accounts. Where there is unreasonable delay by the guardian in making final settlement after the ward is of age, the court, in settling the account, should charge the guardian at least 7 per cent. interest annually on any balance he may have had on hand when they arrived of age, unless there are circumstances absolving him from such charge. Clearly, therefore, there can be no valid objection to a charge of 8 per cent. voluntarily made by the guardian against himself, unless he is shown to have received more, which is not asserted.

With regard to credits claimed by the guardian against the adult wards, accruing after they became of age, the circumstances do not show good reasons for rejecting them all on that ground alone. In the case of In re Allgier, 65 Cal. 228, 3 Pac. 849, there is a dictum to the effect that the court, in settling a guardian's account, has no jurisdiction of transactions arising between the guardian and the ward after the latter becomes of age. This, however, manifestly refers to transactions which do not arise out of any settlement between them regarding said estate and are not in any way connected with that estate, nor with any disposition the guardian may have made thereof, either by paying or delivering it to the ward, or expending it for his benefit with his knowledge and consent, or at his request. Where such transactions concerning the estate, or such dispositions of it, have occurred after the majority of the ward, the court, upon the settlement of the final account, not only has jurisdiction of them, but it is its duty to inquire into them, allow the payments, and approve or disapprove other dispositions of the ward's estate by the guardian, and allow or refuse credit to the guardian accordingly. If the guardian, after the ward becomes of age, has continued, as before, with his knowledge and consent, to support him, or pay money for him, out of the ward's estate received by the guardian during the minority of the ward, and there is nothing unfair, or unjust to the ward in the transactions, the guardian should be allowed credit in his account with the estate thus applied to the ward's use. If he has overpaid the money in his hands and other estate remains, he may be allowed a lien on the estate for the overpayment, but he cannot be given a personal claim against the ward for such overpayment in any case. Estate of Kincaid, 12( Cal. 203, 52 Pac. 492.

In the account with Mattie Angeline a credit is claimed for her support during the year 1899 as a member of the family. It appears from the statement in the account that she was not at home during that year, and did not receive the support claimed. Nothing is said about this in the briefs, and it may be a mere inadvertence or clerical error. On the face of the account it appears to be an improper credit.

The principal ground for the rejection of the credits appears to have been the failure of the guardian to secure their support out of the estate of their father. The fact that he was one of the administrators of that estate is of no importance here; for, if his duty as administrator required him to obtain a family allowance for them, and he failed to do so, the remedy must be sought in the proceeding for the administration of the estate, or by a suit against him for a breach of that duty, and not by exceptions to the account of the guardian. Nor does good reason appear for the rejection of all the credits to the guardian because of such failure, conceding that, under some circumstances, it might become his duty, as guardian, to press a claim against the father's estate for such family allowance. If that estate was in fact insolvent, no family allowance for a longer period than one year could have been made. Until July 15, 1891, which was 15 months after the issuance of letters of administration on the estate of Boyes, the children were all supported out of the estate of Boyes, or, at all events, from some source other than the money received by the guardian for them. The credits claimed by the guardian for their support did not cover any part of this period. Consequently, if we assume that the estate was insolvent, the guardian could have obtained no family allowance during the time for which he claims credit for their support in these accounts as guardian, and his failure to obtain it was no ground for disallowing his credits.

The assets of the father's estate were appraised at $58,564.34, and the debts allowed, exclusive of subsequently accrued interest, amounted to only $31,036.43, and hence the estate appeared to be solvent. But the assets consisted chiefly of horses and mortgaged lands, and at the time of the death of Boyces, and for many years afterwards, they were unsalable at the appraised value. The horses could not be sold for cash, and after several years they were sold on credit and a chattel mortgage taken on them as security for the price. This debt the administrator has been unable to collect, and it is now represented by a mortgage for some $40,000, including interest, on certain Los Angeles property, which has been in litigation until recently. The real property of the estate was sold by the administrators in 1895, but it did not bring enough to pay the mortgages thereon. The mortgagees, Mr. Churchill being one of them and interested in all of them, discounted their claims more than $10,000, and accepted the proceeds in full satisfaction. In order to preserve the estate and carry it over the period of low prices without sacrifice of the property, the insurance money of the children was borrowed for the use of the estate, at 8 per cent. annual interest, upon an arrangement with the mother that the interest was to be applied as far as it would go in support of the children. This insurance money was paid out upon the debts of the estate. This was not sufficient to satisfy the demands of the creditors, and Mr. Churchill advanced of his own means and paid upon the debts of the estate and expenses of administration sums which, with interest to November 25, 1902, amounted to $26,561.45, which sum is still owing to him from said estate. By reason of a recent general advance in the values of real estate in Los Angeles, the Los Angeles mortgage, taken to secure the debt for the horses, has become worth its face. The evidence shows, without serious conflict, that there was no time, until this advance, at which the property of the estate could have been sold for money enough to have paid the debts of the estate and the expense of administration. The advance in the value of the Los Angeles property began only two or three years before the filing of the account, and it does not appear that the mortgage held by the estate thereon could have been collected before the accounting by any means within the control of the administrators.

These were the circumstances under which the guardian was called upon to determine his conduct of the wards' estate. It was certain that if the estate of the father had been made to pay out further sums by way of a family allowance, amounting to anything near the sums shown to have been paid by the guardian in its support, its insolvency would immediately have been demonstrated.

This would, perforce, have compelled the cessation of any payments on such family allowance. The attempt to obtain the family support in that way would have defeated itself. The estate was practically insolvent. It is extremely doubtful whether he would have been justified in pressing against the estate a claim for such allowance, under such circumstances, and, if he had done so, whether he would not have been chargeable with malfeasance either in his capacity as guardian, or as administrator. But, at all events, it must be conceded that the question whether or not he should have compelled the estate to support the family, or should have supported them as he did, out of the guardianship funds, was a matter committed to his sound discretion as guardian. His duty was to pursue that course which would best subserve the interests of the children, but he was not bound as an insurer of the wisdom of the course adopted. He was only bound to the use of such care, diligence, and sound judgment as a man of ordinary prudence would exercise in matters of similar importance to himself. In such circumstances he must act according to his own best judgment and discretion. The court should be liberal in judging of the conduct of a guardian who, when confronted with such problems, uses his best judgment and acts with ordinary diligence and prudence, in good faith, and with a view to the proper discharge of his duty to his wards. Estate of Schandoney, 133 Cal. 393, 65 Pac. 877. There appears to be no doubt that the guardian, in the present instance, was acting throughout the entire proceeding in the utmost good faith. Indeed, he went far beyond the requirements of the law in voluntarily advancing his own money to preserve the property of the estate of the father from sacrifice, and, although this was done in his capacity as administrator, he is entitled to have it considered in judging of the wisdom and good faith of his conduct as guardian. The court below erred in assuming that there was a hard and fast rule which prevented the allowance of credit to the guardian for the money thus applied in support of the wards. Upon the case as presented, he should have been allowed credit for the money properly expended for the support of the wards during their minority. And, unless it should appear upon a new trial that the money properly expended for that purpose for the adult wards, after their majority, was expended without their knowledge and consent and voluntarily on his part, we think he is also entitled to credit therefor, to the extent of the money in his hands belonging to them, respectively, but not to a personal claim for any excess in his favor.

3. Complaint is made that the charges and credits were not properly itemized. These objections seem to have been disregarded, but in view of another trial it becomes necessary to consider them. In each account there are three items of credit against the ward for maintenance for certain stated periods, and they are identical. These items and periods are: $150.08 from July 15, 1891, to March 1, 1893; $239.92 from March 1, 1893, to September 1, 1895; and $44.80 from September 1, 1895, to March 1, 1896. They exactly balance corresponding charges against the guardian for interest accruing during the same periods upon the money of the respective wards loaned to the estate of Charles B. Boyes, deceased, as above stated. The explanation given in the report is that it was arranged between the administrator of the estate and the mother of the wards that the mother and children should all live together as members of the family, that there should be paid out of the funds of said estate for their maintenance a sum equal to the interest which would accrue on the money so borrowed by the estate, and that these sums paid for maintenance of the children should be charged against them by the guardian, and that he should credit them with the same sums in his accounts as guardian, as interest collected on the money loaned. The form of the items will be shown by quoting one of them. It is as follows: "Sept. 1, 1895. By amount paid for the maintenance of said minor from March 1st, 1893, to Sept. 1st, 1895—$239.92." It is claimed that this is not a sufficient specification of the items of charges and credits; that it does not appear how much was paid on account of any particular child, nor how much of the supplies furnished was consumed by each. A family of children, under any ordinary circumstances, should be kept under the care and nurture of their mother, if possible. It is seldom possible, when this is done, to have accurate accounts kept showing the precise expense on account of each child. It is customary to apply to the court for an order fixing a lump sum by the week, month, or year, which is to be allowed and paid to the mother for such maintenance. This is perhaps the better method, as it serves as a protection to the guardian against a subsequent revision of his conduct, and also to some extent as a protection to the children against excessive payments. It also avoids the great expense that would be involved in the keeping of separate accounts of supplies furnished to each child. We do not understand, however, that a previous order of the court is necessary. In re Beisel, 110 Cal. 270, 40 Pac. 961, 42 Pac. 819. The guardian may make a contract for such support without the sanction of the court; and, if it is for a reasonable amount, the court should allow him credit therefor in his account. 21 Cyc. 66. Guardians are not always men of great efficiency in the matter of bookkeeping, and estates are not always of sufficient amount to justify an elaborate system of accounts. In cases where such contract is made without the order of the court, it is a sufficient itemization to state in the report accompanying the account, or else-

where in the account, the particulars of the contract or agreement made to secure the maintenance of the ward, and to state in the account proper the sums paid in pursuance thereof. The method pursued in the account in question was a sufficient compliance with this rule. It would be the duty of the court to scrutinize the contract or arrangement whereby the money was applied to maintenance, and to see that it was just and fair, and that the sum for which credit was claimed did not exceed the sum paid in pursuance of the agreement. But, if the guardian acted in good faith, and the contract was fair and just, the fact that the precise expense for each child was not separately provided for by the arrangement made, or was not shown in the account, would not of itself deprive the guardian of the right to credit for money actually paid or applied to the support of the wards.

The bulk of the credits claimed by the guardian consists of a list of items paid on general account for the support of the family as a whole during the years following March 1, 1896; the particular ward being charged with his proportion of the entire sum for each year separately. The items of expenditure are given in great detail, and no objection is made on that account. But it is claimed that it is not fair to the respective wards that each should be thus charged with a numerical proportion of the total expense of the support of the whole family, regardless of the fact that many of the items may have been incurred for some one or more of the other members exclusively, and that the account furnishes no means of ascertaining whether or not all the members participated equally in all the supplies furnished. With regard to food furnished no such segregation of the account would be possible. Nor can we say that it would be unreasonable to keep the family together, and charge each with the same share of the total expense of that character, although the appetite of one may have far exceeded that of another. The same would be true of many other things consumed in the household. The slight inequalities that would occur between the different children in this respect would be more than compensated by the advantages of having them reared as a family, under the care of a mother and surrounded by the associations of brothers and sisters. It would be entirely proper for the trial court to invite or inaugurate investigations in regard to this matter, and, if it found that the expenses for the respective children were substantially unequal, and that any fair conclusion could be reached in regard to the amount justly chargeable to each ward, to give or refuse credit accordingly, and to adjust the credits between the respective wards according to the amounts justly chargeable to them. We cannot, in advance of a new trial, lay down a specific rule to govern the court in this particular case. In general it must be said that if the guardian has acted in good faith in expending money for the benefit of the wards, and the expenses thus incurred have not been unreasonable or excessive, he should be given the proper credit for the money actually so expended, although he may not be able to trace every item to the particular child. In matters of this nature much must be left to the sound discretion of the guardian by the trial court, and, after it has passed upon the questions, much must be left to the sound discretion of the trial court by the appellate tribunals. It may be a difficult task for the court below to examine into these matters and determine how much of the credits claimed by the guardian should be allowed in one account and how much in another, but it should endeavor to adjust them between the respective wards, if the evidence enables it to do so. It is not justified in rejecting all of the credits because some of them are improper.

4. The order settling the accounts as to the two youngest children provides that the guardian shall be discharged upon payment of the balance to one C. Henry Haight, their guardian. It does not appear that any order has been made removing Mr. Churchill as guardian, or appointing Haight as such guardian in his place, or as an associate with him. If, in fact, no such order of appointment has been made, the order for payment to Haight was erroneous.

5. It appears from the evidence that the supplies for which the guardian claims credit were used for the support of the entire family, including the mother. There is some evidence of an understanding that she should receive support to this extent out of the children's estate in return for her services in taking care of them. It does not appear that the court below decided as to the existence or validity of such an agreement. Ordinarily a mother owes to her children the duty of nurturing and caring for them, without compensation from their estate, but circumstances may exist which would make it proper to pay her for such services out of their funds, and to make an agreement to that effect. If the court, upon another trial, finds that it was not proper to charge the children for her support, it should make such deduction on that account from the credits for support, as it may deem reasonable from the evidence.

6. It is claimed that the guardian cannot be given credit for money paid out of the principal of the estate in support of the wards, because he did not obtain a previous order from the court authorizing such use of the principal. We have no statute on the subject. The authorities are conflicting. We believe the more reasonable rule to be that where the income is insufficient, and the expenditures out of the principal are necessary and reasonable, and are made in good

faith, the guardian should be allowed the credit, although no authority was obtained from the court in advance.

In each case the order appealed from is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

7 Cal. Unrep. 324

## TRACY v. CALIFORNIA ELECTRICAL WORKS.

(Court of Appeal, First District, California. April 5, 1907.)

1. SALES — ACTION FOR PRICE — BREACH OF WARRANTY—SUFFICIENCY OF EVIDENCE.

In an action to recover the balance due on the contract price of an engine, where there was a defense of breach of contract and guaranty, and a cross-claim for damages, evidence considered, and *held* sufficient to sustain the finding of the court that certain knocking of the engine and flickering of the light produced by the electric plant run thereby were not caused by any defect of the engine, and that the engine was not defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1279.]

2. APPEAL—REVIEW—REFUSAL OF NEW TRIAL.

The appellate court will not reverse an order of a trial court refusing a new trial for insufficiency of the evidence to support the findings of fact, if there is substantial evidence to support the findings of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3872.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by H. H. Tracy against the California Electrical Works. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank M. Parcells, for appellant. William H. Schooler, for respondent.

HALL, J. Appeal from order denying defendant's motion for a new trial.

Defendant entered into a contract in May, 1900, with A. C. Bilicki & Co., whereby defendant agreed to furnish and install an electric light plant in the basement of the Hollenbeck Hotel, in the city of Los Angeles; said electric light plant to consist of a dynamo of a specified description, and an engine known as a "Shepard cross-compound, vertical non-condensing engine." Defendant, in order to carry out its contract with Bilicki & Co., entered into a contract with the Tracy Engineering Company, a copartnership (assignor of plaintiff), whereby the Tracy Engineering Company agreed to furnish the engine, and install both the engine and dynamo, which was furnished by defendant, in the Hollenbeck Hotel for a stipulated price. The contract between the defendant and the Tracy Engineering Company contained various stipulations concerning the engine, and among other things the following guaranty, to wit: "The party of the second part guaranties the material and workmanship entering into the construction of engine for one year, and any defects or flaws developing within the said one year from date of acceptance will be made good by the party of the second part, unless it is shown that such breakage, flaws or defects were caused by unskillfull management of the machinery during the said one year." The engine was furnished and the plant installed by the engineering company, and the engine was accepted by defendant on the 3d day of November, 1900, as completed and having run six days successfully, conditionally, however, upon the results of a test to be thereafter made as to economy and regulation; any defects found during that test to be made good, according to the contract. The electric plant, however, proved to be unsatisfactory, and after efforts, both by the engineering company and defendant, to discover the cause and to correct its defects, extending over several months, defendant was obliged to remove the plant from the hotel, and to pay damages in the sum of $1,650 to Bilicki & Co. Plaintiff, as assignee of the Tracy Engineering Company, brought this action to recover of defendant the sum of $1,284, being the alleged balance due on the contract price of the engine. Defendant for a defense pleaded a breach of the guaranty concerning the engine, and also, by leave of court, set up, by way of cross-complaint against the Tracy Engineering Company (said company having been made by order of court a party to the action), a breach of its contract and guaranty concerning said engine and damages resulting to defendant by reason thereof. Defendant claimed that the engine was defective, and that by reason thereof when in operation it caused a loud and continuous knock or pound, and also caused the lights generated to flicker. There is no dispute as to the fact that, after the acceptance of the engine, the lights generated by the electric plant did flicker, and that the engine, when operating the dynamo, did "knock" or "pound." Defendant claimed that the "knock" or "pound" was caused by defects in the engine, and that the flicker of the lights was caused by the "knock" or "pound," or, at any rate, by some defect in the engine; while the plaintiff and the Tracy Engineering Company claimed that the flicker of the lights was not caused by the "knock" or "pound," or by any defect of the engine, and that the "knock" or "pound" was not caused by any defect of the engine, but was caused by unskillful management of the engine. The court found against the contentions of defendant, and it is the action of the court in this regard that is attacked by this appeal.

Appellant urges with great earnestness that the evidence shows without conflict that both the flicker in the lights and the "knock" were caused by some defect in the engine. A careful examination of the record certainly discloses very persuasive evidence to the effect that both the "knock" and flicker of the lights were caused by some defect in the engine; but we also find substantial evidence supporting the conclusion that neither the "knock" nor the flicker were caused by any defect in the engine. Evidence was given on behalf of plaintiff that the engine was not defective when turned over to the engineer of the hotel, and was at that time working all right. Edward H. Minor, a mechanical engineer, who had charge of the work of installing the plant, testified that he ran the engine for about eleven days before turning it over to the engineer of the hotel. He first ran it five days, and then shut down to correct some trouble with the armature (a part of the dynamo), which caused some noise. After this was repaired, the engine was started again, and ran all right for six successive days, when it was turned over to the engineer of the hotel. During this time witness testified that there was not the slightest trouble or difficulty with the lights. The engine ran five days successfully, and then six days successfully, and everything ran correctly. There was no unusual noise, and no flicker in the lights. "The material and workmanship which entered into the construction of that engine are first-class. * * * When I went away the engine was running all right. When I came back it was not, in my judgment. It had been misused or abused. * * * I was conversant with the engine in its entirety, and knew it to be a first-class engine, and knew it was running in good order, and that everything was in first-class shape about it when I went away." H. N. Tracy, a member of the firm of the Tracy Engineering Company, and a mechanical engineer, testified that he first saw the engine in operation after it had been running five days. There was then a jar or bump, which he located in the armature shaft, and corrected. "When it started up there was no bump or knock discernible. It was started then again on the 28th of October. This engine was the quietest direct-connection engine I had ever seen. It then ran all right for six days successfully, when we got the letter of acceptance on November 3d." He further testified that he returned in two or three weeks, when it was found that the lights flickered when the engine was examined and subjected to certain tests by experts. He testified that he was convinced that the engine was all right, and that "I came to the conclusion that they had treated the engine shamefully. After a careful examination, lasting over quite a period of time, I am satisfied that the engine had nothing to do with the flicker of the lights." It was shown by certain tests that the revolutions of the shaft that imparted motion to the dynamo were uniform in speed. Edward S. Cobb, a consulting mechanical and hydraulic engineer, examined the plant in question as an expert, and testified that in his opinion there was no causal connection between the "knock" in the engine and the flicker in the lights; there was no rhythmic connection between them. Other witnesses testified to this effect also. This witness also testified to certain alternating discolorations in the commutator bars in the dynamo, which always appeared after the dynamo had been run for a time, whereupon the flicker in the lights would appear. This witness gave his opinion that the flicker was caused by some fault in the dynamo. Clarence N. Cory, witness for plaintiff, professor of electrical engineering, and engaged also in the business of consulting electrical and mechanical engineering, was furnished with full data concerning the tests and estimates made by Mr. Cobb and Mr. H. N. Tracy, respecting the engine and dynamo in question, made mathematical calculations based upon that data, and reached the conclusion that the disturbing cause of flicker of lights was located in the dynamo. He further said: "I took up the question of the engine tests, and I am satisfied that the flicker was not caused by the knock or pound of the engine, and the knock might be caused by many things, but in this case the engine did not produce the flicker. * * * I should say that the knock would be caused rather from improper handling than from any inherent defect in the engine." John Lafferty, a witness for defendant, and an expert engineer, employed as such by the Hollenbeck Hotel, had charge of the plant for some time, and testified that he did not think the knocking was responsible for the flicker, although in another part of his testimony he disclaimed all knowledge as to what did cause the flicker. J. W. Milstead, a witness for defendant, and an expert steam engineer, worked on engine for 24 days for defendant, testified to knock in engine, but said in regard to the engine: "There was not anything erroneous in its construction. There was not any knocking whatever so far as I know when there was no electricity generated. * * * I don't pretend to say that the knock or noise affected the lights." W. W. Hanscom, also a witness for defendant, and an expert engineer, who examined the plant, testified: "A knock or pound in an engine that was being run for the first time I should not consider of any importance. I could not see that the jarring or knocking was directly or immediately the cause of the flicker." He also said that if, after the dynamo started up, the flicker gradually appeared, it might be due to the engine, or it might be due to the generator. Other witnesses testified that the flicker did gradually appear in this way. He also testified to the alternating discolorations in the commutator bars, and that this showed defects in the commutator bars.

Other evidence was given of a similar character to that which we have above set forth; but we think we have specified enough to show that there is in the record sufficient evidence to support the findings of the court that the engine was not defective, and that neither the flicker in the lights nor the "knock" in the engine were caused by any defect in the engine. It is true, as we have before stated, that there is in the record much persuasive evidence supporting a contrary conclusion; but this court cannot reverse the order of the trial court for insufficiency of the evidence to support the findings of fact, if there be any substantial evidence supporting the findings made by the trial court.

No other point being suggested why the order should be reversed, the same is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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7 Cal. Unrep. 329

## TRACY v. CALIFORNIA ELECTRICAL WORKS. (Civ. 204.)

(Court of Appeal, First District, California. April 5, 1907.)

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by H. H. Tracy against the California Electrical Works. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank M. Parcells, for appellant. William H. Schooler, for respondent.

HALL, J. Appeal from order denying defendant's motion for a new trial.

In this action defendant pleaded as a counterclaim the same matters pleaded as a defense, and by way of cross-complaint, in the action of the same title, and numbered 205, this day decided by this court. 90 Pac. 461. The two cases involved the same issues, and were tried upon the same testimony, and the same grounds are urged for a reversal of the order.

For the reasons set forth in the opinion this day filed in said action No. 205, the order appealed from is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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5 Cal. App. 319

## MANUEL v. FLYNN. (Civ. 244.)

(Court of Appeal, Third District, California. April 3, 1907.)

1. Boundaries—Establishment—Evidence—Sufficiency.

In a suit involving the location of the boundary between adjacent owners, evidence *held* to support the finding of the trial court as to the location of the boundary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 184–194.]

2. Appeal—Conflicting Evidence.

The findings of the trial court based on conflicting evidence cannot be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

3. Witnesses—Cross-Examination.

Where, in a suit involving the location of a boundary, the testimony of a party was confined to his employment of a surveyor to run a line to ascertain the boundary and to what the surveyor had done to establish a line, the court did not err in sustaining an objection to a question on cross-examination if that surveyor was the only surveyor who had surveyed the land for the party and who had run the lines testified to.

4. Evidence—Admission of Altered Instruments—Preliminary Proof.

Under Code Civ. Proc. § 1982, providing that a party producing a writing as genuine which has been altered must account for the alteration, a party offering an instrument on its face presenting evidence of having been altered must, on objection to its admissibility, account for the alteration if it involves a material part of the instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1579.]

5. Same.

A written agreement executed by adjacent landowners fixed the location of a corner and the location of a tree by description by reference to monuments and distances therefrom. After the execution of the instrument, the number "11," inserted in the agreement as indicative of the dimensions of the tree, had been written in such a manner as to give it the appearance of the number "41," and it was changed so as to read "11." *Held*, that the alteration was immaterial, and the court did not err in admitting the instrument in evidence in a suit involving the location of a boundary between the adjacent owners.

6. Same.

The proper time for a party objecting to the admission in evidence of a written instrument offered by the adverse party on the ground that the same has been altered to offer his evidence in support of his contention is when the question of the admission of the instrument is before the court for determination.

7. Appeal—Rulings of Trial Court—Admission of Evidence—Conclusiveness.

The conclusion of the trial court from the evidence on the issue of the alteration of an instrument offered in evidence is binding on appeal, unless the party offering the instrument admitted that he had without the consent of the other party altered the same in some material matter, or the evidence accounting for the alteration enabled the court on appeal to say as a question of law that it could not support the conclusion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955–3969.]

8. Evidence—Declarations Against Interest—Admissibility.

On a trial involving the location of a boundary, the declaration of a party at a time the adverse party was building a line fence that he had all the land that belonged to him was admissible as a declaration against interest within Code Civ. Proc. § 1870, subd. 2, permitting proof of the declaration of a party as evidence against him.

9. Notice—Service—Proof—Certificate of Service.

The service by a constable of a notice commanding an owner of land to restore a fence, alleged to have been removed by him, to its proper place, is not an act within the constable's official duties, and his purported certificate of service is not prima facie evidence of service.

10. Appeal—Record—Review.

Affidavits alleged to have been used on the hearing of the motion for a new trial, but not incorporated in the bill of exceptions, and not authenticated as required by rule 29 (78 Pac. xii), will not be considered on appeal, though included in a stipulation between the attorneys to the effect that the motion was heard on enumerated papers.

Appeal from Superior Court, Napa County; A. G. Burnett, Judge.

Action by D. A. Manuel against P. H. Flynn. From a judgment for plaintiff, defendant appeals.

Weber & Rutherford, for appellant. T. B. Hutchison, for respondent.

HART, J. Action to quiet title and for damages claimed to have been suffered by plaintiff through certain alleged tortious acts of defendant.

The complaint alleges that the plaintiff "ever since the 23d day of February, 1884, has been the owner, in possession of and entitled to the possession of certain real property, situate within the county of Napa, state of California," and of which a description is particularly set out. The title in plaintiff to the lands as described in the complaint is not questioned, but the controversy arises over the line dividing the lands of the parties, and involves a certain strip of land which the plaintiff claims is within the description of the property belonging to him, but which defendant insists is within the boundaries of his lands. It is also charged, by appropriate averments, that on the 9th day of May, 1901, the defendant committed a trespass vi et armis upon said property of plaintiff, and that on the 14th day of May, 1901, he likewise entered upon the property in dispute, and "maliciously tore down and destroyed the fence belonging to said plaintiff along the north and east sides of said plaintiff's land for a distance of about one mile." It is charged that, by reason of the trespass first alleged, the plaintiff suffered damage in the sum of $2,000, and that because of the alleged destruction of the fence he was damaged in the sum of $100. Other damages are alleged to have been sustained in the sum of $100 and $200, respectively, for cutting down and destroying trees on plaintiff's property, and by reason of the alleged fact that through the destruction of the fence the stock of plaintiff was enabled to and did run at large, etc. It is alleged that defendant claims some interest in plaintiff's property adversely to the latter. The complaint is unverified. The answer denies the allegations of the complaint, both as to plaintiff's ownership of the certain strip or portion of the land referred to and as to the damages claimed. The question presented by the pleadings, aside from the incidental question of damages, is as to the ownership of said strip of land, approximately two chains in width and something like a half mile long. The plaintiff was given judgment, quieting his title to the strip of land in controversy, and awarding him damages in the sum of $200—$100 for the destruction of the fence as alleged and $100 for the alleged injury suffered by plaintiff through the running at large of plaintiff's stock, in consequence of the alleged destruction of the fence and the loss thereby to him of the value of the pasturage upon said lands. The last-mentioned item of damages was, however, upon the order of the court at the time the motion for a new trial was made remitted by the plaintiff, and the judgment, so far as it affected damages, was reduced accordingly. The conclusion of the court was, as the findings of fact and judgment show, that the plaintiff's contention as to the location of the line between the lands of the parties was sustained by the evidence. The appeal is from the judgment and order denying a new trial.

1. Appellant contends that the evidence is insufficient to support the findings of the court, and specifies the particulars in which the evidence, according to his view, sustains his position. There appears from the record some conflict in the evidence relative to the disputed line dividing the respective properties of the parties. There is seldom presented to the appellate courts a record on appeal of which the same thing may not be said where the sufficiency of the proof of the ultimate fact is challenged. But we think the evidence as shown here fully sustains all the material findings, from which the judgment derives ample support to uphold it. While it could serve no useful purpose to consider the evidence in detail, in view of our opinion as already expressed that it fully justifies the findings of the court upon all the essential propositions in the case, it may be well to explain the exact point of difference between the parties, and make a brief statement of the facts bearing upon that point as established by the evidence. The lands of the appellant are situated without the exterior boundaries of the grant known as the "Rancho Carne Humana," near Calistoga, Napa county, while the lands of the respondent are located within the boundaries thereof. In the determination of the ultimate fact, it became necessary to locate through the evidence the eastern boundary line of said ranch as made by certain early surveys. The respondent contends, of course, that the strip of land in dispute is embraced within the boundary line of said rancho, while the appellant claims that it is not, and the whole controversy finally hinges upon and is reduced to the determination of the location of what is known as "corner 51." This corner was thus designated by one Tracy, a surveyor, who surveyed the rancho in the early 60's, and was thereafter designated as "corner 32" by one T. J. Dewoody, a surveyor, who, in the month of February, 1867, and in the month of August, 1868, surveyed the rancho, and which survey so made by him was subsequently confirmed by the United States District Court, and contains a full description of the boundary lines of said rancho. In the year 1886 and again in the year 1887 one O. H. Buckman, a surveyor and civil engineer, surveyed, at the request of the plaintiff, a portion of the land of the latter for the purpose of ascertaining the

location of the line, and at the trial testified that he "ran the north line of lot 5, a part of the line of the Rancho Carne Humana, and some of the lines of the government surveys adjoining. One of the corners of the rancho is on the line of Mr. Manuel, commonly called 'corner 51' of the Tracy survey." He said that he was familiar with the field notes of the "Tracy survey of the Carne Humana Rancho as affecting corner 51, and also with the field notes of the Dewoody survey" of said rancho, and that, according to the field notes of those surveys, there was no change made in the Dewoody survey and corners 50 and 51. There was other evidence to this point. The plaintiff testified that he built a fence on the line made by Buckman a short time after the latter made his survey, and that the same remained on that line until destroyed by defendant a short time prior to the institution of this suit. There were other witnesses who corroborated the testimony thus given on behalf of plaintiff. There was also admitted in evidence a written agreement, made in February, 1884, and to which the plaintiff and defendant and Ephraim and T. A. Light (the latter owning lands adjoining those of the former) were parties, which stipulated as to the correct location of "corner 51." There is some testimony directly tending to show that the line as contended for by plaintiff was consistent with the number of acres embraced within his lands, as described by metes and bounds; that is to say, that, including the strip of land in dispute in the computation of the number of acres embraced within the description of the lands belonging to plaintiff, the latter would only have the number of acres to which he was entitled. On behalf of defendant, there was evidence contradictory of that given for plaintiff. Wallace, a civil engineer, testified to having made a survey of the disputed line of the rancho a short time previous to the trial of this action. His testimony, as well as that of one Lillie, who stated that he was then engaged in the business of a carpenter, but had studied and had had some experience in surveying, was, as to the location of the grant line and "corner 51," opposed to that given for plaintiff. There was also testimony given by neighbors and old settlers in the locality of the lands of the parties tending to corroborate the testimony of the surveyors thus testifying for the defendant. The evidence, so far as such a proposition may be determined from the bare record, seems to greatly preponderate in favor of the plaintiff's contention. It was, however, as is well understood, for the court below to pass upon the weight and probative force of the evidence, and, having done so, and made its findings accordingly upon evidence sufficient to justify them, its conclusions are beyond our power to disturb.

2. The appellant complains of a large number of alleged errors in the rulings of the court on the admission and rejection of testimony. There are only a few of these which we think justify special notice. The plaintiff testified to having employed surveyor Buckman to run some lines for him for the purpose of ascertaining the proper line of division between his lands and those of the defendant. The witness stated that he was present when Buckman made the survey, and confined his testimony to the fact of the employment of Buckman and what the latter had done in the matter of marking the corners, etc., as established by said survey. Upon cross-examination the witness was asked if Buckman was "the only surveyor who surveyed that land for you, and who ran the lines you have testified to?" An objection that the question was not cross-examination was sustained. The witness had not been questioned on his examination in chief as to any other survey having been made at his request than the one concerning which he testified. We can understand how such a question, if its purpose is the impeachment of the witness, or laying the foundation therefor, might be proper on cross-examination; but the question here was not in a form to imply any such purpose. If the defendant deemed it important to show that the witness had caused other surveys to be made than the one to which he testified in chief, he was not at liberty to do so by making the plaintiff his own witness before the latter had closed his case. He could have called him for that purpose, had he desired to do so, upon the presentation of his defense. Counsel declares that a more pertinent question could not have been asked in cross-examination of the witness in view of his direct testimony. It is true that the right of cross-examination should be given considerable latitude or not be restricted where it is apparent that it will accomplish some important purpose, and is not carried beyond the scope of the examination in chief. The power of cross-examination is one of the most efficacious weapons with which truth may be pursued and discovered. The law, it must be admitted, has contrived no other method or test so productive of that result. Trial courts, therefore, in the exercise of the discretion committed to them as to the extent of the cross-examination, should, for the sake of the discovery of the truth of a disputed fact, give it full range for that purpose, and yet the discretion of which we speak should never be abused, or given such elasticity as to permit an adversary party to prove his own case under the guise of cross-examination by thus propounding questions which are neither directly nor collaterally related to the subject-matter of the original examination. The truth sought by a cross-examination must, of course, be in respect of and limited to the material matters to which the witness has testified in chief, and, when such examination transcends that limitation and purpose, it ceases to be cross-examination. It does not appear what defendant's purpose

was in asking the question, but, whatever its purpose, the form in which it was put rendered it, in our opinion, not pertinent cross-examination, and the court's ruling thereon was not erroneous.

3. The written agreement to which we have referred as having been entered into by and between the plaintiff, the defendant, and the Lights, and which was received in evidence, was objected to by appellant because it had been altered in some respects. The instrument upon its face presented evidence of having been at some time altered after it was written. This objection having been made, the burden was upon plaintiff to explain or account for such alterations, if they involved a part thereof material to the question in dispute. Section 1982, Code Civ. Proc. The plaintiff was therefore questioned as to the alterations, and testified that the name "Dewoody" had been inadvertently and unnecessarily written in the agreement twice, and that the erasure of the name in one place was made before the agreement was signed. Plaintiff also testified, and likewise his son, William A. Manuel, that, after the agreement was signed, he observed that the first figure of the number "11," inserted in said agreement as indicative of the dimensions of one of the "witness trees," had been written in such manner as to give it the appearance of a figure "4," which would have made the number read "41" instead of "11." The son of plaintiff, upon discovering the apparent mistake, changed the figure so that it conformed, as he declared, to what it was intended to be and what was understood to be the dimensions of the tree by the parties when the agreement was executed. The location of the tree was definitely fixed in the agreement by descriptive reference to other monuments and its distance therefrom, and was marked "B. T." by the parties, so that, whatever might have been its dimensions, it was thus clearly capable of identification as the "witness tree" to which the parties had reference when making the agreement. This erasure was therefore, in our opinion, immaterial. The other erasure was, as observed, shown to have been made previous to the signing of the agreement and in any event immaterial. No attempt was made by the defendant to contradict the explanation of the erasures by plaintiff until the defendant took the stand in his own behalf. He said that all the erasures were made subsequent to the signing of the instrument. But the proper time for him to have offered this testimony upon the point was when the question of the admissibility of the document was before the court for determination. And, even so, the court's conclusion from the evidence upon that issue would be binding here, unless, of course, it appeared that it was admitted by the plaintiff that he had without the consent of the other parties altered the agreement in some part material to the question in controversy subsequent to the execution of the instrument, or the evidence accounting for material alterations was such as to enable us to say that, as a question of law, it would not support the conclusion of the court.

4. The witness Doda was permitted, over an objection by defendant, to state that during a conversation with appellant the latter, at a time when the fence built by respondent was still intact, said that he (appellant) had all the land that belonged to him. The deduction from this statement by appellant was that the fence constructed by respondent was, under appellant's belief then, on the correct dividing line of the lands of the parties. The evidence, while, of course, furnishing only a circumstance and not conclusive upon the point to which it related, was undoubtedly admissible as a declaration against the interest of the defendant. Section 1870, subd. 2, Code Civ. Proc.

5. Nor was error committed in the refusal of the court to admit in evidence a paper purporting to be a notice served on the plaintiff by the defendant through one Scott, then a constable, commanding the respondent to restore a fence, charged to have been removed by him, to "its proper place." The notice was signed by the defendant and a certificate attached to it by Scott, setting forth that the same had been served by him on the plaintiff. The testimony disclosed the fact that Scott had died previous to the time of the trial. If the notice was proper testimony for any purpose, the document was nevertheless inadmissible. The service of the notice was not an act within the constable's official duties under the law, and his purported certificate was not even prima facie evidence of the fact of service. This document was shown to the plaintiff when he was on the witness stand, and he denied that he had ever been served by any one with such a notice. It was then that it was offered in evidence by counsel for appellant. The court's ruling excluding the alleged notice was proper.

6. There appears in the transcript certain affidavits of defendant, his son, Thomas Flynn, and Rollo Fay, deputy recorder of Napa county, which affidavits, it is claimed in the briefs of appellant, were used on the hearing of the motion for a new trial. The affidavit of defendant is to the effect that he was surprised at the testimony given for the plaintiff of some of the witnesses, that he did not anticipate such testimony, and was, therefore, unprepared to meet it at the trial; and alleged that, if a new trial were granted, he could produce evidence to contradict it, etc. The other affidavits set forth facts in opposition to those testified to by said witnesses which affiants deposed that they would give in evidence upon another trial of the cause. These affidavits are not incorporated in a bill of exceptions, but counsel claim that they can nevertheless be considered on this appeal, because of a stipulation entered into between the attorneys representing both parties, to the effect "that the foregoing

printed pages shall constitute the transcript on appeal in the above-entitled cause, and that the appeals may be heard thereon," and "that the papers therein mentioned are correct copies of the originals on file in the superior court of Napa county, with the endorsements of the dates of filing the same," etc. Said stipulation appears in the transcript, but not in the statement or in a bill of exceptions, and is signed by the attorneys for appellant and the attorney who tried the case for respondent and who has died since the taking of the appeal. (The present attorneys for respondent were thereafter substituted for and in the place of the deceased lawyer.) It is not clear that the stipulation includes the affidavits mentioned. But, whether it does or not, we think that, under the rule of this court and the decisions, the affidavits, not being incorporated in a bill of exceptions and therefore not authenticated as required by rule 29 (78 Pac. xii) of this court, cannot be considered on this appeal. In Melde v. Reynolds, 120 Cal. 237, 52 Pac. 491, there appeared in the transcript certain affidavits, upon which was indorsed the following: "Affidavits of ———, used on hearing of the motion for a new trial. John Hunt, Judge." These affidavits were not incorporated in a bill of exceptions and authenticated as required by rule 29 of the court, and it was held that they could not for that reason be considered on appeal. The court says: "When a motion for a new trial is made upon the ground of accident or surprise, it must be made upon affidavits (Code Civ. Proc. § 658); but whether an affidavit was 'used on the hearing' can be determined only by the judge before whom the hearing was had, and as there is no other mode provided by law for authenticating the affidavits which may be used on the hearing of the motion, under rule 29, they cannot be considered on the appeal unless they are incorporated into a bill of exceptions. [Citing Herrich v. McDonald, 80 Cal. 472, 22 Pac. 299; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022. See, also, Skinner v. Horn, 144 Cal. 279, 77 Pac. 904.] A bill of exceptions, settled as directed by section 651 of the Code of Civil Procedure, would contain all the affidavits upon which the judge acted in making the order, but the indorsement by him upon certain affidavits that they were used at the hearing of the motion does not make them the record of the papers upon which the motion was heard, since it does not appear thereby that these were all the papers used at the hearing. [Citing Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966. See, also, San Diego Savings Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299 et seq.]" In that case, it is to be noticed, even the indorsement upon the affidavits by the judge who heard the motion that they had been used on the hearing, they not having been incorporated in a bill of exceptions, is held to be insufficient to meet the requirements of the rule. Certainly where, as here, there is nothing more than the mere stipulation of the attorneys showing that they had been so used could not authorize their consideration upon appeal. Moreover, it does not thereby or otherwise appear that they constituted all the affidavits and papers used on the hearing.

We find no error in the record prejudicial to the defendant.

Judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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5 Cal. App. 391

## BROWN v. WRIGHTMAN et al. (Civ. 339.)

(Court of Appeal, Second District, California. April 15, 1907.)

DEEDS—CONSTRUCTION—RESTRICTIONS—WAIVER OF FORFEITURE FOR BREACH.

Plaintiff conveyed land to defendant's predecessors in title; the deed containing the condition that the grant should become void if the business of selling intoxicating liquors or keeping a bawdy house was ever conducted on the premises. Plaintiff subsequently sold parts of a tract lying immediately across the street from the first without making these restrictions, and the purchasers, with his knowledge and consent, conducted thereon bawdy houses and saloons. Plaintiff also leased parts of the second tract, understanding that they were to be used for such purposes. *Held*, that the plaintiff had waived his right to claim a forfeiture of the first tract for a violation of a restriction in the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 522, 524.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Joseph Brown against Henry Wrightman and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Byron Waters and Henry Conner, for appellant. T. J. Norton, E. E. Millikin, and Gill & Densmore, for respondents.

TAGGART, J. Appeal from a judgment in favor of defendants. Appellant contends that the findings of fact made by the superior court entitled him to judgment against the defendants as prayed for in his complaint.

A summary of the findings of fact material here shows: That on the 14th day of December, 1886, plaintiff sold and conveyed to defendants' predecessors in title 45 acres of land adjoining the town of San Bernardino. The deed of conveyance contained the following condition: "This grant is made upon the following expressed condition subsequent, to wit: That there shall never be conducted upon said premises or any part thereof the business of selling intoxicating liquors at retail, nor shall there ever be kept or maintained upon said premises or any part thereof any bawdy house, house of ill fame, or house of prostitution, and in case of the happening of either of said events then this grant to cease and be void." At the time of such sale and conveyance plaintiff owned and resided, and still continues to reside, upon a tract of 15 acres of land lying immediately west of said 45-acre tract with only the width of a street intervening. At the time of said conveyance, the district in which said two tracts of land were situated was a residential district, and free from the business and houses of the character mentioned in the said condition; but in the years between 1891 and 1900 plaintiff sold portions of the tract of land so retained by him to various parties, without restricting or limiting the use of the premises, and that said parties to whom the said portions were so conveyed established and maintained and continue to maintain thereon, with full knowledge, consent, and acquiescence of plaintiff, houses of prostitution and places where intoxicating liquors are sold at retail, and plaintiff during said years himself leased to persons conducting houses of prostitution and carrying on a retail liquor business houses located on said 15-acre tract, understanding that they were to be used for such purposes. And said district in which both of said tracts of land were situate ceased to be a respectable residence neighborhood, and before the year 1902 became a district wholly devoted to places of lewd resort, houses of prostitution, and retail liquor business, and that plaintiff directly, knowingly, and deliberately contributed to and acquiesced in such change. On October 28, 1902, the defendant the South San Bernardino Land & Improvement Company sold four lots in said 45-acre tract to defendant Miller, who erected thereon two cottages, which have been occupied since about January 1, 1903, by the two defendants Bertha Smith and B. Flores, who have conducted bawdy houses therein and used said houses as places of prostitution and for the sale of intoxicating liquors at retail. Plaintiff brought this action to have the court declare a forfeiture of title to the 45-acre tract under the condition above set out, and for restitution of the possession of the premises. The trial court held that plaintiff had waived his right to claim a forfeiture of any part of said lands, and that he was estopped by his own acts from complaining of the violation of the condition by his grantees or their successors in interest, by reason of the transactions and business heretofore or that may hereafter be done or performed in violation of said condition on the lots conveyed to Miller as aforesaid.

The statement of facts found compels the conclusion reached by the trial court. As a reason why the plaintiff should not be divested of his right to a forfeiture of the lands in question, appellant contends that his conduct with reference to other lands can have nothing to do with his right to the lands conveyed upon condition. The description of the two tracts as shown by the numbers of lots and blocks show them to consist of contiguous portions of the Rancho San Bernardino, and parcels of the same lands; but, conceding them to have been held by different title, we are not aware of any rule which considers the place of the act constituting the waiver or estoppel, if the act be such as to cause the result upon which the waiver or estoppel depends. No authority has been called to our attention which would permit the plaintiff to render it impossible to fulfill the purpose for which the condition subsequent was placed in the deed, if the act by which this was accomplished were done on one side of the street, while he would not be permitted to do so if the act were done on the other side of the street. This attempted distinction "sticks in the bark." The authorities cited by appellant declare the rule that forfeitures are not favored by the courts, and that conditions providing therefor are to be construed liberally in favor of the holder of the estate, and strictly against the enforcement of the forfeiture. Quatman v. McCray, 128 Cal. 285, 60 Pac. 855. See, also, Reclamation Dist. v. Sels, 145 Cal. 184, 78 Pac. 638. The waiver and estoppel found by the superior court are sustained by numerous cases. In Duncan v. Central Pass. R. Co., 4 S. W. 231, 85 Ky. 525, the restrictions were inserted in the deed of plaintiff to the defendant to carry out a general plan of selling the property for residence purposes only. Subsequent sales of lots in the tract without such restrictions were held to constitute a waiver or abandonment. The court says: "A contract, the fulfillment of which becomes unreasonable, will not be enforced at the instance of a party who by his own conduct has produced such a result." In Jenks v. Pawlowski, 56 N. W. 1105, 98 Mich. 110, 22 L. R. A. 863, 39 Am. St. Rep. 522, it is said: "Restrictions of this class are sustained upon the theory that a party has the right, in disposing of his property, to prevent such a use by the grantee as might diminish the value of the remaining land, or impair its eligibility for other uses. But is there no mutuality in such agreements? It certainly cannot be said that a grantor has the right afterwards to sell an adjoining lot without restrictions, and thereby diminish the value of his former grantee's property and impair its eligibility for other uses, converting the locality into a saloon locality, and still be allowed to insist upon the restriction." In Chippewa v. Tremper, 42 N. W. 532, 75 Mich 36, 4 L. R. A. 373, 13 Am. St. Rep. 420, the restricting condition on which the forfeiture was asked applied only to the sale of intoxicating liquors. Held, that evidence of the sale of liquors by one of plaintiff's officers in a building erected upon an adjoining lot to that of defendant was admissible to show a waiver of the condition by plaintiff, and, also, as tending to show an effort upon plaintiff's part to create a monopoly, and that a court of equity would not lend its aid to create a monopoly in selling poisons, any more than it would in the selling of foods or other necessaries.

These authorities appear to be directly applicable here, and sustain the conclusions and judgment of the trial court.

The judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 367

## MERIDIAN OIL CO. v. DUNHAM.

(Civ. 334.)

(Court of Appeal, Second District California. April 8, 1907.)

1. SPECIFIC PERFORMANCE—CONSIDERATION.

A vendor who has accepted and retained the agreed consideration cannot question its adequacy in an action for specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 151.]

2. SAME—PART PERFORMANCE OF ORAL CONTRACT.

In order to justify equity in granting specific performance of a parol contract for the sale of land, there must be a part performance, consisting of the payment of the purchase price, accompanied by a change of possession or an expenditure of money on the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 120–139.]

3. EVIDENCE—ADMISSIBILITY—ACCOUNTS.

In a suit by a corporation to enforce specific performance of an oral contract to convey land to complainant, it was proper to admit in evidence a book entry on plaintiff's journal showing the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1432–1483.]

4. SPECIFIC PERFORMANCE—DEFENSES.

In a suit by a corporation to enforce specific performance of a contract, whereby complainant's president agreed to convey land to complainant in consideration of stock of the corporation, the fact that the stock, after its issuance to defendant, was subsequently used pursuant to a subsequent contract to aid the company in financial difficulties, and that defendant thereafter advanced money to the corporation, did not entitle defendant to withhold conveyance until payment of his claims.

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by the Meridian Oil Company against F. H. Dunham. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. C. Batcheller, for appellant. Dunning & Craig, for respondent.

SHAW, J. Action to enforce specific performance of a contract to convey real estate.

On July 14, 1902, the plaintiff was a corporation having a board of three directors, of which defendant and his wife were members, and president and secretary, respectively, thereof. It had in process of construction an oil refinery located upon certain lands, which were then owned, or afterwards acquired, by defendant. At a meeting held on said date, all the directors being present, its board adopted a resolution to purchase from the defendant the real estate upon which it was constructing its plant, and pay therefor in capital stock of the company, and authorized the secretary to issue said stock to the defendant. The stock was issued in accordance with said resolution and delivered to defendant, who conveyed, or caused to be conveyed, to plaintiff, all of the property except the three lots involved in this action, and which he did not then own, but subsequently acquired. Plaintiff took possession of the property, including the three lots, and has made valuable improvements thereon, having a number of oil tanks located upon the lots, conveyance of which defendant withholds. After making these improvements, plaintiff learned the condition of the title and demanded a conveyance from defendant, and upon refusal to convey brought this action.

Appellant's demurrer was properly overruled. The allegations of the complaint sufficiently show that the contract was, as to the defendant, reasonable and just. The consideration for the sale was capital stock of plaintiff company. This was issued to and accepted by defendant, who executed a deed of conveyance to a part of the property. The well-recognized rule that in actions for specific performance the complaint must state the value of the land, or other facts showing that the consideration is adequate, is not applicable to the facts existing here. After accepting and retaining the agreed consideration, appellant cannot question the adequacy thereof. Nicholson v. Tarpey, 70 Cal. 608, 12 Pac. 778. The agreement to sell was based upon a parol contract. To justify a court of equity in enforcing the same, there must be, on the part of the purchaser, part performance thereof within the meaning of section 1741, Civ. Code. Payment of the purchase price alone does not constitute such part performance. Such payment must be accompanied by a change of possession, or an expenditure of money upon the property. Not only was there a change of possession and payment of the consideration here, but a large expenditure was made upon these lots in the way of improvements thereon, consisting of a number of tanks constituting a part of the plant for its oil refinery. Calanchini v. Branstetter, 84 Cal. 249, 24 Pac. 149. As the contract called for no improvement, it was not necessary to allege or prove that the improvements upon the property were made pursuant to the agreement. Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657.

An examination of the record discloses no error in the rulings of the court in admitting evidence. Neither the copy of the plat admitted in evidence, nor the certificate excluded therefrom, is included in the record, and without which we must conclude that the ruling of the court thereon was correct. The book entry dated July 14, 1902, in the journal of the company, whereby it appeared that the company had bought from appellant the lots described in the resolution of that date and paid therefor in stock at a certain price, taken in connection with appellant's relation to the corporation as its president, was material as tending to show the parol contract with appellant, and was therefore properly admitted. The evidence offered by defendant relative to a sale of the company's property to one Jordan appears to have been wholly irrelevant, and was properly excluded. On direct examination appellant was interrogated as to his understanding and intention as to what he was to convey, and as to whether he intended to convey the lots in question to the company; all of which and other like questions called for the conclusion of the witness. It was likewise wholly immaterial what appellant did with the stock received by him as consideration for the promised conveyance of the lots. The fact that it was, pursuant to a subsequent contract, placed in the hands of trustees to aid the company in tiding over its financial distress, could not, in the absence of an agreement so to do, release appellant from his obligation to convey the property. Nor did the fact that he had subsequently advanced money to the corporation entitle him to withhold the conveyance, unless his claim was paid. His position in this respect was one in common with other creditors. San Francisco Water Co. v. Pattee, 86 Cal. 623, 25 Pac. 135.

The main contention of appellant is that, if for no other reason, the judgment and order denying his motion for a new trial should be reversed upon the ground that the evidence fails to show an agreement on his part to sell the property. It conclusively appears from the record that defendant was president of the company; that he and his wife at the time of the adoption of the resolution held practically all of the issued stock; that he was present at the time the resolution was offered and adopted; that he accepted and retained the stock named in this resolution as the consideration for the purchase of the lots therein designated and described; that he assisted in locating the lines of the property, and with an employé staked out where to set the tanks on these lots; that he, in selling stock, represented to the purchaser thereof that the company owned these lots. And in the face of all this he strenuously contends that he never agreed to sell the lots in question. As we have seen, the adequacy of the consideration is not involved in the action. The court finds that the contract was fair and just as to defendant, and the evidence supports the findings. We cannot approve of the position for which appellant contends. It requires no authority to support the statement that one occupying the position with reference to a corporation held by appellant should be bound to the highest standard of good faith. Any other view would open wide the door for the perpetration of gross fraud.

What we have said as to the sufficiency of the complaint answers appellant's contention as to the court's failure to find any facts upon which it could be determined that the consideration was just and reasonable. The court did find the ultimate fact that it "was just and reasonable as to defendant."

Judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 380

## REYMERT v. SMITH, Superior Judge.
(Civ. 384.)

(Court of Appeal, Second District, California. April 12, 1907.)

1. CONTEMPT—NATURE AND ELEMENTS.
Contempt of court is a specific criminal offense, and the charge and the findings and judgment of the court thereon are to be strictly construed in favor of the accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 4.]

2. APPEAL—REVIEW—FINDINGS OF JUDGMENT—RIGHT TO EXAMINE RECORD.
The findings of the judgment do not preclude a reviewing court from an examination of the record to determine the jurisdictional facts.

3. SAME — PRESUMPTIONS — PROCEEDING NOT INCLUDED IN RECORD.
Where the performance or taking of necessary steps which ought to appear of record is not shown by the record, it will be presumed that such steps were not taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3670-3681.]

4. CONTEMPT—POWER TO PUNISH—CONTEMPT NOT IN PRESENCE OF COURT—NOTICE.
In order to give the court jurisdiction to punish for a contempt committed without the presence of the court or the judge at chambers, the accused must be served with notice or order to show cause containing a formal statement of the charge against him, and he must be given an opportunity to plead and answer such charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 151-154.]

Application by James D. Reymert for review of proceedings upon commitment for contempt. Order of commitment annulled.

J. D. Reymert, in pro. per., and J. Marion Brooks, for petitioner. J. D. Fredericks, Dist. Atty., and John C. North, Deputy Dist. Atty., for respondent.

TAGGART, J. Application for review of proceedings upon commitment for contempt by superior court of Los Angeles county.

Judgment was rendered by said superior court on March 16, 1907, adjudging that petitioner pay a fine of $200 and, in case such fine be not paid, that he be confined in the county jail of said county until the fine be satisfied at the rate of one day's imprisonment for each two dollars of fine. The fine not being paid, the defendant was committed to the custody of the sheriff of said county.

The original minute entry of the judgment made on the day of its rendition contained nothing to show of what the alleged contempt consisted; but subsequent to the issuance of the order of this court directing that the record of the proceedings in said matter be certified up to this court, and on the 10th day of April, 1907, an order was entered in the minutes of said superior court, stating that the judgment rendered by the superior court on March 16, 1907, "was not properly written out in the judgment record of this court" and ordering that the judgment entered be amended to conform to the judgment rendered. The latter order finds the allegations of the affidavits of certain persons (naming them) to be true and adjudges petitioner guilty of contempt for procuring false and perjured testimony.

There is nothing in the record brought up to show that the petitioner was served with any notice or order to show cause that indicated the character of the charge of contempt which the petitioner was expected to answer. It does not even appear that he was served with a copy of the affidavits upon which the proceeding was predicated. No answer of petitioner appears in the record, and it does not appear that he was given an opportunity to answer. Section 1217, Code Civ. Proc. The only instrument of any kind presented on his behalf was a motion to set aside the citation upon the ground that there was no proper complaint or information upon which to base it. This motion was overruled, and the court proceeded to hear the matter without any formal statement showing the charge that was made against the petitioner, and without any answer or plea being filed or entered or any issue of fact joined. Contempt of court is a specific criminal offense (Ex parte Gould, 99 Cal. 362, 33 Pac. 1112, 21 L. R. A. 751, 37 Am. St. Rep. 57; Cosby v. Superior Court, 110 Cal. 52, 42 Pac. 460), and the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused (Schwartz v. Superior Court, 111 Cal. 112, 43 Pac. 580). The findings of the judgment do not conclude a reviewing court from an examination of the record to determine the jurisdictional facts. Blair v. Hamilton, 32 Cal. 50. While all natural and proper conclusions from the record will be indulged, where the performance or taking of necessary steps which ought to appear of record is not shown, it will be presumed that such steps were not taken. 5 Ency. Pl. & Pr. 290.

Waiving the question of the right of the court below to amend its records pending a proceeding for review in this court, it is apparent that the superior court failed to acquire jurisdiction of the person of the petitioner. The conviction of a citizen of a criminal offense without service on him of a formal statement of the charge against him and an opportunity to plead and answer such charge would be an anomaly in the law of criminal procedure. That a contempt proceeding is summary in its character is a reason why greater care should be taken in pursuing the steps required to reach a conviction, rather than a reason why certain steps necessary to the ordinary criminal proceeding should be omitted or overlooked. Where an alleged contempt has been committed without the presence of the court or the judge at chambers, there is no step essential to a proper accusation, and plea in an ordinary criminal case which can safely be omitted from the proceeding.

We are of opinion that the superior court was without jurisdiction to make the order made in this matter, and that an order of this court should be entered annulling said order and discharging said petitioner from custody; and it is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 329

## PEOPLE v. WHITE. (Cr. 51.)

(Court of Appeal, Second District, California. April 3, 1907.)

1. CRIMINAL LAW — TRIAL — PROVINCE OF JURY.

The jury in a criminal case are the sole judges of the credibility of the witnesses and of the weight of the conflicting evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1719-1724.]

2. ROBBERY—ELEMENTS—FORCE AND FEAR—EVIDENCE.

On a trial for robbery, evidence *held* to show force and fear sufficient to constitute robbery.

3. CRIMINAL LAW—APPEAL—INSTRUCTIONS—CONDUCT OF JURY—PRESUMPTIONS.

The court on appeal in a criminal case must presume that the jury obeyed the instructions of the court limiting the effect of certain evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3032-3034.]

4. SAME — VERDICT — AFFIRMANCE BY TRIAL COURT—REVIEW.

The questions of the credibility of the prosecutrix on a trial for robbery, and of the intent and motive of accused, are conclusively determined by the trial court's action denying a motion for a new trial, and cannot be considered by the appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3084.]

5. ROBBERY—INSTRUCTIONS.

An instruction, on a trial for robbery, that if accused by the use of force and violence on the person of the prosecutrix, or by putting her in fear, compelled her against her will to deliver to him her personal property, and that accused took and received the same by such means, he was guilty of robbery, though he may have attacked the prosecutrix for some other purpose, is not open to the objection that it advised the jury that the intent to take the property was not necessary to constitute the crime.

6. CRIMINAL LAW—INTENT—EVIDENCE—PRESUMPTIONS.

Under Code Civ. Proc. §§ 1962, 1963, providing that the law presumes a guilty intent from the deliberate commission of an unlawful act, and that a person intends the ordinary consequences of his acts, the intent essential under Pen. Code, § 20, to constitute a crime, is evidenced by the acts of accused, and the presumptions arising therefrom, which presumption attaches successively to each act as done, regardless of the original intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 26-28.]

7. SAME — INSTRUCTIONS — INCONSISTENT INSTRUCTIONS.

An instruction, on a trial for robbery, which deals with a transaction in which the original attack by accused on prosecutrix was made with the intent to commit rape, is not inconsistent with an instruction dealing with later acts committed by accused, justifying the inference of an intent to commit robbery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1961–1968.]

8. SAME — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

Where, on a trial for robbery, the defense relied on an alibi, and rested on the theory that accused was sober, and the prosecution did not rest its case on intoxication of accused to establish motive, the failure to charge on the effect of evidence of intoxication on motive was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1980.]

9. SAME.

Where, on a trial for robbery, the prosecution relied on both force and fear, and there was no element of stealth in the taking of the property, the failure of the court to distingish in its instructions between robbery and larceny, and submit the lesser offense, was not erroneous.

10. ROBBERY—INSTRUCTIONS—SUFFICIENCY.

On a trial for robbery, it is sufficient for the court, in defining robbery, to give the statutory definition of the crime.

11. CRIMINAL LAW — INSTRUCTIONS — REQUESTS—NECESSITY.

The failure of the trial court, in a criminal case, to charge on any proposition deemed essential by accused, is not error, unless he made a request for an instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1996.]

12. SAME — TRIAL — EXAMINATION OF WITNESSES.

On a trial for robbery, the court refused to require the prosecutrix to repeat to the jury in open court, on her direct examination, a proposal which she said was made to her by accused. The information desired was obtained by accused on cross-examination. The response was given to the counsel for accused in writing as requested by him. *Held*, that it could not be presumed that, had accused insisted on an oral response, and not accepted the written one, the court would not have required the witness to answer him orally, and therefore no constitutional right of accused was invaded.

13. SAME—CONDUCT OF COUNSEL—IMPROPER ARGUMENT.

The statement, outside of the record, made by the district attorney in his argument on a trial for robbery, that the shirt accused wore the night of the alleged assault had not been in possession of the prosecution, and that it must be in the possession of accused, was prejudicial to accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1669.]

14. SAME—REVIEW—EXCEPTIONS.

The appellate court in a criminal case will not review an improper statement of the district attorney in his argument, where the improper conduct was not called to the attention of the trial court at the time, so that it might so act in the premises as to prevent a mistrial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2645.]

15. SAME.

The error due to the improper statement of the district attorney, in his argument on a trial for robbery, that the shirt accused wore the night of the alleged assault had not been in the possession of the prosecution, and that it must be in the possession of accused, arising from the fact that the statement was outside the record, could be cured by an instruction to the jury to disregard it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1693.]

16. SAME—MISCONDUCT OF JURY—CONFLICTING EVIDENCE—FINDINGS OF TRIAL COURT —CONCLUSIVENESS.

The finding of the trial court on the question of the misconduct of the jury in a criminal case, based on conflicting affidavits, will not be disturbed on appeal.

17. SAME — VIEW — PRESENCE OF JUDGE — RIGHT OF ACCUSED.

The jury in a criminal case, in viewing the place of the commission of the offense, as authorized by Pen. Code, § 1119, is receiving evidence, and accused is entitled to have the judge present.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1461.]

18. SAME—CORRECTION OF ERRORS.

The error committed by the court in a criminal case, arising from it permitting the jury to take, in the absence of the judge, a view of the place of the commission of the crime, may, in a proper case, be corrected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2118 2121.]

19. SAME—RIGHTS OF ACCUSED—WAIVER.

The right of accused in a criminal case to object to a view by the jury, in the absence of the judge, may be waived by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol 14, Criminal Law, §§ 2118–2121.]

20. SAME—WAIVER.

The failure of accused in a criminal case to make timely objection to the jury taking, in the absence of the judge, a view of the place of the commission of the offense, is a waiver of his right to have the judge present at the view.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2118–2121.]

21. SAME.

Accused in a criminal case did not object to the jury taking a view unaccompanied by the judge, but, after the return of the jury into court, made the absence of the judge a ground of an exception, and asked the court to have the record show the facts and his exception. *Held*, that accused waived his right to have the judge present at the view.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2118–2121.]

22. SAME.

Accused in a criminal case did not object to the jury taking a view unaccompanied by the judge, but, after the return of the jury into court, the court was asked to have the record show that the judge did not accompany the jury. The court then advised the jury of the error committed in permitting it to take a view in the absence of the judge, and instructed them to disregard all impressions acquired during the view, and directed the taking of a second view. The second view was taken in the presence of the judge. *Held*, that accused could not complain of the action of the court in permitting the taking of the first view in the absence of the judge.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

John White was convicted of robbery, and he appeals. Affirmed.

See 75 Pac. 828.

H. H. Appel and F. R. Robertson, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and J. C. Jones, for the State.

TAGGART, J. Defendant was informed against for the crime of robbery. From a judgment of conviction in the superior court, and an order of that court denying his motion for a new trial, he appealed to the Supreme Court. This appeal was regularly transferred to this court for hearing and decision.

The evidence of the commission of the crime rests almost entirely upon the testimony of the complaining witness. The defense relies upon an alibi and the insufficiency of the identification of the defendant. As the complaining witness was returning to her home about half past 10 o'clock on the night of June 18, 1902, a man stepped in front of her. She stopped, threw up her hands, and he struck her with a rock. She screamed. He told her to "shut up," put his arm around her neck, and struck her in the mouth with his fist. She kept screaming, and he kept "beating" her. They both fell down, he on his knees and she on her back on the sidewalk. He kept pounding her in the face, and she begged him to let her up. At last he "loosened up a little" on her, and she said: "Do you want my money?" and he said: "Where is it?" She said: "It's in my pocket." He said: "Give it to me." He kept saying: "Give it to me." "So," says the witness, "I twisted myself in shape that I got the pocketbook, and he took it." After another effort to scream, followed by further beating, the man made a proposal to her which she characterized as the "worst proposal a man can make to a woman." This statement was stricken out on motion of defendant. The witness then further testified that she was dragged through an opening in a billboard to a sand bank near the river. An effort was made by her assailant to tear her clothing from her, the undoing of his own clothing by the man, and other preparations made by him tending to show an attempt to commit rape. The witness described the face and dress of the man with much particularity of detail, and attributed her ability to do this to the location of certain lights, and to the fact that, while she had been held down on the ground, an electric headlight on a passing street car had shone upon the man's face and clothing in such a manner as to enable her to see him with great distinctness. The "proposal" spoken of was not introduced upon the direct examination of the witness. Defendant demanded that the prosecution be required to disclose the language of this proposal as part of the transaction, and excepted to the refusal of the court to require this to be done. On cross-examination the witness requested to be relieved from using the language of the proposal, and was permitted, with consent of defendant's attorney, to write it on a piece of paper. It was a solicitation of sexual intercourse. It does not clearly appear from the record how or when (if at all) this language was disclosed to the jury. The suggestion was made by the district attorney that the writing be submitted to counsel and jury, but it does not affirmatively appear that this was done.

It is urged that the verdict is contrary to the evidence, because, among other things, the condition of the lights at the scene of the crime were such that it was improbable that the complaining witness could have seen her assailant with sufficient clearness to be able to identify him. Besides the cross-examination of the complainant in this regard, the record shows many pages of testimony disclosing the results of various experiments made by different persons at the place where the offense was consummated to test the effect of the lights mentioned in complainant's testimony. The testimony introduced by the defendant tended to establish a condition of darkness, and that of the prosecution one of light. The jury resolved these contradictory opinions in favor of the truthfulness of complainant's story, and they were the sole judges of the credibility of the witnesses and of the weight of such conflicting evidence.

It is also contended that the motive and intent shown by the evidence indicated rape, rather than robbery; that no taking was proven; and, conceding a larceny was established, that it was not accompanied by sufficient force to constitute robbery. The complainant's description of the occurrence up to the time of the delivery of her purse to her assailant embodies every element of the crime of robbery. Force and fear were both present, and it is unnecessary to distinguish those cases discussing the violence of the force used. Motive and intent to commit both robbery and rape appear from the evidence. In order that evidence of the latter might not induce the jury to find the defendant guilty of the former, merely because robbery was the crime charged in the information, the court gave the instruction, marked "20." The jury were thereby informed that, if the assault was for the purpose of rape, and there was no intent to rob, and no taking of the purse by either force or fear, the defendant should be acquitted. It must be presumed that the jury did its duty and obeyed this instruction of the court. The questions of the credibility of the complaining witness and the preponderance of the evidence, so extensively presented by appellant in his brief, were ultimately and conclusively determined by the superior court when it denied his motion for a new trial, and cannot be considered by this court. What intent and motive were established by the evidence were also questions of fact, and were included in that determination.

The effect of instruction 20 as to intent with which the crime was committed was not neutralized by the giving of the last instruction (not numbered) by the court. The latter instruction is in the following language: "The court instructs the jury that, if you believe from the evidence, beyond a reasonable doubt, that the personal property mentioned in the information was in the possession of the witness Kate A. Dripps, and that the defendant by the use of force and violence upon the person of said Kate A. Dripps, or by putting her in fear, compelled her, against her will, to deliver to him the said personal property, or any part thereof, mentioned in the information, from her person, or immediate presence, as charged in the information, and that defendant then and there took and received said personal property from said Kate A. Dripps, under such circumstances and by such means, then the defendant would be guilty of robbery, even though you may further believe from the evidence that the defendant may have attacked the said Kate A. Dripps (if you believe from the evidence that he did attack her) for some other purpose or motive." If, as contended by appellant, the jury were advised by this instruction that a felonious intent to take the personal property mentioned in the information was not necessary to constitute the crime of robbery, then it would have been an erroneous statement of the law; but we do not think this a necessary or proper construction of the language used by the court. The moving intent was evidenced by the acts of the party and the presumptions of law that he intended the ordinary consequences of his acts. Pen. Code, § 20; Code Civ. Proc. §§ 1962, 1963. This attached successively to each act as done, regardless of the original intent. The last instruction given is not in conflict with instruction 20. By the latter instruction (20), the jury were told that if the assault was not made "for the purpose of committing the crime of robbery, and that the person who assaulted Mrs. Dripps did not intend to rob her," and did not act in connection with the assault from which an intent to commit the crime of robbery could be inferred, then they should acquit the defendant. One instruction deals with an hypothesis in which no element of robbery was present at any time in the transaction, the other with a transaction in which the original attack was made with the intent to do something else, but the later acts in which justified the inference of an intent to commit the crime of robbery.

Appellant contends that the court should have instructed the jury in regard to three matters upon its own motion, to wit: The effect of evidence tending to show intoxication in respect to the motive or intent with which an act was done; the definition of the word "fear" as given by section 212 of the Penal Code; and the definition of the word "robbery," as distinguished from "grand larceny." And the failure to do so is assigned as error. A consideration of the last proposition includes the same question of law arising from the failure of the trial court to give an instruction as to the "lesser offenses" included in the crime of robbery (instruction 14), at the request of the appellant. Instructions given to the jury must always be adapted to the evidence and circumstances of the case on trial. The whole defense rested upon the theory that defendant was perfectly sober. He staked his case upon the fact that he was not there. So there is nothing in his case to justify an instruction upon the question of intoxication. The case for the prosecution did not rest upon the intoxication of the defendant to establish motive. It did not rely upon fear alone to show a robbery, but force and fear combined. There was no element of stealth in the taking proven, and nothing in the evidence to require the court of its own motion to distinguish robbery and grand larceny. This case is one of the class in the mind of the court, when the opinion in the case of People v. Church, 116 Cal. 303, 48 Pac. 125, was written, and the following language used: "Many cases of robbery may be disclosed by the evidence where the trial court would be justified in refusing an instruction to the effect that the defendant could be convicted of grand larceny. Such cases would be those where the evidence, without contradiction, indicates the offense to have been accomplished by means of force or fear." The statutory definition of the crime of "robbery" was given to the jury in one of the instructions of the court. That was sufficient. The failure of the trial court to instruct the jury upon any proposition deemed essential by the defendant is not to be regarded as error, unless he made a request for such instruction. People v. Fice, 97 Cal. 460, 32 Pac. 531. This has been applied to an instruction as to intoxication in the case of People v. Oliveria, 127 Cal. 381, 59 Pac. 772. We have considered defendant's objections to the instructions given by the court, notwithstanding the Attorney General's position that they are part of the judgment roll and are reviewable only as part of the judgment roll, and that the record does not disclose the judgment from which the appeal was taken. It is unnecessary to determine the question of practice raised in view of the rulings made on the questions of law, further than to say that we do not adopt the views of the Attorney General as applied to this case.

The defendant suffered no injury because the court refused to require Mrs. Dripps to repeat to the jury in open court upon her direct examination the proposal which she said was made to her by her assailant. The information desired was obtained by defendant on cross-examination in answer to his counsel's question. The response was given to defendant's counsel in the manner requested by him, that is, in writing, and if it failed to reach the jury it was the defendant's own act. It cannot be presumed that, had he insisted upon an oral response, and not accepted the written one, the court would not have required the witness to answer him orally. No constitutional right of the defendant was invaded. It is not a constitutional right of the defendant to have the prosecution conduct its case in accordance with his wishes, and there was no interference with the fullest exercise of his right of cross-examination in the case in this connection.

The remarks of the district attorney specified as error and misconduct upon his part were all within the bounds of legitimate inference from the evidence, except one. The statement, outside the record, "that the shirt defendant wore the night of the alleged assault had not been in the possession of the prosecution, and that it must be in the possession of the defendant," was the statement of a fact important to the case of the prosecution and highly prejudicial to the defendant. It would have been reversible error had the matter been called to the attention of the trial court at the time, and that court had refused to instruct the jury to disregard the remark; but no opportunity was given the trial court to correct the abuse. It is essential, in order that such an act shall be reviewed by this court, that it shall first be called to the attention of the court below at the time, in order that the court may so act in the premises as, if possible, to avoid the error and prevent a mistrial. People v. Kramer, 117 Cal. 647, 49 Pac. 842. The effect of such a remark could have been removed by an instruction to the jury to disregard it. People v. Shears, 133 Cal. 159, 65 Pac. 295.

The jury were twice taken to view the place where the crime had been committed. On both occasions the proper safeguards were thrown around the jury, and the proper cautions and instructions were given, except that on the first occasion the trial judge failed to accompany the jury to the scene. Misconduct of the jury at the first view was claimed by defendant, and presented, by affidavit, to the trial judge upon the motion for a new trial. This showing was met by counter and conflicting affidavits from the prosecution, and, by its ruling on the motion, the trial court ascertained the truth to be with the prosecution. This was a matter peculiarly within the province of the judge who tried the cause, and this court will not disturb his finding. People v. Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141.

The defendant did not object to the first view being taken upon the grounds that the jury were not accompanied by the judge, but, after the return of the jury into the court, made this the ground of an exception, and asked the court to have the record to show the fact and his exception. The learned judge who tried the case recognized the error committed by his absence from the first view, and with the purpose of correcting such error, if possible, advised the jury of the error committed and instructed them to disregard any and all information or impressions acquired during or by reason of the first view, and to eliminate everything seen or heard on that occasion in the same way that they should disregard any testimony ordered stricken out, and ordered that a second view be taken. No tenable objections to the proceedings in connection with the second view, or exceptions to the court's actions in relation thereto, appear in the record.

Appellant contends that it was irremediable error for the jury, under the instructions of the court, to view the premises without the presence of the judge of the court. That he was entitled to have the judge present as a constitutional right, and that his failure to object cannot be construed as a waiver. The Attorney General, on the other hand, in support of the action of the trial court, urges: First, that a view is not the taking of evidence; neither is it "the trial." Therefore, the presence of the judge is not necessary. Next, that if his presence be necessary, his absence is but an irregularity which the defendant could and did waive; And that the jury were instructed to disregard the first view, and the first view became merged into the second. Whatever may be the rule in other jurisdictions, it is clear that the later decisions of the Supreme Court of this state are based upon the theory that, in viewing the place in which an offense is charged to have been committed, under section 1119 of the Penal Code, the jury is "receiving evidence." People v. Milner, 122 Cal. 184, 54 Pac. 833. It was upon this theory that it was declared to be error for the jury to view the place in the absence of the defendant in a criminal case. People v. Bush, 68 Cal. 623, 10 Pac. 169, s. c. 71 Cal. 606, 12 Pac. 781. It must also be accepted as the law of this state that the judge is a component part of the court, and there can be no court without the judge; and that a defendant convicted under such circumstances has been deprived of his liberty without due process of law. People v. Tupper, 122 Cal. 424, 55 Pac. 125, 68 Am. St. Rep. 44; People v. Blackman, 127 Cal. 248, 251, 59 Pac. 573; People v. Yut Ling, 74 Cal. 570, 16 Pac. 489. The opinion in People v. Blackman, in so far as it has any bearing on the question here involved, relies upon the opinion in People v. Tupper, which, in turn, rests upon O'Brien v. People, 17 Colo. 561, 31 Pac. 230, Turbeville v. State, 56 Miss. 793, and State v. Beuerman, 59 Kan. 586, 53 Pac. 874. The Colorado case mentioned (O'Brien v. People) is expressly distinguished, by the justice writing the principal opinion therein, from one in which there is a waiver of, or consent to, the absence of the judge. The Chief Justice, in a concurring opinion, says that every absence of the judge from the courtroom during a criminal trial is not reversible error. He concurs in the decision because an error was committed by taking the testimony of a witness, away from the courtroom, in the presence of the jury, when the judge was absent. In Turbeville v. State, the decision of the court, as stated in the syllabus, is that "the circuit judge's absence from the bench during the argument of a felony case is not such abandonment of the court and conduct of the trial as that the judgment should be reversed, if he remains in an adjoining room within hearing with a lawyer on the bench to call him if needed." The portion of the opinion supporting the California cases is: "If we would consider this statement of the facts as showing such absence from the room on the part of the judge as constitutes a temporary relinquishment of the control of the court and of the conduct of the trial, we should unhesitatingly reverse the judgment. There can be no court without a judge, and his presence as the presiding genius of the trial is as essential during the argument as at any other time." In State v. Beuerman it is said: "If the presiding judge abandons the trial, or relinquishes control over the proceedings, the accused has good cause to complain. Meredeth v. People, 84 Ill. 479; Thompson v. People, 32 N. E. 968, 144 Ill. 378; State v. Smith, 49 Conn. 376; Turbeville v. State, 56 Miss. 793; Palin v. State, 57 N. W. 743, 38 Neb. 862; O'Brien v. People, 31 Pac. 230, 17 Colo. 561. The fact that the court may not see or hear everything occurring in the courtroom, or that he may step into an adjoining room, but not out of hearing of the proceedings, is not necessarily prejudicial to the interests of the defendant in every case; but the presiding judge cannot safely absent himself from the trial, or relinquish control over the proceedings during the trial." If the language of this opinion be considered in connection with the holding by the Kansas court in State v. Adams, 20 Kan. 311, that a view of the premises by a jury is not receiving evidence during the trial, and the absence of either judge or defendant therefrom not error, because the statute does not in terms require them, or either of them, to be present, it is apparent that the Kansas court would regard that case as not applicable here. In People v. Yut Ling it is said: "When the jury went to view the premises the judge of the court should have gone along with them. It was the right of defendant to have the judge accompany the jurors when they went to take this view." We are left in the dark as to the reasons of the court for its position on this question, and Justices McFarland and Paterson dissent from the decision without comment. In the absence of reasons given, we have assumed that the court considered the view as receiving evidence (People v. Bush), and a part of the trial, and therefore the absence of the judge from the trial was error. People v. Tupper, supra.

Accepting these cases as declaring the law of this state, and considering them in the light of the reasons given for the decisions upon which they rest, it is apparent that the error committed by the court here is such an error as may, in a proper case, be corrected by the court, and the right to object thereto may be waived by the defendant. The view has been a part of the jury trial since its origin, and at one time constituted, with the personal knowledge of the jurors, the entire evidence considered by the jury in arriving at its verdict. There is nothing in the reports of the earlier English cases to indicate that the judge was required to be present at the view, and the practice permitted a view by either a part or the whole of the jury. In some of the cases the courts seem concerned chiefly in determining how many jurors, or what part of the jury, must have visited the scene in order to sustain the verdict. For many years after other evidence than the knowledge of the jurors began to be considered by the jury, the view continued to be the main evidence received in cases of waste, trespass, and nuisance. It is still made an important part of the evidence in cases of waste in some states, and in other states in cases of eminent domain, by express statutory provisions. The personal knowledge of the juror can no longer be considered, unless he be sworn and examined in open court. Pen. Code, § 1120. The freedom of the common-law view is much restricted. Its use now rests in the discretion of the trial court, and the whole matter is generally regulated by statute. In construing these statutes, the courts have reached widely divergent conclusions. The opinions range from those holding that a statute providing for a view of the premises in a criminal case, similar to section 1119 of the Penal Code, is unconstitutional because such a view is receiving evidence by the jury when absent from the court (Foster v. State, 12 South 822, 70 Miss. 755), to those holding that the view is no part of the trial, and that the jury are not receiving evidence, but merely receiving impressions from inanimate objects that will enable them better to comprehend and apply the testimony in the case. State v. Adams, 20 Kan. 311; Shular v. State, 4 N. E. 870, 105 Ind. 289, 55 Am. Rep. 211; People v. Johnson, 17 N. E. 684, 110 N. Y. 134; People v. Thorn, 50 N. E. 947, 156 N. Y. 286, 42 L. R. A. 368; State v. Mortensen, 73 Pac. 562, 26 Utah, 312.

This diversity of conclusion appears to be due, largely, to the restriction of the term "the trial" to the permanent proceedings in the courtroom, and an effort of the courts to evade the apparently inevitable result of that construction upon the case under consideration. Every step taken in a criminal case, by, or in, the court wherein the case is pending, from issue joined to verdict rendered, is a step or proceeding "arising during the course of the trial." People v. Turner, 39 Cal. 370. In this extensive sense, "the trial" would include many occasions when the judge need not be personally present exercising control or conducting the trial. This is the case where the jury are kept together during the entire trial. Between the sessions of the court they are under the sole control of the sheriff, and if they make an unauthorized visit in a body to the place where the crime was committed, while in charge of that officer, the error may be waived, and the court can consider whether or not the view influenced the minds of the jurors, in ruling on a motion for a new trial. Warner v. State, 29 Atl. 505, 56 N. J. Law, 686, 44 Am. St. Rep. 475. The same rule was applied in a case in which the gist of the action on trial was the condition of the locus in quo. Rush v. St. Paul, 72 N. W. 733, 70 Minn. 5. The inquiry is: "Was the [misconduct] not calculated to prejudice the result of the trial? Is it apparent that it could have had no influence upon the verdict?" People v. Stokes, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102. Such error should be objected to at the time, and consent of defendant or his failure to object in time will defeat his right to complain. People v. Tarm Poi, 86 Cal. 225, 24 Pac. 998; People v. Fitzgerald, 137 Cal. 546, 70 Pac. 554. This same test has been extended to an absence of the judge from the courtroom, without suspending the trial, during the examination of a witness for the prosecution (Hayes v. State, 58 Ga. 35), and during the argument of the case (O'Shields v. State, 6 S. E. 426, 81 Ga. 301; Pritchett v. State, 18 S. E. 536, 92 Ga. 65).

The conditions surrounding the jury at the view; the restrictions upon their actions, and that of the judge; the inability of the judge or any one else to control or direct their observations to any objects other than those indicated to the person appointed as "shower" while in open court at the courtroom; the absence of any assistance of counsel to indicate the details of the observation which make for their respective clients; the prohibition of the taking of testimony or receiving of any other information than that given by the "shower," coupled with the statutory requirement that the jury be placed in the custody of the sheriff—might call for a distinction between the modified form of trial at the view and the proceedings taken and had in the courtroom, if this were necessary to this decision; but the rule having been established in this state that the defendant is of right entitled to have the judge present at the view, the modified character of his functions there becomes immaterial. Considering the absence of the judge as involving the question of whether or not it be depriving the defendant of his liberty without due process of law, we see no reason why the rule above declared should not be applied to the error committed.

"Due process of law" undoubtedly means, in the due course of legal proceedings according to the rules and forms which have been established for the protection of private rights; and that changes of forms, proceedings, and process from time to time shall be made with due regard to the landmarks established for the protection of the citizen. Cooley on Const. Lim. 355. Many of the common-law statutory and constitutional rights of a defendant may be waived by him, and some will be presumed to have been waived, if they have not been asserted in a timely manner. He is entitled to be tried by a full common-law jury on a charge of felony before sentence; but he may waive all the incidents of the trial established for his protection and enter a plea of guilty. He is entitled to challenge jurors both for cause and peremptorily without assigning cause; but if he fails to do so, having had the opportunity, it is too late to complain after conviction. So it is with having the process of the court to secure the attendance of his witnesses, and his right to have only competent evidence introduced upon the trial. Failing to assert his right, he is deemed to have waived it.

In the case at bar, the defendant had an opportunity to assert every legal right involved, and either failed to do so, or asserted them in such a manner that he is deemed to have waived them. If the first view be left out of consideration, the record would show a complete trial unattended by any prejudicial error preserved and excepted to as required by the rules of practice. The first view was no more prejudicial to the defendant than the introduction of incompetent evidence during the trial, which, on discovery of the error by the court, was directed to be stricken out, and the jury instructed to disregard it. The jury were aided in doing this by the subsequent view. The impressions obtained from the two views would be presumed to be the same, as the second view covered the same grounds, the shower pointed out the same places and objects, and the affidavits produced on the motion for a new trial show that there was no change in the location of the objects viewed, or the topography of the scene, between the first and second views. If a different impression were obtained, that from the second, being more recent, would no doubt be the more vivid at the time of the deliberations of the jury. There was no dispute at the trial in relation to the location of any of the objects which were seen by the jury on either view. The evidence in relation to the disputed matters was directed to the angle at which the lights fell upon certain objects and places, the effect of the distance of the street lamps from the scene, and the strength of the light that would be given by them at the place of the occurrence. Even this evidence was of minor importance, as the complaining witness based her ability to see so distinctly upon the fact that the headlight of a passing street car fell upon the face and clothing of her assailant. Both of the views by the jury were taken in the daytime, and there was no opportunity on either occasion to observe the effect of the lights upon the scene. The case was one in which a view was proper and served the purpose which should be the primary, if not the only, consideration in criminal cases, to wit, a knowledge of the premises that the jury may the better apply the testimony heard in court. The evidence received on both views was evidently of this character.

However the error be classified or considered, the facts disclosed by the record, on the motion for a new trial, warranted the trial judge in finding that the prosecution had sustained the burden of showing that no injury resulted to defendant's case, and that he was not prejudiced by the absence of the presiding judge from the first view. No timely objection to the absence of the judge from the first view was made, such absence was not prejudicial to the defendant or subversive of his legal rights, and there is no ground for granting a new trial. Horne v. Rogers, 35 S. E. 718, 110 Ga. 362, 49 L. R. A. 176. It is not every unauthorized view of the locus in quo that will require the setting aside of a verdict. Considerations of practical justice forbid it. If verdicts were set aside for such reasons, there would be no reasonable limits to litigation, especially in cities where the opportunities are great for jurors personally to view the locality of a crime under consideration.

Judgment and order appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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5 Cal App. 371

## Ex parte SHORTRIDGE. (Cr. 86.)

(Court of Appeal, First District, California. April 12, 1907.)

1. Habeas Corpus—Contempt—Conclusiveness of Commitment.

Where one has been committed for contempt on petition for discharge by writ of habeas corpus, he may not contradict the facts set forth in the order of commitment.

2. Contempt — Commitment of Attorney — Order—Sufficiency.

An order committing an attorney for contempt, reciting that he "interrupted" court proceedings, without stating what he did, does not comply with the statute requiring the court to recite the facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 207, 208.]

3. Same—Review—Presumptions.

On proceedings to review a commitment for contempt, no intendments or presumptions may be indulged in against the prisoner, but the order must be strictly construed in favor of his liberty, and hence an attorney is entitled to discharge, where the order of commitment merely discloses that, while a witness was being examined, he persisted in addressing the court, though admonished not to do so; it not appearing he was not rightfully and respectfully discharging his duty to the court and his client.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 233.]

4. Same—Fugitive Client.

An attorney, who persists in addressing a court on behalf of a fugitive client, after being refused permission to do so, is guilty of contempt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 9.]

Application of Samuel M. Shortridge for a writ of habeas corpus. Petitioner discharged.

Peter F. Dunne, Frank P. Murphy, Henry Ach, Robt. Ferral, and Charles H. Fairall, for petitioner. Hiram W. Johnson, for respondent.

HALL, J. Samuel M. Shortridge heretofore filed in this court his petition, wherein he alleged that he was illegally restrained of his liberty by Thomas F. O'Neil, as sheriff of the city and county of San Francisco, and praying for a writ of habeas corpus, to be directed to said sheriff, which being granted, said sheriff in due time made return thereto that he held said Shortridge in custody by virtue of a conviction and judgment for contempt of court; a certified copy of the commitment being attached to the return. At the hearing before this court, petitioner excepted to the sufficiency of the return by way of a demurrer thereto, to the effect that the commitment is on its face void, for the reason that it does not set forth facts sufficient to warrant a conviction or judgment for contempt of court.

The commitment, after reciting the title of the court, is in the words as follows, to wit: "On this day the superior court of the state of California in and for the city and county of San Francisco, being regularly in session, and having then and there regularly before it the actions and proceedings of the People v. Eugene E. Schmitz and Abraham Ruef, and being then and there engaged in such actions and proceedings in the taking of testimony in open court while a witness, William J. Walsh, was upon the witness stand in open court and being regularly examined and interrogated in respect to said actions and proceedings, after the said William J. Walsh had been duly and regularly sworn to testify as a witness in said matter, and while he was so testifying in regard to his actions in the matter of serving an attachment for the body and person of one Abraham Ruef, which had theretofore on the 7th day of March, 1907, been regularly issued by said court and delivered to said William J. Walsh for execution as coroner of the city and county of San Francisco, state of California, by reason of the fact that said court had theretofore duly made and entered its order, adjudging that Thomas F. O'Neil, the duly qualified, elected and acting sheriff of said city and county of San Francisco was disqualified to act in said matter, and after said court had on several occasions admonished said Samuel M. Shortridge to take his seat and to refrain from interrupting the said proceedings, or from interfering with the due and orderly administration of justice, or the orderly administration of the procedure in said court, and the said Shortridge having refused to obey the orders and directions of said court, and having interrupted and continued to interrupt the orderly conduct of the proceedings before the said court, and having interrupted and interfered with the due and orderly administration of justice in said court, the said court adjudged the said Shortridge guilty of contempt of court, and directed that the sheriff of the city and county of San Francisco take the said Shortridge into custody, and that he be confined for the period of twenty-four hours in the county jail of the city and county of San Francisco, and the court then found and now finds the following facts in relation to the said contempt, to wit: That on the 8th day of March, 1907, there was pending before the above-entitled court an action or proceeding entitled the People of the State of California, Plaintiff, v. Eugene E. Schmitz and Abraham Ruef, Defendants; that the said court on said day duly and regularly met, and was during the time hereinafter mentioned duly and regularly holding a session of the said court; that in the matter of the said action and said proceeding the witness had been in said court at said time duly and regularly sworn, and was being examined and interrogated as such witness in said action on said day; that during the time of the examination of said witness the said Samuel M. Shortridge addressed the said court, interrupted the said proceedings, and was admonished and warned by the said court to take his seat and to cease his interruptions, and the said Samuel M. Shortridge refused then and there to obey the order and direction of the said court; that the said Shortridge continued to talk to said court and interrupt the said proceedings, although directed by the said court to cease to do so, and the conduct and acts and language of the said Shortridge were calculated to and they did interrupt the orderly conduct of the investigation and proceeding before said court, and they did interfere with and interrupt the administration of justice in said court; that the conduct and the language of the said Shortridge were boisterous and offensive; that by reason thereof the said Shortridge was guilty of a contempt of court committed in the immediate presence of the court. And, the court being fully advised in the premises, it is hereby ordered, adjudged and decreed that the said Shortridge be confined in the county jail of the city and county of San Francisco for the period of twenty-four hours; that the sheriff of the city and county of San Francisco take the said Shortridge into his custody and execute this sentence and order. Dated March 8, 1907. F. H. Dunne, Judge of the Superior Court."

The law does not permit the petitioner to contradict the facts set forth in the order of commitment, but the recitals of the facts must be taken as true upon the hearing before this court on the proceedings for a discharge by the writ of habeas corpus. Upon the other hand, no presumptions or intendments can be indulged in against the prisoner, but the facts set forth in the commitment must be sufficient to show contempt within the meaning of the law without the aid of intendments and presumptions. "The power of the court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support." Batchelder v. Moore, 42 Cal. 415. In Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372, it was said: "In the case of a contempt committed in the presence of the court, the section says that the order adjudicating the contempt must contain a recital of the facts. This provision can only mean that the order must contain a recital of those facts which make out a contempt; that is, a recital of those facts, which in a case of constructive contempt, the law says must be incorporated in an affidavit." In other words, the facts that prove the contempt, and not mere conclusions. To the same effect are People v. Turner, 1 Cal. 155; People v. Rowe, 7 Cal. 183; Ex parte Zeehandelaar, 71 Cal. 238, 12 Pac. 259. In Ex parte Zeehandelaar, the prisoner was discharged because the return did not show that a question that he had refused to answer as a witness was pertinent to the matter in issue before the court. In Overend v. Superior Court, supra, an order adjudging a witness guilty of contempt was annulled on certiorari because the question which he had refused to answer was not set forth, and the order therefore did not show that he had refused to answer a pertinent question, for which reason the order did not state facts showing the accused to be guilty of contempt of court. These two last cited cases strikingly illustrate the doctrine that no presumptions or intendments can be indulged in to support an adjudication of contempt, and that the order of adjudication must state facts showing the prisoner to be guilty of contempt. "The offense being criminal in its nature, both the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused." Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580.

With the foregoing principles in mind, we now proceed to an examination of the facts set forth in the commitment before us. The petitioner is an attorney at law, entitled to practice as such in all the courts of this state, and as such is an officer of all said courts. It is apparent from a reading of the commitment that the adjudication of contempt is not predicated upon the theory that the acts charged against him were committed by him as a mere interloper and stranger to the action then pending before the court. If that were so, it certainly should have been so stated in the order. Being an attorney at law, we think we should assume, in the absence of any statement to the contrary, that in addressing the court, as it is found that he did, he was acting as the attorney for one of the parties to the action then before the court. We do this the more readily because the argument before this court from both sides shows this to be the fact. A reading of the order of commitment discloses that the gravamen of the charge and finding against the petitioner is that, while a witness was being examined in the action then before the court, and after he had been admonished not to do so, he addressed the court and insisted on talking to the court. The finding is "that during the time of the examination of said witness the said Samuel M. Shortridge addressed the said court, interrupted the said proceedings, and was admonished and warned by the said court to take his seat and to cease his interruptions, and the said Samuel M. Shortridge refused then and there to obey the order and direction of the said court; that the said Shortridge continued to talk to said court and interrupt the said proceedings, although directed by the court to cease to do so." Evidently the statement that the petitioner interrupted the proceedings is based upon the fact that he addressed the court, for no other concrete fact is set forth. The mere statement that he interrupted the proceedings, without stating what he did, does not comply with the plain mandate of the law that the facts must be stated. The statute requires that the court must make an order "reciting the facts as occurring in such immediate view and presence." This is essential, in order that it may clearly appear from the actual facts set forth that the accused has been guilty of a contempt. Every interruption of the proceedings of the court is not a contempt, nor unlawful, nor necessarily improper. Many interruptions are lawful and proper. Every time an attorney in the performance of his duty objects to a question asked a witness, or objects to any other proceeding in the action, he may be said to interrupt the proceedings. The particular circumstances of the interruption—the concrete facts constituting the interruption—must be set forth, in order that the commitment shall show upon its face and without the aid of presumptions that the accused has been guilty of a contempt. The only interruption set forth—the only concrete fact set forth—is that, while a witness was being examined, the petitioner addressed the court, and continued to do so after being admonished to take his seat. What he said to the court is not stated, and no circumstances are set forth which will enable us to say without the aid of intendment and presumption that his remarks were not perfectly proper in themselves, and strictly within the line of his duty as an officer of the court and the attorney for one or both of the parties to the action then pending before the court.

It is true that the court had directed him to cease addressing the court, but so had the court in the cases heretofore cited (Overend v. Superior Court, supra; Ex parte Zeehandelaar, supra; Ex parte Rowe, supra) directed the accused as a witness to answer a question; yet it was held in those cases that the witness was not guilty of contempt, unless the question was one pertinent to the issue before the court. Not only this, but the order of commitment must set forth the question and sufficient facts to affirmatively show that the question was one which the witness should answer. The reviewing court cannot, in such cases, in support of the action of the trial court, presume that the question which the witness refused to answer was pertinent and proper; but it must be shown to be so on the face of the commitment. Unless this be shown on the face of the order, the commitment of the witness for contempt cannot be sustained, notwithstanding that the witness refused to obey the order of the court to answer the question. See cases last cited.

Examining the commitment now before us by the four corners in the light of the rule of law that no presumptions or intendments can be indulged in against the accused, it boils down to the proposition that the petitioner, an attorney for one of the parties to the action then pending before the court, has been adjudged guilty of contempt because he persisted in addressing the court as such attorney, presumably on behalf of his client. It is not suggested by anything in the commitment that the language employed by him was improper, or that it reflected in any manner upon the court or the judge thereof. It is true that the order does state in general terms that his conduct was boisterous and offensive; but, reading this statement in connection with the context in which it occurs, it is clear that the order means no more by this than to state a conclusion from the fact that he persisted in addressing the court against the order of the court. So the question involves the single proposition: Does the simple fact that an attorney for a party to an action pending before the court, while a witness is being examined, persists in addressing the court, although admonished not to do so, constitute a contempt of court? We think it does not. For aught that we can see from the order, the petitioner may have been rightfully and respectfully discharging his duty to the court and to his client, making proper objections to the questions put to the witness on the stand. What he said to the court is not set forth, nor are any circumstances set forth making it improper for him to address the court in a respectful manner, except the bare order of the court not to do so. This we do not think is sufficient, any more than is the order to a witness to answer a question sufficient without an affirmative showing in the order of commitment that the question is one that the witness should answer.

In what we have said concerning the commitment, we have not overlooked the argument so forcibly pressed upon us by counsel for the respondent that the court has the right to refuse to hear counsel for a defendant who is a fugitive from justice, or who refuses to appear in court when lawfully required to do so. Undoubtedly a defendant in a criminal case who is a fugitive from justice, or who refuses to submit himself to the jurisdiction of the court, has no right to be heard in court by counsel until he does submit himself to the jurisdiction of the court. People v. Redinger, 55 Cal. 290, 36 Am. Rep. 32; People v. Elkins, 122 Cal. 655, 55 Pac. 599. If the commitment in this case showed that the client of the petitioner was, at the time of the acts complained of, a fugitive from justice, and that the court for such reason had refused to permit him to address the court on behalf of such client, and that he nevertheless persisted in so doing, we should not hesitate to uphold the action of the court in adjudging him guilty of contempt for such action. There is no statement in the order before us that defendant, or any party to the action then before the court, was a fugitive from justice, or was not then before the court. Neither is it stated that the court for any such reason denied petitioner the right to address the court. For aught that appears upon the face of the order of commitment, the petitioner's client may have been sitting by his side in the courtroom. It is true that there is a recital in the order to the effect that an attachment had theretofore been issued for the body of Abraham Ruef, and from this we might infer, if it were permissible in this proceeding to indulge in presumptions against the accused, that Mr. Ruef may have been a fugitive from justice; but, as we have already seen, upon proceedings to review an order committing a person for contempt, no intendments or presumptions may be indulged in against the accused, but the order must be strictly construed in favor of his liberty. Batchelder v. Moore, supra; Schwarz v. Superior Court, supra. There is no statement in the record before us that Mr. Ruef was, at the time the petitioner addressed the court, or at any other time, a fugitive from justice. If such were the fact, and if for such reason the court had refused the petitioner the right to address the court, it was a very simple matter to so state in the order.

The power to punish for contempt, being an arbitrary power, and the facts as recited in the order of commitment being conclusive in such contempt proceeding, the correct rule, in our opinion, is to require the commitment to state the facts, so that this court, on reading the commitment, can determine as to whether or not such facts as a matter of law constitute a contempt of court. When we examine the commitment by the above rule, we cannot say as matter of law that the petitioner was guilty of contempt.

For the reasons above set forth, we think the order of commitment insufficient, and that petitioner should be discharged, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

5 Cal. App. 383

## PAGE v. GARVER. (Civ. 315.)

(Court of Appeal, Second District, California. April 13, 1907.)

1. Judgment — Res Adjudicata — Validity of Judgment.

To constitute an estoppel, the judgment pleaded in bar must be a valid judgment rendered by a court having jurisdiction, and these facts must be shown to justify the reception in evidence of such judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1150–1156, 1254–1258.]

2. Same — Collateral Attack — Validity — Presumptions.

Where a collateral attack is made, the recitals in a judgment pleaded in bar are sufficient evidence of the matters therein recited, and, where the judgment is rendered by a court of general jurisdiction, the recitals constitute evidence of their truth, and every intendment must be indulged in support of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 907–916, 1809–1812.]

3. Same.

Where a judgment is pleaded in bar, a certified copy is, under the express provisions of Code Civ. Proc. § 1905, evidence of the adjudication by the court of the issues involved in the suit, and the recitals therein showing jurisdiction are evidence thereof.

4. Same — Conclusiveness of Judgment—Persons Concluded—Privity.

A grantee brought a suit to set aside a deed on the ground of the fraud of the grantor. Pending the suit he married and died. The suit was prosecuted by his administrator, and a judgment was rendered in favor of the validity of the deed. *Held*, that the judgment was a bar to an action by the widow to set aside the deed on the same ground.

5. Same—Issues.

A grantor in an action to set aside a deed alleged that at the time of the execution thereof he was infirm of purpose, mind, and body, and that the grantee took advantage of his condition, and by fraudulent representations induced him to sign the deed. The court denied any relief. *Held*, that the judgment was a bar to a subsequent action by his widow seeking to set aside the deed as sole heir of her deceased child in esse at the time of the grantor's death, on the ground that the grantor was at the time sick and in an exhausted condition, and incapable of making the deed, and that the grantee took advantage of his condition, and by fraudulent representations induced him to sign the deed.

Appeal from Superior Court, Kings County; W. M. Conley, Judge.

Action by Lillian H. Page against Mary A. Garver. From a judgment for defendant, plaintiff appeals. Affirmed.

See 80 Pac. 860.

E. T. Cosper, for appellant. T. E. Clark, for respondent.

SHAW, J. Appeal on behalf of plaintiff from judgment and order denying her motion for a new trial.

The plaintiff, who is appellant here, is the widow of Samuel Page, deceased, who died intestate on June 24, 1899. Besides his widow, he left surviving him her unborn child in esse, who was born alive, but died on the same day, and three sons and a daughter, the defendant herein, all children by a former marriage. Plaintiff in her own right as widow and as sole heir of her deceased child, brings this suit to set aside and have declared null and void certain deeds, whereby the said Samuel Page, in his lifetime and long prior to his marriage to appellant, conveyed to defendant certain real estate described in the complaint, upon the ground that at the time of making the deeds Samuel Page was in a sick, weakened, and exhausted condition, and, on account of great physical and mental weakness, incapable of making any deed, or doing any business whatever; that, taking advantage of his condition, this defendant and her brother, Solomon C. Page, did, by means of fraudulent representations made to said Samuel Page, induce him to make and deliver to defendant the said deeds to the real estate. The answer contains no denial of the allegations as to the mental and physical condition of Samuel Page at the time of executing the deeds; nor any denial as to the fraudulent representations alleged to have been made by defendant. There is a denial that Samuel Page was at the time of his death the owner of the land in question, or that he had been, subsequent to May 1, 1897, the owner of any part thereof, or held any interest therein other than a life estate to a portion thereof. As a defense to the action defendant relies upon two judgments, which are pleaded by way of estoppel.

The conveyances from Samuel Page to the defendant were made on December 9 and 11, 1896, and the marriage of plaintiff to Samuel Page occurred on February 4, 1899. About one year after the conveyance of the property to defendant Samuel Page commenced an action against her, having for its purpose the annulment and setting aside of the deeds whereby he had theretofore conveyed the real estate to the defendant. Pending the trial of this action Samuel Page died. A special administrator of his estate was substituted as plaintiff, who, under the order of the court, prosecuted said action to a final determination and judgment was rendered in favor of defendant therein. At the time of filing the answer herein said judgment had become final. At the trial of this action defendant offered in evidence certified copies of the judgment, findings, complaint, amended complaint, and the order substituting the special administrator as plaintiff and his supplemental complaint in the former suit brought by Samuel Page, to all of which objections were made upon the ground that they did not constitute the entire record of the case. Other objections were made, which will be noticed in discussing the effect of the former action as an estoppel. To constitute an estoppel the judgment pleaded in bar must be a valid judgment rendered by a court having jurisdiction, and these facts must be shown in order to justify the reception in evidence of such judgment. The usual and appropriate manner of making this proof is to offer the judgment roll. Conceding, but not holding, this mode of proof to be exclusive where a direct attack is made upon a judgment (McKinlay v. Tuttle, 42 Cal. 570; Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646), we are nevertheless of the opinion that where a collateral attack is made, the recitals contained in the judgment are sufficient evidence of the matters therein recited. The judgment may be grossly unjust or erroneous, but the decision of the court as to all issues involved in the action stands as a finality between the parties and their privies until set aside in some mode recognized by law. Jones on Ev. § 601. In such case, where the judgment is one rendered by a court of general jurisdiction, the recitals contained therein constitute evidence of their truth, and every intendment must be indulged in support of the judgment. Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Est. of Twombley, 120 Cal. 351, 52 Pac. 815; Drake v. Duvenick, 45 Cal. 455. The duly certified copy of the judgment pleaded and offered was the highest evidence of the adjudication by the court of the issues involved in the suit brought by Samuel Page against respondent, so its recitals showing acquisition of jurisdiction of the parties in that action constituted evidence of the facts recited. Simmons v. Threshour, 118 Cal. 100, 50 Pac. 312; section 1905, Code Civ. Proc. We therefore conclude that the documents referred to were entitled to be received in evidence unaccompanied by the judgment roll.

The further objection is made that the action was not between the same parties, and did not involve the same issues. A solution of these questions must dispose of the appeal. Samuel Page commenced his action against this respondent December 9, 1897, and prior to his marriage to appellant herein. His death occurred June 24, 1899, and, as she claims by right of succession and as sole heir of her deceased child, it follows that her title, if any, was acquired at a date some 18 months after he, Samuel Page, had instituted suit against this defendant to regain the property involved, and wherein this judgment was rendered. The rule is statutory that, when a matter has once been adjudicated by a competent tribunal, its determination "in respect to the matter directly adjudged" is conclusive not alone between the actual parties themselves, but also as to "their successors in interest by title subsequent to the commencement of the action."

Section 1908, Code Civ. Proc. A judgment binding upon an intestate is binding upon his heirs at law. Jones on Ev. § 603; Ross v. Banta, 34 N. E. 865, 39 N. E. 732, 140 Ind. 120; Bigelow on Estoppel, pp. 75, 76. Appellant's position is one of privity with her deceased husband, to whose position she succeeds, to a limited extent, as to all property rights which he owned at the time of his death. Page v. Garver, 146 Cal. 577, 80 Pac. 860. She stands in his shoes, and a judgment which would estop him in life would bar an action on her part after his death. Page v. Page, 143 Cal. 602, 77 Pac. 452; section 63, Herman on Estoppel.

Appellant insists that the issues determined in the case of Samuel Page against respondent are entirely different from those involved in this action; that the question of Samuel Page's competency or capacity to convey the lands was not in issue in the former action and has never been adjudicated. For the purpose of determining whether the issues are the same, resort may be had to the amended complaint and findings introduced in evidence. Wixson v. Devine, 67 Cal. 341, 7 Pac. 776; Gray v. Dougherty, 25 Cal. 266; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54. An examination of these discloses the fact that the actions were brought for identically the same purpose; that is, to set aside and annul the deeds (which are the same) whereby Samuel Page conveyed the real estate to this respondent. In the former action Samuel Page alleged that he was at the time of making the deeds "of great age, to wit, of the age of 74 years, and was infirm of purpose, mind and body." In the case at bar his widow alleges that he was at said time "sick, weak and in an exhausted condition," and, by reason of said sickness, he was "incapacitated from doing any business and wholly incapable of making a deed." In both cases it is alleged that this respondent took advantage of his alleged condition, and by false and fraudulent representations induced him to sign the deeds. Evidence which would prove the allegations of the complaint in the one case would be equally applicable to the issues in the other. The same evidence which would be required to support the former action would be required in the one at bar. Phelan v. Quinn, 130 Cal. 374, 62 Pac. 623; Freeman on Judgments, § 259; Taylor v. Castle, 42 Cal. 367.

The court found that Samuel Page was not induced through fraudulent representations to make the deeds to this respondent, that there was no conspiracy between respondent and her brother to obtain the property, and that Samuel Page was not infirm of body, mind, or memory. The former case involved the same issues as this, was brought for the same purpose, tried upon its merits, and appellant, claiming under the same title as the successor in interest of Samuel Page, and by reason of her privity with him, is estopped by the adjudication therein had.

This conclusion renders it unnecessary to pass upon any other points made.

The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 395

## KELLER et al. v. McGILLIARD et al.

(Civ. 341.)

(Court of Appeal, Second District, California. April 15. 1907.)

1. Quieting Title — Answer — Showing Source of Title—Necessity.

In an action to quiet title, defendant set up a decree in an action wherein the issues were the same, quieting title in defendant as against one W., alleging that W. was the real plaintiff in the present action, and that plaintiffs were merely his successors and agents. *Held*, that the allegations constituted an estoppel preventing W. and his successors and agents from questioning defendant's title, and rendering it unnecessary for defendant to show his source of title.

2. Appeal—Harmless Error.

The error, if any, in refusing to strike out defendant's cross-complaint in an action to quiet title, was harmless where the judgment was not rendered on the cross-complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4114.]

3. Quieting Title—Pleadings—Cross-Complaint.

Plaintiff in an action to quiet title may be compelled by defendant's cross-complaint to litigate in the action the cloud cast on defendant's title by the commencement of the action

4. Appeal—Harmless Error.

Where, in an action to quiet title, a judgment for defendant was not based on a certain deed to him, the error, if any, in introducing the deed in evidence, was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4171.]

5. Quieting Title—Burden of Proof.

In an action to quiet title, the burden of proving a paramount title was on plaintiff.

6. Judgment—Res Judicata.

A party to an action to quiet title failing to assert his claims properly, or to present the proper evidence, cannot litigate it in a second suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1085.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Mrs. E. J. Keller and another against G. D. McGilliard and others. From a judgment for defendant McGilliard, and from an order denying plaintiffs' motion for new trial, they appeal. Affirmed.

Jones & Weller, for appellants. R. L. Horton, for respondent.

TAGGART, J. This is an action to quiet title. Judgment was in favor of defendant McGilliard. Plaintiffs appeal from judgment and order denying their motion for a new trial.

The complaint is in the usual form. The action was dismissed as to the defendants Campbell and McC. Chaffey, and the answer of the defendant McGilliard first denies the material allegations of the complaint and then sets up three affirmative defenses: (1) That the property described in the complaint was conveyed by the sheriff of Los Angeles county to one J. E. White by deed made pursuant to a judgment foreclosing a street assessment lien against Alex. Scott and J. A. Frawley and others; that said White thereafter brought an action to quiet his title to said property against the said G. D. McGilliard, defendant herein; that notice of the pendency of said action was filed in the recorder's office as provided by law; and that by the judgment of the superior court duly given and made in said action on the 17th day of September, 1901, it was decreed that said G. D. McGilliard, defendant herein, was the true and lawful owner of said property, and that his title thereto be quieted against the claims of the said J. E. White, and said White estopped from setting up any claim to the property against the defendant herein. That an appeal was taken by said White to the Supreme Court, and said judgment was duly affirmed by that court on the 16th day of October, 1903. That the plaintiff E. J. Keller acquired her title to the property by quitclaim deed from said Alex Scott and J. A. Frawley, dated May 7, 1902; that the issues involved in this case are the same as those involved in White v. McGilliard, and that plaintiff is the direct successor in interest to the alleged title of said Scott and Frawley acquired after the entry of the judgment in the action of White v. McGilliard. (2) A title by adverse possession based upon a certificate of sale of said property for payment of a delinquent bond for street assessment, made to him by the city treasurer of Los Angeles city on October 19, 1898; actual possession and payment of all taxes for more than five years prior to the commencement of the action being alleged. And (3) that the deed by which plaintiff acquired title is void and of no effect. By the same instrument, and as part thereof, said defendant McGilliard sets out a cross-complaint in the form, and containing the usual allegations, of a complaint to quiet title to the property described in the original complaint against the plaintiffs and his codefendants. On the day of trial and prior to the decision of the case defendant was permitted by the court to amend his answer by adding the allegation: "That the plaintiffs herein are closely related to the said J. E. White, the plaintiff in the case of White v. McGilliard, above mentioned, and are his agents and representatives, and that they have no interest in the property described herein, of any kind or character." The court finds all the averments, allegations, and denials of defendants' answer and cross-complaint to be true, but the defense of adverse possession and void deed; and that the allegations, averments, and denials of plaintiffs' pleadings are untrue.

Appellants specify as grounds for reversing the judgment (1) that defendant did not set up in his answer his source of title, upon which the judgment was rendered; (2) error of the court in refusing to strike out the cross-complaint and in giving judgment thereon; and (3) insufficiency of the evidence to justify the court in finding that the treasurer's certificate of sale and deed passed the title to the defendant, and that the plaintiff was not the real party in interest.

To sustain their first point, appellants assume that the only source of title pleaded by defendant was the city treasurer's certificate of sale and adverse possession. These were but parts of the same source of title set up in the second affirmative defense in the answer, and in no way support the judgment, since the trial court expressly found against this defense.

The assumption of appellants is unwarranted by the record. The first affirmative defense pleads as a source of title good against the plaintiffs a decree of the superior court (affirmed by the Supreme Court) quieting defendant McGilliard's title to this same property, rendered, in an action wherein the issues were the same as in this, against J. E. White, who is alleged to be the real plaintiff in this action. While perhaps not in the strict sense a source of title, these allegations constitute an estoppel which prevents J. E. White and his successors and agents from questioning the title of McGilliard, and renders it unnecessary that he should as against their claims show his source of title. This defense appears to be the one upon which the judgment was rendered. It is the rule that a cross-complaint is unnecessary in an action to quiet title, and, where unnecessary, it may be stricken out on motion, but the rule has its exceptions. Winter v. McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; Islais, etc., v. Allen, 132 Cal. 438, 64 Pac. 713. There is no issue tendered by the cross-complaint here and none made by the answer to it which was not before the court on the complaint and answer. The judgment, however, was not rendered upon the cross-complaint. The findings of fact which support the judgment, and which are sufficient for that purpose, negative the allegations of the complaint and confirm the allegations of the first affirmative defense set forth in the answer. The references to the cross-complaint in the findings may be stricken out as surplusage and the findings still be sufficient to support the judgment. The so-called cross-complaint was not a separate pleading, and its allegations were mere repetitions of some of the allegations of the answer. If the ruling on the motion were error, it was not prejudicial to plaintiffs' interests; but the practice here followed seems to be justified by the decision in Islais v. Allen, supra, in cases where affirmative relief is sought by the defendant to enable the latter to prevent a dismissal of the action by the plaintiff and thus compel a determination of the rights of the parties if the action be begun. In other words, the plaintiff in such an action, having laid claim to the defendants' property by suit, may be compelled, if the latter elects, to litigate in that suit the cloud thus raised upon defendant's title by the commencement of the action.

Appellants' third ground of reversal, like the first, proceeds upon the assumption that the treasurer's certificate of sale is the only source of title pleaded by the defendant. The trial court was of the opinion that there was not sufficient evidence to justify it in finding that this certificate and the deed made in pursuance thereof passed title to the defendant, even when aided by the evidence of adverse possession introduced, and there is nothing in the record to suggest that the judgment rests upon these instruments, or either of them, alone. If the introduction of the deed were erroneous, it could not have been prejudicial. The plaintiffs' confused and conflicting testimony on the witness stand, taken with the record evidence in the case, was sufficient to justify the trial court in finding that she was the mere agent of J. E. White in this action. The matters to be considered in drawing this inference are peculiarly within the province and discretion of the trial court, who had the witness before it, and could best determine the true relations of the parties. For the purposes of this appeal, this finding of the trial court must be accepted and J. E. White regarded as the real plaintiff here. The real plaintiff then stands in the position of attempting to relitigate or again litigate title to the same property and against the same parties who were before the court in White v. McGilliard, 140 Cal. 654, 74 Pac. 298. From the opinion of the Supreme Court in that case it appears that plaintiff in that action (the real plaintiff here) to sustain his claim of ownership of the property relied upon the same title conveyed by deed of one A. K. Crawford to Alex. Scott and J. A. Frawley, which was introduced to support the title of Mrs. Keller, the record plaintiff here, and also upon the deed which White received from the sheriff in pursuance of the execution of the judgment foreclosing the street assessment lien in the action of White v. Scott, Frawley et al. In the absence of other evidence than these instruments and proceedings, the court found that they were "not in themselves sufficient to connect appellant with any paramount title to the premises."

The court upon the trial of that case (140 Cal. 654, 74 Pac. 298) considered these evidences of title, and presumably found that all the title originally held by Crawford was vested in J. E. White; but, since it did not appear that Crawford had any title at all, White's claim of ownership failed against defendants' possession because the burden was upon him to establish a paramount title. Had he supplied in that action the chain of title with which he now supports the title in Mrs. Keller's name, his whole title would have been passed upon by the court. The purchase from Scott and Frawley in the name of Mrs. Keller does not bring to plaintiffs' support any other or different title than that presented on the trial of the other cause. All the title of Scott and Frawley and of A. K. Crawford was before the court, but plaintiff in that action failed to show of what this title consisted. Failing to do this, he cannot now maintain another action against the same parties for the purpose of introducing evidence to show what title Scott and Frawley had at the time of the former trial. It is a well-settled rule that if a party fails to assert his claims properly, or to present the proper evidence in the first suit, he will not be permitted to litigate it in a second suit. Bingham v. Kearney, 136 Cal. 177, 68 Pac. 597.

The errors of law complained of as arising during the course of the trial, in so far as they are not covered by the foregoing consideration of the case, are not specially urged. They do not appear to present any error prejudicial to appellant.

Judgment and order appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 388

## LINDOW v. COHN. (Civ. 292.)

(Court of Appeal, Second District, California. April 15, 1907.)

1. Principal and Agent — Authority of Agent.

A traveling salesman, engaged in soliciting orders for merchandise and transmitting them to his employer, who had the option to accept or reject them, and not held out as possessing other than the ordinary authority incident to the business of a soliciting agent, though possessing authority, under Civ. Code, § 2323, to warrant the quality of the goods, has no authority to enter into an agreement for the settlement of a customer's claim for breach of warranty of the quality of goods previously sold by him to the customer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 329.]

2. Same—Ratification—Evidence.

A traveling salesman, engaged in soliciting orders for merchandise and transmitting them to his employer, transmitted an order, which the employer accepted and filled. The order was procured by the salesman agreeing with the customer to settle for breach of warranty of the quality of goods previously sold. The employer had no knowledge of the settlement prior to the shipment of the goods pursuant to the order, and he subsequently repudiated the settlement and returned to the customer the check sent by him. *Held*, that the employer having no knowledge thereof, as required by Civ. Code, § 2310, did not ratify the unauthorized act of the salesman in making the settlement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 627, 630.]

3. SALES—CONTRACTS—RESCISSION—REDELIVERY OF GOODS.

A traveling salesman procured an order from a customer, which the principal filled. The goods did not comply with the warranty, and thereafter, on the customer giving to the salesman a second order, the salesman agreed that the customer might return the unsold portion of the first bill of goods, and, after deducting the price of the same, remit to the employer the balance in settlement of the second bill. The employer refused to accept the return of the goods, writing: "We return you your check. * * * The goods that you shipped back will lay at the railroad at your expense, as we positively refuse to accept them." *Held*, that the employer did not receive the goods that were returned by the customer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 257.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by G. C. Lindow against C. Cohn. From a judgment for defendant, plaintiff appeals. Reversed.

Jellett & Meyerstein and Geo. E. Whitaker, for appellant. Emmons & Irwin, J. W. P. Laird, and Fred E. Borton, for respondent.

SHAW, J. The facts as they appear from the record are: That one Peiser, as traveling salesman and soliciting agent of Meyerstein Company, plaintiff's assignor, sold to defendant a lot of merchandise, consisting of corduroy trousers, and on behalf of his principal made covenants of warranty as to the quality of the goods. Some six weeks after the goods had been received and paid for by defendant, Peiser again called upon defendant, soliciting further orders for his house, when defendant for the first time made complaint, stating that the corduroy trousers were not as he had represented them; that every pair thereof which defendant had sold had been brought back to him; and that he (defendant) had been compelled to reimburse the purchasers thereof. Whereupon Peiser admitted that the goods were not as warranted, and said to defendant that he wanted his trade, that he would do all that he could to make it right, and told defendant to return the goods and charge his principal, the Meyerstein Company, with the goods shipped back, plus freight charges and the amount of defendant's loss in making adjustments with his customers. Defendant then gave Peiser an order on Meyerstein Company for the bill of goods, the purchase price of which is herein involved. The order was transmitted to Meyerstein Company, who in due course of time shipped the goods as per order. The defendant, pursuant to his agreement with Peiser, returned to Meyerstein Company the unsold portion of the first bill of goods, and after deducting the price of the goods so returned, together with freight charges and the amount which defendant had paid to his customers in making adjustments with them, sent to Meyerstein Company his check for the balance, in settlement of this last bill of goods. The Meyerstein Company refused absolutely to accept the return of the goods, and by letter stated: "We return you your check, shipping receipt and Wells, Fargo & Co. receipt. The goods that you shipped back will lay at the railroad at your expense, as we positively refuse to accept them." The assignee of Meyerstein Company thereupon brought suit for the amount of the last bill of goods, and judgment was rendered for defendant, from which, and an order denying his motion for a new trial, the plaintiff appeals.

The court found that Peiser, as agent of Meyerstein Company, had authority to make the agreement for the return of the corduroy trousers and settle and allow the amount of damages claimed by defendant, as a condition of defendant giving the second order for goods, and found further that Meyerstein Company ratified the act of its agent. There is nothing in the record disclosing the extent of Peiser's authority, other than the fact that he was the traveling salesman of Meyerstein Company, engaged in soliciting orders for his house. It thus appears that no actual authority, as defined in section 2316, Civ. Code, was conferred upon him to make this agreement. Hence the only question, aside from the ratification found by the court, is whether or not the making of the agreement for the return of the goods to his principal was within the scope of his employment as traveling salesman or soliciting agent. Did the position clothe him with authority to make the said agreement with defendant, and, if not, did Meyerstein Company ratify his acts in that behalf? Peiser's authority to sell carried with it the authority to warrant the quality of the goods sold (section 2323, Civ. Code), and the court, upon sufficient evidence, finds that he did so warrant them. This section of the Code, however, cannot be extended so as to clothe the agent with authority to determine, not only whether there was a breach of the covenants of warranty, but also to adjust and allow the damages which defendant claims to have sustained by such breach. Section 2325, Civ. Code, provides that a general agent intrusted with the possession of goods sold may receive the price for which they are sold; but in this case the agent was not so entrusted. There is no evidence of custom, previous dealings, or evidence of any character, which tends to show that Peiser was held out by his principal as possessing other than the ordinary authority incident to the business of soliciting agent (section 2337, Civ. Code), and that was merely to solicit orders and transmit them to his principal. Chambers v. Short, 79 Mo. 204. His principal was not bound to complete the sale, but might, at its option, decline to fill the order. Ency. of Law, vol. 6, p. 227. In the absence of evidence to the contrary, "to sell" means to sell for cash, and an agent authorized to sell has no authority to receive other goods in part payment (Organ Co. v. Starkey, 59 N. H. 142); and in this case Peiser had no authority solely by virtue of his position to bind his principal upon an agreement to receive back a portion of the goods in the way of barter in payment for the second order (Clough v. Whitcomb, 105 Mass. 484; Benjamin on Sales, p. 728; Hayes v. Colby, 65 N. H. 192, 18 Atl. 251; Seiple v. Irwin, 30 Pa. 513). Defendant had paid Meyerstein Company for the first bill of goods, and the transaction was complete, and left defendant with his cause of action against the principal for any breach of warranty made by the agent in the sale thereof.

We are, therefore, of the opinion that the evidence is insufficient to justify the findings to the effect that Peiser was authorized to make, on behalf of his principal, the covenants and agreement upon which respondent bases his defense.

The court finds that Meyerstein Company ratified and affirmed the acts of Peiser, and respondent contends that, even conceding that authority was lacking in Peiser to make the agreement, the ratification is sufficient to bind his principal. It is true that Meyerstein Company filled the second order and shipped the goods to defendant; but this in itself would not constitute a ratification on the part of the company, unless it had notice of Peiser's alleged agreement with defendant before making delivery of the goods. Section 2310, Civ. Code; Lumber Co. v. Krug, 89 Cal. 237, 26 Pac. 902; Owings v. Hull, 9 Pet. (U. S.) 607, 9 L. Ed. 246. There is no evidence tending to show that the company had any knowledge of the alleged agreement claimed to have been made with Peiser prior to such shipment, and it appears from the letter which defendant offered in evidence that it repudiated the agreement in the strongest possible language, and returned to defendant his check. Such disavowal was sufficient. We cannot agree with respondent that Meyerstein Company received the goods that were returned. The contrary clearly and conclusively appears.

The judgment and order appealed from are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

151 Cal. 118

## ROBINSON v. MUIR et al. (Sac. 1,415.)

(Supreme Court of California. May 7, 1907.)

1. Execution—Bona Fide Purchasers.

The purchaser, in a suit to foreclose liens, takes no title as against a prior grantee in an unrecorded deed, not a party to the suit; the lien claimants and such purchaser, who was acting on their behalf, knowing at all times of the claims of such grantee, and Civ. Code, § 1217, declaring an unrecorded instrument valid as between the parties and those having notice thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 783, 785.]

2. Corporations — Sale of Property to Stockholder.

Civ. Code, § 309, prohibiting the directors of a corporation from making dividends except from surplus profits, or dividing any of the capital stock among any of the stockholders, does not prevent the sale, for an adequate consideration, by a corporation of any of its property to a stockholder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 695, 698.]

3. Appeal—Record.

The admission in evidence of a judgment roll cannot be reviewed on appeal from the denial of a new trial; the judgment roll not being incorporated in the statement on motion for new trial, so that its contents cannot be known.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2899.]

4. Execution—Title of Purchaser.

The purchaser at sale in a suit to foreclose liens on land, though knowing that the one in whom was the legal title had purchased as agent, takes the legal title, subject merely to the equity of the agent's principal to have a conveyance of such title.

5. Quieting Title—Pleading and Proof.

The defense, in an action to quiet title, consisting merely of a denial of plaintiff's title and an assertion of title in defendant, is not established by proof that, while plaintiff is the owner of the legal title, defendant has an equity entitling him to a conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 87.]

6. Appeal—Supplying Findings.

Findings on issues as to which the trial court has not found cannot be supplied on appeal, though the evidence be regarded as sufficient to sustain them.

7. Same—Harmless Error.

Where findings are sufficient to sustain a judgment, failure to find on other issues, which could not change the result, is harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4238, 4239.]

8. Same—Reversal in Part.

Where the issues are entirely separate, and a new trial was properly denied as to some, and erroneously as to others, the order will be reversed only so far as necessary to correct the error therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4555.]

Department 1. Appeal from Superior Court, Placer County; E. E. Gaddis, Judge.

Action by A. K. Robinson against William Muir and others. From an order denying a motion for new trial, plaintiff appeals. Reversed in part.

A. K. Robinson, for appellant. J. D. Meredith, F. P. Tuttle, and Lander & Burns, for respondents.

SLOSS, J. The plaintiff commenced this action to quiet his title to four placer mining claims known as the "Manhattan," the "Weske No. 1," the "Weske No. 2," and the "Weske No. 3" mines, and to a ditch or canal known as the "Dead Horse Mining Ditch," all situate in Placer county. The action was dismissed as to the defendant Hamilton; the other three defendants answering separately. White set up a claim of title to the Manhattan mine. Muir and Chapin filed answers, in which each denied the plaintiff's allegation of ownership, and claimed title in himself to an undivided one-half interest in all the property involved in the action. Certain separate and additional defenses were also pleaded by Muir and Chapin. Upon a trial before the court, sitting without a jury, findings were made to the effect that the plaintiff "is not, and never was, the owner of, or entitled to, or in the possession of, all, or any, of" the property described in the complaint; that the defendant White "has no right, title, claim, interest, demand, or estate" in or to said Manhattan placer mine, or any of the property described in the complaint; that the defendant Muir is the owner of an undivided one-half interest in said Weske No. 1, Weske No. 2, and Weske No. 3, and Manhattan mines, and the defendant chapin the owner of an undivided one-half interest in and to said mines. The court made no findings on any other of the defenses set up by Muir and Chapin. Appropriate conclusions of law were drawn from the findings, and a judgment was entered whereby it was decreed that Muir and Chapin are the true and lawful owners and entitled to the possession of the four mining claims in question; and that their title thereto be quieted as against the claims of the plaintiff and all persons claiming under him. It was further adjudged that plaintiff was not the owner of or entitled to the possession of the ditch known as the "Dead Horse Mining Ditch." Plaintiff moved for a new trial, which was denied, and he now appeals from the order denying his said motion. The principal contention of the appellant is that the evidence was insufficient to justify the findings of the court that he was not the owner of any of the property described in the complaint, and that the defendants Muir and Chapin were the owners of the four mining claims involved in the action. The titles asserted by the parties to the various pieces of property involved are traced through different channels, and it will be necessary therefore to state them under separate heads.

1. The three Weskes: It appeared without dispute that the three claims, known as "Weske No. 1," "Weske No. 2," and "Weske No. 3," were originally patented to Adolph Weske, who, in October, 1878, conveyed them to the Weske Consolidated Mining Company, a corporation. The plaintiff offered in evidence the judgment roll in an action entitled A. Skym et al. v. William Muir et al., in the superior court of Placer county. This was an action to foreclose miners' liens upon said Weske No. 1, Weske No. 2, and Weske No. 3 claims. The Weske Consolidated Mining Company was one of the parties defendant in said action, which resulted in the entry of a decree foreclosing said liens. An order of sale was duly issued in said action, and pursuant thereto said three claims were, on June 21, 1897, sold to J. M. Fulweiler and Ben P. Tabor, who, on June 28, 1898, received the commissioner's deed for the same. On October 11, 1898, Fulweiler and Tabor conveyed said claims to John R. Scupham. Subsequently, E. D. Pereira and others commenced an action in the superior court of Placer county to foreclose certain miners' liens upon all the property involved in this case, including the three Weskes. Among the parties defendant were George W. Hamilton, John R. Scupham, William Muir, the Weske Consolidated Mining Company, and others. In that action a decree was entered in favor of the plaintiffs as against Scupham, but not against Muir, and an order of sale issued. On September 20, 1902, the sheriff of Placer county executed a certificate of sale of the four claims and the Dead Horse Ditch to A. K. Robinson, the plaintiff herein, and on September 29, 1903, the sheriff's deed of said property was executed to plaintiff and recorded.

Undoubtedly these facts made out a prima facie case of title in plaintiff to the three Weskes. The defendants Muir and Chapin, however, offered evidence tending to establish that on or about the 29th day of November, 1882, the Weske Consolidated Mining Company had executed and delivered a deed conveying the Weske No. 1, Weske No. 2, and Weske No. 3 claims to the defendant Muir. This deed was never recorded; it having been, as was claimed, destroyed by fire shortly after its delivery. Evidence was also produced to the effect that on June 17, 1883, Muir mortgaged the three Weskes to C. F. Morgan and J. W. Huffman; that on August 6, 1883, Morgan and Huffman assigned the mortgage to Samuel Sussman, who thereafter brought an action to foreclose the mortgage, recovering judgment of foreclosure on June 3, 1885. A foreclosure sale was had on August 4, 1885, and Sussman became the purchaser at this sale, and received his deed in due course. On June 4, 1898 (after the foreclosure sale in Skym v. Muir to Fulweiler and Tabor), Sussman deeded the three Weskes to Muir. Muir conveyed a one-half interest in all these properties to Chapin.

The trial court evidently believed this testimony, and, so believing it, necessarily reached the conclusion that plaintiff had no title to the three Weskes, but that the title thereof was in Muir and his grantee, Chapin. Plaintiff's claim is derived from the sale in the action of Pereira et al. v. Hamilton et al. Among the defendants in that case was John R. Scupham, and it is his interest that is claimed to have passed to the plaintiff by virtue of this sale. But the only interest which Scupham had was acquired by his deed from Fulweiler and Tabor, who were the purchasers at the sale under the foreclosure of the miners' liens in Skym v. Muir. In this action of Skym v. Muir, Samuel Sussman was not a party, and any interest which he may have had in the property could therefore not have been affected by the judgment in that action or the sale thereunder. But during the entire pendency of that action, and until after the sale therein, Sussman had been the owner of the property. It follows that no title passed to Fullweiler and Tabor by the foreclosure sale, and that none could pass from them to Scupham or to the plaintiff. The evidence does not sustain the contention of plaintiff that Sussman held the property merely as trustee for Muir, who was made a party to the Skym suit. Nor could Muir's interest, derived from Sussman's conveyance in 1898, have been affected by the sale in the Pereira suit, since Muir, although a party to that suit, recovered judgment in his favor.

It is argued that, as Muir's claim of title has its original basis in the unrecorded deed from the Weske Consolidated Mining Company, it cannot prevail as against the claim of plaintiff. There would be much force in this contention if plaintiff occupied the position of a bona fide purchaser for value. Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579, 21 L. R. A. 33, 33 Am. St. Rep. 209; Murphy v. Clayton, 113 Cal. 153, 45 Pac. 267. But there is ample evidence to sustain the conclusion that the lien claimants suing in Pereira v. Hamilton, and the plaintiff, who was acting on their behalf, were at all times fully informed of Muir's claim of title, even if they were not put upon inquiry by his actual possession of the property. Security, etc., Co. v. Willamette, etc., Co., 99 Cal. 636, 34 Pac. 321. The purchaser, with notice of another's claim, cannot take advantage of the fact that the conveyance under which the other claims was not recorded. Civ. Code, § 1217.

It is suggested also, that, as Muir was shown to be a stockholder of the Weske Consolidated Mining Company, the conveyance from that company to him was void, under the provisions of section 309 of the Civil Code. Assuming that plaintiff is in a position to assail collaterally a transfer which has never been questioned by the corporation, its stockholders, or its creditors, there is nothing in section 309 to prohibit the sale by a corporation, for an adequate consideration, of property owned by it, and such sale may be to a stockholder as well as to a third person. There is evidence here that the transfer in question was the result of such a sale.

It is claimed that the court erred in admitting, over the plaintiff's objection, a certain judgment roll in an action brought by William Muir against J. R. Scupham. But the appellant failed to incorporate this judgment roll in his statement on motion for a new trial. We have no knowledge beyond the statements of counsel as to the contents of this roll, and without such knowledge we cannot say that its admission, if erroneous, was prejudicial.

So far as the three Weskes are concerned, we think the findings were fully sustained by the evidence, and that the court committed no error to the prejudice of the appellant.

2. The Manhattan mine: The statement on motion for new trial sets forth that "the evidence is undisputed that in 1898 the title to the Manhattan placer mine stood of record and was in J. M. Fulweiler and B. P. Tabor." Fulweiler and Tabor conveyed said mine to John R. Scupham by deed dated and recorded October 11, 1898. Scupham executed a deed to Muir on July 25, 1902. Meanwhile, on July 14, 1902, the plaintiff, in Pereira et al. v. Hamilton et al., had obtained a decree foreclosing their liens on this property as against Scupham, and pursuant to this decree the sale to plaintiff, as above stated, was made. A notice of the pendency of this action had been filed with the recorder of Placer county on January 18, 1902. The sale to plaintiff, and the deed executed in pursuance thereof, conveyed to the purchaser all the title which the judgment debtor (Scupham) had at the date of the filing of the lis pendens. Code Civ. Proc. §§ 409, 1908. At that date the legal title was in Scupham, and it accordingly passed by the execution sale and deed. The respondents sought to avoid this conclusion by offering evidence to the effect that Scupham, in purchasing the Manhattan mine, acted as agent for Muir, and was holding the title in trust for him, and that the lien claimants, before commencing their foreclosure suit, as well as the plaintiff, their attorney, had actual notice of these facts. The evidence was probably sufficient to justify a finding in favor of this theory; but, if this was so, it did not alter the fact that the legal title to the property was in Scupham, and that Muir simply had an equity entitling him to a conveyance from Scupham of such legal title. The plaintiff, purchasing with notice of Muir's claim, became the owner of the legal title, subject to the same equity. The findings were that plaintiff had no title, but that the title was in Muir and his grantee, Chapin. These findings were contrary to the evidence. It has long been settled law in this state that an action to quiet title can-

not be maintained by the owner of an equitable title against the owner of the legal title. Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518; Harrigan v. Mowry, 84 Cal. 456, 22 Pac. 658, 24 Pac. 48; Burris v. Adams, 96 Cal. 667, 31 Pac. 565; Tuffree v. Polhemus, 108 Cal. 676, 41 Pac. 806; McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421; Chase v. Cameron, 133 Cal. 231, 65 Pac. 460. See, also, Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010. And, similarly, in such action by the owner of the legal title, proof of a mere equity in the defendant will not sustain a finding that such defendant is the owner of the property. Reilly v. Wright, 117 Cal. 77, 48 Pac. 470. We do not intend to suggest that an equitable defense may not be set up in actions to quiet title; but, where the defense consists merely of a denial of plaintiff's ownership and the assertion of title in defendant, such defense is not established by proof that the plaintiff is the owner of the legal title, subject to an equity in favor of defendant. It is true that in this case various equitable defenses were interposed by the answers of the defendants Muir and Chapin. No findings were made on these, however, and they cannot therefore be considered. Such defenses, in order to be available to the defendants, should have been the subject of favorable findings by the court. Even though we might regard the evidence as sufficient to sustain them, we cannot supply findings on issues as to which the lower court has not found.

It is, perhaps, hardly necessary to add that, if the findings actually made (which are sufficient to support the judgment), were sustained by the evidence, the failure to find upon additional issues, which could not affect the result, would be entirely immaterial. We mention this in answer to the contention of appellant that such failure in itself constitutes prejudicial error.

3. The Dead Horse mining ditch: This stands in much the same situation as the Manhattan mine. The plaintiff offered evidence tending to show title in Scupham, and a sale of the same to plaintiff in the Pereira foreclosure suit. The defendants again rely on proof of the trust relation between Scupham and Muir; but, for the reasons stated above, this was insufficient to overthrow plaintiff's claim of title. A new trial must accordingly be ordered as to the Manhattan claim and the Dead Horse mining ditch. We see no reason, however, why such new trial should not be limited to the issues raised as to these properties. Under our practice a party may move for a new trial as to a part of the issues. San Diego Land & Town Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83. If the motion be for a new trial as to the entire action, the court may grant it in part, and deny it in part, leaving its former determination upon a portion of the issues to remain. Duff v. Duff, 101 Cal. 1, 35 Pac. 437. It has also long been settled that upon an appeal from the judgment an appellate court may order a new trial as to a part of the issues, leaving the decision in force as to the remainder. Marziou v. Pioche, 10 Cal. 546; Soule v. Dawes, 14 Cal. 248; Argenti v. San Francisco, 30 Cal. 463; Kinsey v. Green, 51 Cal. 379; Glascock v. Ashman, 52 Cal. 420; Billings v. Everett, 52 Cal. 661; Goodlett v. St. Elmo Investment Co., 94 Cal. 303, 29 Pac. 505; Tunis v. Lakeport Ass'n, 98 Cal. 285, 33 Pac. 63. The reasoning upon which these cases went is equally applicable to an appeal from an order denying a new trial. Where the issues are entirely separate, and a new trial was properly denied as to some, and erroneously as to others, the order should be reversed only so far as may be necessary to correct the error in the order. As we have seen, there was no error in denying a new trial as to the three Weskes, and it would be imposing a useless burden and expense upon the parties to require the issues affecting these claims, which have once been properly adjudicated, to be again reopened for litigation. See Emerson v. Yosemite, etc., Co. (Cal. Sup.) 85 Pac. 122.

The order denying a new trial is reversed so far as it affects the issues raised regarding the Manhattan mine and the Dead Horse mining ditch. In all other respects it is affirmed. The parties should, if they desire, have leave to amend their pleadings, or to file additional pleadings regarding the issues sent back for a new trial.

We concur: SHAW, J.; ANGELLOTTI, J.

151 Cal. 162

## CHUBBUCK v. WILSON. (Sac. 1,333.)

(Supreme Court of California. May 9, 1907.)

1. OFFICERS—COMPENSATION—OCCUPANCY BY DE FACTO OFFICER—LIABILITY.

Pol. Code, § 936, as amended by Laws 1891, p. 28, c. 44, provides that, when the title of an incumbent to any office is contested in any court no warrant can be drawn or paid for any part of the salary until such proceedings have been finally determined, except that the section shall not apply to any party to a contest who holds the certificate of election or commission of office and discharges the duties of the office, but that he shall receive the salary as if no contest was pending. Code Civ. Proc. § 807, relating to actions by the Attorney General against one usurping or unlawfully holding a public office, declares that, if judgment be rendered on the right of another person alleged to be entitled in favor of such person, he may recover by action the damages which he may have sustained by reason of the usurpation of the office by the defendant. *Held*, that where defendant was awarded a certificate of election as sheriff of B. county, under which he performed the duties of the office, pending a contest, in which plaintiff was successful, plaintiff could not recover the amount paid to defendant as salary while he held the office, either as compensation incident to the office, or as damages for defendant's withholding the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, §§ 134, 159.]

2. SAME—ELECTIONS—CONTEST—APPEAL.

Where an appeal was taken by defendant in an election contest within the time prescribed, the appeal suspended the judgment, and continued defendant's certificate of election in full force during its pendency, as provided by Code Civ. Proc. § 1127, in so far as such certificate and defendant's incumbency entitled him to receive the salary of the office.

Henshaw and McFarland, JJ., dissenting.

In Bank. Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by James Chubbuck against S. H. Wilson. From a judgment in favor of defendant, sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The following is the opinion of HENSHAW, J., in department, with which McFARLAND and LORIGAN, JJ., concur:

"Plaintiff's cause of action against defendant arose out of the following facts: He and defendant were rival candidates for the office of sheriff of Butte county at the general election held in November, 1902. On the canvass of the returns by the board of supervisors, defendant was declared elected, and a certificate of election was issued to him. In January, 1903, he entered upon the discharge of the duties of his office. Plaintiff in due time contested defendant's election. His action was tried, and resulted in a judgment in his favor on the 24th day of January, 1903. The judgment decreed that the certificate of election issued to the contestee, defendant and respondent herein, be annulled and set aside, and that the county clerk issue to contestant, plaintiff and appellant herein, a certificate of election to the office of sheriff. The county clerk duly issued this certificate of election. Chubbuck qualified, and on the 26th day of January, 1903, demanded of Wilson possession of the office, which was refused. Wilson in due time appealed from the judgment in the election contest to this court, and on the 25th day of March, 1904, the judgment against him was affirmed. Upon the going down of the remittitur one month thereafter, namely, on the 25th day of April, 1904, Wilson surrendered the office to Chubbuck, who then took possession of it, and has since discharged its duties. Chubbuck then commenced his action, setting forth all these facts, and alleging that the respondent had wrongfully withheld said office from him from the 24th day of January, 1903, the date of the judgment of the superior court, until the 25th day of April, 1904, and prayed for damages for such unlawful withholding in the sum of $8,100, the amount of salary and fees received by defendant between these dates. Defendant demurred to this complaint upon the ground that it failed to state a cause of action, in that it appeared that defendant had received the salary and fees pending the election contest, and that during all of that time the defendant held the certificate of election and was discharging the duties of the office. The demurrer was sustained, and plaintiff appeals.

"The action is in form for money had and received. It is based upon the well-established principle that a de jure officer, after recovering possession of the office, has a right of action against the intruder, and that the salary and fees received by such intruder are the measure of his damage. Such was the rule at common law, and such, generally, is the rule in all of the states which have adopted the common law as the basis of procedure. 1 Chitty Plead. 100 m. p.; 8 Am. & Eng. 810; Avis v. Stukey, 2 Mod. 260; Vaux v. Jefferson, 2 Dyer, 114. In Dolan v. Mayor, 68 N. Y. 274, 23 Am. Rep. 168, it is said: 'The exclusion of a de jure officer is a legal wrong committed by the intruder. In a legal view it is immaterial that the defendant may have acted in good faith, or that he supposed he had the better title. A good motive is not an adequate answer to a claim for indemnity for a violated right. There is a great preponderance of authority in support of the doctrine that the de jure officer can recover, as against the intruder, the damages resulting from the intrusion.' Indeed, as we have read respondent's brief, that such a right of action exists, where not destroyed by statute, is conceded. But respondent insists that the statutory law of this state now deprives the successful litigant in a contested election case of this right. He admits that under section 807, Code Civ. Proc., such a right exists, as it has been declared to exist in People ex rel. Drew v. Rogers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668, where the action is strictly for usurpation of office under section 803, Code Civ. Proc., but argues that this right is limited to that particular class of actions because of the present reading of section 936 of the Political Code. Prior to 1891 that section read as follows: 'When the title of the incumbent of any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of the salary until such proceedings have been finally determined.' In 1891 the Legislature amended this section by adding the following: 'Provided, however, that this section shall not be construed to apply to any party to a contest or proceeding now pending, or hereafter instituted, who holds the certificate of election or commission of office and discharges the duties of the office; but such party shall receive the salary of such office the same as if no such contest or proceeding was pending.' Laws 1891, p. 28, c. 44. Upon the construction of this section as amended, respondent cites Bledsoe v. Colgan, 138 Cal. 34, 70 Pac. 924, Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850, and Anderson v. Browning, 140 Cal. 222, 73 Pac. 986, and, from his reading of these cases, declares that they are absolutely determinative of the case, and leave no ground for argument as to the soundness of the ruling of the court in sustaining the demurrer. It is important to consider, therefore, just what these cases do decide. Bledsoe v. Colgan was an original proceeding for mandate, brought against the state controller, asking that he be ordered to draw his warrant in favor of Bledsoe for salary as judge of the superior court. It was shown that, in a quo warranto proceeding brought by Bledsoe to contest the right of John L. Campbell to hold the office, the trial had resulted in a judgment that Bledsoe had been duly elected to the office, and should take possession thereof upon qualifying and taking oath, and that subsequently Bledsoe had so qualified and taken possession of the office, and had continuously performed the duties thereof. The defendants in the quo warranto proceedings had appealed from the judgment, and the appeal was pending at the time of this application for mandate. This court held that, under these circumstances, the judgment in mandate could not be considered the equivalent of the certificate of election contemplated by section 936, Pol. Code, saying that the commission of office which he was given by the judgment was not the same as the certificate of election which the law declared he must hold to become entitled to the salary while litigation was pending. 'Prior to 1891,' says this court, 'when litigation arose contesting the title to an office, no salary could be paid to the incumbent of the office until that litigation was finally determined; but the Legislature, recognizing the extreme harshness of this rule, made the exceptions found in the aforesaid proviso.' Thus, what Bledsoe v. Colgan decides is, first, that the proviso to section 936 of the Political Code is valid and entitles the state, or other disbursing officer, to pay, and the incumbent who holds a certificate of election to receive, the salary or emoluments of the office. Anderson v. Browning, supra, was an appeal from a judgment of the superior court of Yolo county, directing the issuance of a peremptory writ of mandate requiring the defendant, as auditor of the county, to draw his warrant on the county treasurer in favor of the plaintiff as salary of the plaintiff as district attorney. Anderson had been declared elected, and a certificate of election had been issued to him, and he had qualified by taking the official oath and had entered upon the discharge of his duties. His opponent, Huston, had instituted a contest of Anderson's right, and a trial had resulted in a judgment in favor of Huston. Anderson had appealed to this court, and the appeal was pending at the time of the demand made upon the auditor, who refused to draw his warrant under the indicated circumstances. It was held that mandate should issue, that the appeal by Anderson stayed the operation of the judgment, and that the certificate of election continued unimpaired during the pendency of the appeal. Therefore that Anderson occupied the position of incumbent who held a certificate of election, and, under section 936, Pol. Code, was entitled to draw the salary. Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850, was in principle and in decision identical with the last cited case. Collectively, then, these cases decide that under the proviso of section 936, Pol. Code, the incumbent, who has received the certificate of election, is entitled to draw the salary of the office, and the state, or county, or municipality, is compelled to pay that salary until final determination of the right upon appeal, even though the trial court may have decided against his claim of title to the office. But in none of these decisions, it will be noticed, is there a single word touching the right of private action which exists against one who is a usurper of office, and an officeholder who continues to hold office after judgment by the superior court, notwithstanding that his appeal may suspend the operation of that judgment, is a usurper from the date of that judgment, if the decision upon appeal shall be adverse to him. Such has been the settled law of this state since Dorsey v. Smyth, 28 Cal. 21, where it is said: 'It was the duty of defendant when judgment was rendered against him in the contest, to have surrendered the office. He was presumed to know the law, and acted at his peril.' So, in People v. Potter, 63 Cal. 127, it is said: 'After the judgment in the superior court there was no legal obligation upon him to hold. On the contrary, the law made it his duty to surrender the office to his successor. If he did not, he acted at his peril.'

"What, then, is the meaning of the amendment to section 936, Pol. Code? Before that amendment, while a contest over an office was pending, and until the final decision of such contest, the disbursing officers could draw no warrant in favor of either party without peril of becoming themselves liable in case, ultimately, title should be found in another, for the rule of law was that the salary was an incident, not to the tenure, but to the legal title, and in whomsoever the legal title should be shown to exist, to him belonged the salary. So far, therefore, as the disbursing officers were concerned, since they could not pay, excepting at their own peril, the result was that no payments were made at all, and this resulted in injury to the service of the state, since it must often follow that service would not be performed well, if at all, by one who would have to look eleswhere than to the salary for his very living expenses during a protracted period of litigation. In contemplation of this situation, which had actually arisen, the amendment was passed, and, for the good of the public service, it declared that, as between the state and the incumbent holding a certificate, the state would pay to him the salary of the office, and the disbursing officers, upon such payment, would be relieved from all liability. Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850. It nowhere said that, as between such incumbent and the legal and rightful claimant of the office, such rightful claimant would not have his action against the incumbent for the illegal and unlawful withholding. The government is keenly interested, as a matter of fundamental principle, in seeing that its duly elected officers shall have and hold their offices; but to deprive such a duly elected officer from ever receiving the emoluments of an office by ordering the salary paid to an incumbent holding unlawfully, and then to say that the legal officer should have no right of action for a recovery against such an incumbent, would be to put a premium upon frivolous appeals, and be a declaration that the state was not interested in seeing that its legally elected and qualified officers were seated, but, to the contrary, that it designed the emoluments of an office to go to him who, by hook or crook, could get possession of it with a certificate of election. Moreover, as we have seen, section 807, Code Civ. Proc., does make provision for the recovery of damages by the one who proves his legal title against an intruder, and these damages are, of course, the costs of his litigation, with the salary or fees of the office which the intruder has received. An action for usurpation of office can be brought as well against one holding the certificate of election and drawing the salary, as can an election contest pure and simple. Shall it be said that this private right to damages depends merely upon the form of action, and that, if the claimant adopts the expeditious mode of an election contest, he shall not have a right to recover damages, while if he adopts the more circuitous proceeding of obtaining permission of the Attorney General, to proceed in quo warranto, if successful in this litigation, he may recover these damages? There is neither logic, nor common sense, nor yet the mandate of the law, to compel such a conclusion.

"As we have seen, the defendant became an intruder by holding possession of the office after the judgment of the superior court. He had, of course, the right to appeal, and he had the right to draw the salary until the appeal was determined. Upon the other hand, he could have surrendered the office, and still have prosecuted his appeal. Acting as he did, he acted at peril of the result.

"It is therefore ordered that the judgment be reversed, and the demurrer be overruled, with leave to the defendant to answer."

A. E. Boynton and Park Henshaw, for appellant. W. H. Carlin, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment given in favor of defendant on sustaining a demurrer to the complaint. The facts of the case, as shown by the complaint, are as follows: Plaintiff and defendant were opposing candidates for the office of sheriff of Butte county at the general election held November 4, 1902. On the official canvass of the returns of said election, defendant was found to have received the highest number of votes, and was declared elected, and a certificate of such election was regularly issued to him on November 22, 1902. In January, 1903, he entered upon the discharge of the duties of the office. Plaintiff in due time contested the election of defendant under the provisions of the Code of Civil Procedure relative to such contests (section 1111 et seq.), with the result that, on January 24, 1903, judgment was rendered in the superior court of Butte county declaring plaintiff elected to the office, and annulling the certificate of election issued to defendant. Thereupon plaintiff qualified, and on January 26, 1903, demanded to be let into possession of the office. Defendant on the same day appealed from said judgment to this court. The judgment was affirmed by this court on March 25, 1904; the remittitur being transmitted to the superior court one month thereafter. Thereupon, on April 25, 1904, defendant, who had in the meantime continued in the possession of the office, discharging all the duties appertaining thereto, surrendered possession of the office to plaintiff. Between the date of the judgment in the superior court, January 24, 1903, and the giving up of possession of the office, defendant received from the county the accruing salary provided by law for such office, $6,000 per annum, as well as certain fees allowed such officer by law, amounting to $600, or thereabouts. This action was brought by plaintiff to recover from defendant the amount of salary and fees so received by him during his incumbency of the office.

It cannot be doubted that, in the absence of statutory provision compelling a contrary conclusion, these facts would show a right of recovery in plaintiff. This is not disputed by defendant. At common law, the salary annexed to a public office is incident to the title to the office, and not to its occupation and exercise, and it is apparently well established that, in the absence of statutory provision, the de jure officer recovering possession of the office has a right of action against the intruder for the damage occasioned him by the intrusion, and that the salary and fees received by the intruder are the measure of his damage. We are of the opinion that this rule has, however, been materially modified in this state by statute. From the time of the adoption of the Codes to the year 1891, section 936 of the Political Code was as follows: "When the title of the incumbent of any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of the salary until such proceedings have been finally determined." The effect of this provision was to relieve the disbursing officers of the necessity of determining at their own risk as to who was the rightful claimant, and, by keeping the money in the public treasury pending the proceeding, to secure to the person lawfully entitled to the office the full salary annexed thereto, and to protect the public from the contingency of being compelled to pay twice for the same period of time, as had occurred in Dorsey v. Smyth, 28 Cal. 21, and Carroll v. Siebenthaler, 37 Cal. 193. It was undoubtedly a recognition of the doctrine that the salary annexed to the office is incident to the true title, and not to its occupation and exercise, and the rightful claimant, when his right was finally adjudged, would become entitled to receive from the disbursing officers the amounts so withheld and accumulated during the pendency of the proceedings, whether he had or had not discharged the duties of the office. See People v. Potter, 63 Cal. 127; Bledsoe v. Colgan, 138 Cal. 34, 36, 37, 70 Pac. 924. In 1891, this section was amended by the addition of the following: "Provided, however, that this section shall not be construed to apply to any party to a contest or proceeding now pending or hereafter instituted who holds the certificate of election or commission of office, and discharges the duties of the office; but such party shall receive the salary of such office, the same as if no such contest or proceeding was pending." Laws 1891, p. 28, c. 44. The question in this case is as to the effect of this provision, pending contest of title to an office, in the case of one holding the certificate of election or commission of office, and discharging the duties of the office. It seems very clear to us that it entitles such a person not only to receive, but also to retain to his own use, the compensation incident to the office, and to this extent modifies the old rule. It is well settled that, under this provision, the person so situated may enforce payment of the accruing salary at the hands of the disbursing officers. See Bledsoe v. Colgan, supra; Wilson v. Fisher, 140 Cal. 188, 73 Pac. 850; Anderson v. Browning, 140 Cal. 222, 73 Pac. 986. In Wilson v. Fisher, supra, which was mandamus against a county auditor, it was said that the provision of this section, that such a person "shall receive the salary of such office the same as if no such contest or proceeding was pending," is entirely clear, and leaves no room for the play of construction; that no valid reason appeared for holding it unconstitutional; and that under it the petitioner was beyond doubt entitled to his salary, notwithstanding the pending contest. In Anderson v. Browning, supra, the auditor was forced to draw his salary warrant in favor of the incumbent holding the certificate of election, for salary accruing during the pendency of an appeal by him from a judgment awarding the office to the contestant; the effect of the appeal taken within 10 days from such judgment being to suspend the operation thereof, and continue the certificate of election in force unimpaired. Section 1127, Code Civ. Proc.; Day v. Gunning, 125 Cal. 527, 58 Pac. 172. To this extent certainly, under the decisions cited, the common law has been modified by the statutory provision, for under the old rule the lawful title to the office was in issue in any proceeding to enforce the payment of the salary, and only one showing himself to be the officer de jure could prevail. See People v. Potter, supra; Dolan v. Mayer, etc., 68 N. Y. 274. It is further established by decisions of our district courts of appeal that, in view of this proviso, the successful claimant cannot enforce the payment of salary already once paid to an incumbent coming within its terms. See Merkley v. Williams (Cal. App.) 84 Pac. 1015; Tout v. Blair (Cal. App.) 84 Pac. 671. As to the correctness of these decisions we have no doubt.

Plaintiff is compelled by the decisions to admit this much, but claims that the provision deals solely and entirely with the respective rights of the incumbent and the de jure officer as against the disbursing officer or sovereignty paying the salary, and was not intended to affect the right of the contestant to recover from the incumbent such damages as he may suffer by being excluded from the office, in the event that he is ultimately determined to have been entitled thereto. So far, certainly, as he includes in such damage the amount of any salary or fees received by the incumbent by virtue of this statutory provision, and therefore withheld from him, we can see no merit in his contention.

There can, of course, be no doubt as to the power of the Legislature to so change the general rule as to the right to the compensation annexed to the office, as to give such compensation pending contest, to the incumbent holding the certificate of election or commission of office, and discharging the duties of the office. The matter of compensation of public officers is wholly within the domain of legislative power, to be arranged as may be deemed best for the public interest, and every successful candidate for public office takes his office subject to the provision. Public offices are created primarily for the benefit of the public, and if it be considered essential to the proper performance of the duties of such an office during a protracted period of litigation as to the right to the office, that the incumbent possessing the prima facie right evidenced by the certificate or commission, and discharging those duties, shall have the compensation, the Legislature may undoubtedly so provide. If it is so provided here, plaintiff was never entitled under the law to any of the compensation accruing prior to the final determination of the contest in his favor. Under the law, it, to such extent, was made an incident of the occupancy and exercise of the office, and belonged absolutely to the incumbent, and in receiving it defendant received only what the law gave to him as the incumbent performing the public service, and holding the prima facie evidence of title to the office, and plaintiff can have no valid claim against him for damages on account thereof. The question is as to whether the amendment of 1891 is to be construed as constituting such provision. In our judgment no other reasonable construction can be given to it. The only conceivable object for its enactment was to insure the proper performance of the duties of the office. As we have seen, under the law as it stood prior to the amendment, no salary could be paid to either party pending the contest. This manifestly relieved the disbursing officers from all embarrassment as to whom the salary should be paid, fully protected the public against the possibility of double payment for the same service, and preserved the whole salary, incident to the office, intact in the public treasury, for the one who should ultimately be determined entitled to the office. It was found, however, as might well have been foreseen, that the public service incident to the office might not be performed well, if at all, by one who was receiving no compensation for his services, and whose right to ever receive the same was contingent upon a final adjudication in his favor in the contest as to the right to the office, a result as to which there must always be some degree of doubt, and in many cases a very serious doubt. Under such circumstances, it might well be that neither claimant could afford to take the risk of performing the duties without compensation, and the public service might be very greatly embarrassed. To remedy this was, unquestionably, the object of the amendment. It will readily be seen, however, that very little, if anything, has been accomplished in the desired direction, if the effect of the amendment is practically to make the person receiving the salary merely the trustee for the rightful claimant until the contest is concluded, for such would be the effect of a construction that would leave the incumbent liable to such rightful claimant for the damage caused by his failure to obtain the salary. Unless he be absolutely execution proof and devoid of any desire to pay his debts, the incumbent would still be beset with the same difficulties as under the old law. To merely receive, and temporarily retain, and perhaps use, the salary, with a knowledge that the account must ultimately be given in the form of damages to the other claimant, if he finally prevail, would not materially assist the situation as it existed prior to the amendment. No good reason can be given for the amendment if it goes only to this extent. So construed, its only practical effect would be to take away the absolute security theretofore afforded the rightful claimant by retaining the salary in the treasury for him, and make his ability to recover the same depend on the solvency of the party who had received it, which would manifestly be a most absurd result. The plain language of the amendment and the manifest object of its enactment point inevitably to the conclusion that it was the intention of the Legislature that, pending contest as to the title to a public office, in the interest of an efficient performance of the duties thereof, the person having the prima facie right thereto evidenced by certificate or commission, and actually discharging the duties, as he is entitled to do by reason of such certificate or commission, should be entitled to the compensation incident to the office as pay for his services, thus making such person during said time, not only the de facto officer, but practically the de jure officer. Such a condition is, of course, a hardship on the person ultimately found to have been entitled to the office, whose official emoluments have thus been abridged; but the public interests are paramount, and fully warrant legislation of the character here under consideration.

Much reliance is placed upon the fact that section 807, Code Civ. Proc., in the chapter relating to the action that may be brought by the Attorney General in the name of the people of the state, against one usurping or unlawfully holding or exercising a public office, etc., has always provided that if judgment be rendered upon the right of another person alleged to be entitled, in favor of such person, he may recover, by action, the damages which he may have sustained by reason of the usurpation of the office by the defendant. Under the existing law, however, this cannot be held to authorize the recovery, as damages, of the amount of salary or compensation of which the party has been deprived by reason of its payment to the incumbent under such circumstances as existed here. Conceding that an action may be maintained by the Attorney General under this chapter against an incumbent possessing the certificate of election or commission of office, for the purpose of contesting his right to the office on any of the grounds specified for the ordinary contest by an elector (section 1111, Code Civ. Proc. et seq.), the case, in the event of such action, is still within the provisions of section 936, Pol. Code, as amended in 1891. The language of that section is such that it necessarily includes any character of proceeding by which the title of such an incumbent is assailed, and entitles such incumbent to the compensation incident to the office pending the contest, as long as the conditions specified (possession of a valid certificate or commission and discharge of the duties of the office) continue. The rule thus declared by the Legislature in the interest of a proper performance of the public service is paramount to the personal claims of either of the claimants, and necessarily excludes the recovery in any form, either as salary or damages, of the compensation awarded by and paid under the law to the incumbent. The case of People ex rel. Drew v. Rogers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668, does not touch upon the question here involved, and does not assist plaintiff.

The judgment of the superior court in the election contest, declaring plaintiff elected, and annulling the certificate of election held by defendant, in no degree affected the right of plaintiff to hold the office, discharge its duties, and receive the compensation, until its affirmance on appeal, in view of the appeal from the judgment taken within 10 days from the time it was given. His rights after such judgment, and until the disposition of the appeal, were the same as before judgment. The appeal so taken operated as an absolute suspension of the judgment, and continued the certificate of election in full force during its pendency. Code Civ. Proc. § 1127; Day v. Gunning, supra; Anderson v. Browning, supra. See, also, Wilson v. Fisher, 148 Cal. 13, 82 Pac. 421. As suggested in Day v. Gunning, supra, it might be wiser to provide that, pending an appeal in such a case, possession of the office should go to the party prevailing in the trial court; but that is a matter of policy within the legislative domain, and the Legislature has not seen fit to so provide. Construing the amendment of 1891 liberally, with a view to the accomplishment of its manifest object, as we must, we are satisfied that it must be held to so change the old rule, as to entitle an incumbent, under the circumstances therein specified, to the compensation incident to the office, whether the same be salary in the strict sense, or designated fees for specified services.

In view of what we have said, the complaint failed to state a cause of action.

The judgment is affirmed.

We concur: BEATTY, C. J.; SLOSS, J.: SHAW, J.

We dissent and adhere to the opinion and decision heretofore rendered in department: HENSHAW, J.; McFARLAND, J.

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(151 Cal. 137)

## HARTSON v. DILL et al. (Sac. 1,211.)

(Supreme Court of California. May 7, 1907. Rehearing Denied June 6, 1907.)

1. WATERS AND WATER COURSES—IRRIGATION—DIVERSION OF WATER — DECREE — CONSTRUCTION.

Decree, in an action to determine the respective rights of the parties to the use of the waters of a river and of certain sloughs, construed, and *held* to entitle defendants to exclude during a certain period of the year the waters of the river from entering one of the sloughs, and thence passing down to plaintiff's land.

2. JUDGMENT—CONSTRUCTION—EVIDENCE.

In an action involving the construction of a decree, evidence as to what the parties to the decree understood its scope to be was inadmissible; the decree itself determining that matter.

3. SAME.

In an action involving the construction of a decree determining the rights of the parties to the use of the waters of a river for irrigating purposes, evidence as to any custom existing in the locality or adopted by the parties prior to the decree respecting the use of the waters was inadmissible.

4. SAME.

Where, in an action to determine the rights to the use of the waters of a river, the court found that the rights of the parties, as fixed by a decree in an action between them in 1899, were the same as were fixed by a decree in a prior action in 1893, evidence that during the period between the decrees plaintiff had acquired a prescriptive right as against defendant to the use of a portion of the waters was inadmissible.

Department 2. Appeal from Superior Court, Lassen County; Stanley A. Smith, Judge.

Action by Charles Hartson against Mrs. A. Dill and others. From a judgment for defendants, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

E. V. Spencer and H. D. Burroughs, for appellant. Garoutte & Goodwin, for respondents.

LORIGAN, J. This is an action for damages for the alleged wrongful diversion of water, and to quiet title to rights asserted to the use thereof. Judgment went for the defendants in the trial court, and this appeal is from said judgment and an order denying the motion of plaintiff for a new trial.

The waters involved are those of the Susan river, in Lassen county. A portion of the waters of that river leave the main channel and pass down what is known as the "Dill" and "Van Noten" sloughs to their junction, where they form what is known as the "Big" slough. The waters flowing into said Big slough are taken therefrom by all of the parties to this action for irrigation and domestic use. The defendants, by means of dams in the Big slough and ditches leading therefrom, first take the waters from said slough, and lower down through what is known as the "Hartson" slough, a minor slough diverging from said Big slough, the plaintiff takes such waters as defendants are not entitled to. The defendants also, by dams constructed at points near the head of the Dill and Van Noten sloughs, prevent the waters of Susan river, between June 20th and August 1st of each year, from passing into such sloughs and thence into the Big slough, and by means of ditches divert it directly from the river to their lands. These dams at the heads of the sloughs are so arranged that all, or nearly all, of the waters can be made to pass down the sloughs or down the river at pleasure. The sole point involved in this case is as to the right of defendants to exclude said waters, during the above dates, from entering the Big slough and reaching the lands of plaintiff by way of the Hartson slough diverging therefrom. This general statement is all that is necessary to be made for the purpose of considering the question arising on this appeal, because, in our judgment, the rights of the respective parties to the use of the waters here involved are to be determined by the construction to be given to the terms of two separate decrees of the superior court of Lassen county, entered in suits between these same parties, and relative to their respective rights to the use of these same waters.

It appears from the record that in 1890, dissensions having arisen between them as to their rights to the use of these waters, the defendants here (plaintiffs there) brought an action against various parties, including the plaintiff in this present suit (J. D. Byers, Mrs. A. Dill et al. v. Charles Hartson et al.) to have their rights determined. Upon a stipulation entered into between the parties, a decree was entered in 1893, in which, among other things, it was determined: "That plaintiffs (defendants here) severally own the water rights connected with said river and the sloughs making therefrom as described in the complaint, and, as against the defendant Hartson, have the right to divert and use said waters upon their said lands as heretofore appropriated by them as alleged, subject to the rights of the defendant Hartson as hereinafter specified. That plaintiffs also own dams and bulkheads across those sloughs above their said lands known as and called the 'Dill' and 'Van Noten' sloughs, which sloughs unite and form what is commonly known as the 'Big' slough. That said dams and bulkheads are at the heads of said sloughs where the same leave said river. That plaintiffs have the right to maintain said dams and bulkheads and thereby to regulate the flow of the water down said sloughs for the use of the plaintiffs or any one or number of the plaintiffs, and have the right to exclude all the waters of said river from said sloughs from and after the 10th day of May in each and every year, and to compel during said time all of said water to flow down the main channel of Susan river onto their several lands. That from the 20th day of June to the 1st day of August in each year they have the right to use said sloughs, or any part of said sloughs, as a waterway through which to turn from their said several lands all or any portion of said waters, and that the defendant shall not in any manner interfere with the exercise of any of said rights by plaintiffs or any of the plaintiffs." The decree then sets forth the ownership of certain lands by Hartson, and proceeds: "That a branch from the aforesaid Big slough (the Hartson slough) runs to and across the defendants' said land. That prior to the 10th day of May in each and every year the defendant Hartson is entitled to have one-fourth of all water owing down said Big slough to a point thereon where the plaintiffs have a bulkhead. That from the 10th day of May to the 20th day of June in each and every year the said Hartson shall have one-fourth of the water flowing down to said point, provided that his said one-fourth shall not exceed at any part of said time 50 inches of water measured under a 4-inch pressure or its equivalent one cubic foot per second, and provided further that in times of extreme drought when plaintiffs require the water his said one-fourth shall not during said time exceed 25 inches of water so measured. That from the 20th day of June to the 1st day of August in each and every year the said defendant (Hartson) may have all the water which the plaintiffs or any of the plaintiffs shall turn from their or any of their said lands down said slough towards this defendant's said premises. That from and after the 1st day of August in each year the said defendant shall have one-fourth of all water permitted by the plaintiffs to flow down said slough to the point of division as aforesaid." In 1898 the defendants in this present suit brought another action in said superior court against the plaintiff here (Mrs. A. Dill et al. v. Hartson), which again involved their respective rights to these waters, and a decree in the exact terms of the prior one was entered in 1899.

Now, the main question involved in the present suit is as to the interpretation to be put upon the provisions of both these decrees. The contention of the defendants in the lower court was, and is here, that, under the terms of the decrees referred to above, they had a right during the period from June 20th to August 1st of each year to exclude, if they saw fit, the waters of the river from entering the Big slough, and thence passing down it to plaintiff's land through the Hartson slough. The trial court put this interpretation upon the decree, and we perceive no room for any other interpretation. It is provided in both decrees so plainly that it is not open to any other view that, during the period named, the defendants in this suit have the right not only to take out waters from the Big slough, but, if they choose to do so, to take them directly from the channel of the Susan river, and, for that purpose, to exclude or prevent their passage into the Big slough. As to the waters of said river, the only right that is given plaintiff by the terms of the decree, during that period of time, is to take and use a proportion of all such waters of the river as the defendants may turn down or into Big slough towards the lands of plaintiff. If the defendants should turn or permit the waters of the river to run down the slough, plaintiff had the right to use it under the decree. If, on the other hand, the defendants required, during the period fixed by the decree, the use of these waters on their lands, they were accorded the right to prevent their entry into the sloughs and to convey them directly from the river to their lands. This was the view, as we say, the trial court took, and we see no room for any other interpretation of the terms of the decree.

Plaintiff elaborates in his brief upon what he designates as an "unlimited license" to exclude such waters from the slough, and a "wholesale license" granted defendants by the decree to run the waters wheresoever they saw fit, to the deprivation of plaintiff of its necessary use upon his land. There is nothing in the case, however, to warrant this suggestion. There is nothing in the evidence to show that the defendants take this water in order to deprive plaintiff of its use, or for any other purpose than for use upon their own lands. In fact, it appears from the testimony that the amount which they could get out of the river by this means was only about one-fourth of the water which they actually needed upon their lands.

Aside from the proper construction to be placed upon the provisions of this decree, it is insisted by appellant that the court erred in rulings respecting evidence offered by him. We do not think so. It was not a proper subject of inquiry as to what the parties to the first decree understood its scope should be. The decree itself determined that matter. Nor was any custom existing in the locality or adopted by the parties prior to 1893, respecting the use of these waters during said periods of the year, of any moment, in face of the decree establishing exactly what their respective rights were. Nor did the court err in refusing to allow appellant to prove that he had acquired a prescriptive right as against defendants to have the water of said Susan river flow down through the Big slough, and thence to the Hartson slough, during the period from the entry of the first decree in 1893 and the entry of the second decree in 1899. The present action was brought in 1900.

Aside from the fact that whatever rights these parties had in such waters and their flow were fixed by the decree in 1893, it appears that in the action eventuating in the decree in 1899 this plaintiff asserted the same adverse claim as he asserted in the present action, and in determining, by the decree in 1899, that his rights to said waters were the same as were fixed by the decree of 1893, the court necessarily found that there was no merit in such asserted claim of and right acquired by adverse user to any of such waters during said period.

There is nothing further to be considered in this matter. There is no merit in the appeal, and the judgment of the lower court and the order appealed from are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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151 Cal. 254

## BOLSA LAND CO. et al. v. BURDICK et al.

(L. A. 1,608.)

(Supreme Court of California. May 15, 1907. Rehearing Denied June 13, 1907.)

1. INJUNCTION — PRELIMINARY — TRESPASS TO LAND—HUNTING.

In a proceeding to enjoin numerous persons from entering land to hunt, a preliminary injunction was proper, where defendants by preconcert of action had often and in great numbers broken down fences and entered plaintiffs' inclosure, overrunning the lands, traversing the waters by boat, discharging firearms at will, shooting game, and refusing to heed warnings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 302, 303, 305, 306.]

2. NAVIGABLE WATERS—WHAT CONSTITUTES.

A drainage ditch constructed under a grant from private landowners from 12 to 15 feet wide, in some places less than 2 feet deep, and so filled with vegetation that a light skiff cannot be rowed down it, is not a navigable stream.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 5, 7, 9.]

3. SAME—RIGHTS OF PUBLIC.

One may not lawfully obtain access to navigable waters by passing over private property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, § 179.]

4. SAME.

It is not true that wherever one may catch fish waters are navigable, or that wherever one may row or pole a boat he may do so because of the navigability of the water.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 5, 7, 9.]

5. SAME—LAND UNDER WATER—RIGHT OF STATE TO CONVEY.

The state may not only convey into private ownership lands under waters between high and low tide, but, subject to the paramount control of the general government, may convey lands perpetually covered by tides.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, § 203.]

6. SAME—OBSTRUCTION—RIGHT TO REMOVE.

If waters confined by a dam were wholly inclosed by plaintiffs' land, and were navigable, and the dam was a purpresture, it could only be abated at the instance of the state or national government; plaintiffs having color of title to the water-covered lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, § 139½.]

Department 2. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Injunction proceeding by the Bolsa Land Company and another against Will Burdick and others. Plaintiffs appeal from an order discharging a preliminary injunction. Reversed, with directions to restore the injunction.

Dunn & Crutcher and Scarborough & Forgy, for appellants. F. O. Daniel and Clyde Bishop, for respondents.

HENSHAW, J. Plaintiffs' complaint alleged that the Bolsa Land Company was the owner of the land in the complaint described, and with the Bolsa Chica Gun Club, a corporation, the members of which were the same as the members of the Bolsa Land Company, were in possession of it. This tract of land, comprising several thousand acres, was wholly inclosed by a fence surrounding its exterior boundaries. Within the inclosure, and near the center of the tract, were numerous sloughs, artificial ponds, and overflowed swamp lands. These ponds, sloughs, and swamp lands were frequented by wild fowl—ducks, geese, snipe, etc. The plaintiffs had improved these lands and constructed thereon conveniences for shooting purposes, and used these ponds, sloughs, and overflowed lands for such purposes as a preserve for its members and stockholders. To give notice and to protect these lands, the plaintiffs had posted notices along the fence surrounding the tract. It is then alleged that the defendants, who are many, are strangers to the property, and have absolutely no rights or interests therein, but, notwithstanding, have at numerous times, by force and violence, broken down plaintiffs' fences, entered upon the land, hunted, shot, killed, and carried away large numbers of the wild fowl found thereon, and that, although personally notified to refrain from trespassing upon the land, the defendants paid no heed to such notification, but declared their intention to return and enter upon the land whenever they chose to do so, and in particular declared that they would return upon the 26th day of November (which day was Thanksgiving Day) and enter upon the premises and shoot and kill the wild fowl which they might find there. It is further alleged that the effect of such indiscriminate shooting was to drive the birds away from the lands, and to destroy the value of the lands as a game resort and preserve. It was also charged in the complaint that these defendants were acting under agreement and conspiracy so to trespass upon the lands of plaintiffs and commit the unlawful acts charged. Plaintiffs prayed that an injunction might be issued upon the filing of the complaint, restraining the defendants from entering upon the land and trespassing thereon, and that at the trial of the cause the injunction be made permanent. Upon the filing of the complaint the court made its order directing the issuance of a preliminary injunction, and fixed the amount of the bond thereon, which plaintiffs gave as required. The writ of injunction was then issued and served upon the numerous defendants. Thereafter the defendants came into court and filed their answer and served notice of a motion to dissolve the preliminary injunction upon the records of the case and upon accompanying affidavits attached to the notice. This motion was presented to the court, together with affidavits, and plaintiffs in turn filed counter affidavits. Besides these affidavits, they presented documentary evidence, both in support of their title and in opposition to certain asserted rights of defendants, which will hereinafter be more specifically adverted to. The court thereupon dissolved the preliminary injunction, and plaintiffs appeal.

It is plain that this complaint is in all respects like that of Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74. An injunction is the principal relief sought. A preliminary injunction, under the allegations of the complaint, was not only proper but necessary to protect the plaintiffs' rights and to prevent the alleged prospective destruction of their game preserve. The question here presented is whether, under the showing made by the answer, and the affidavits in support of the motion to dissolve, taken with the opposing evidence offered by plaintiffs, the motion was properly granted. Without attempting to set forth at length the matter of this evidence, its substance may be summarized briefly. There is no serious attempt to deny the acts charged against the defendants generally. Affidavits of individual defendants make specific denials in some instances, but certain facts are established substantially beyond question. The defendants did, in great numbers and upon many occasions, break down the fences and enter upon plaintiffs' inclosure, overrunning the lands, on foot, as well as traversing the waters by boat, carrying firearms, discharging them at will, shooting birds, refusing to heed warnings and notices of plaintiffs' employés, and, in at least one instance, that of defendant Barton, threatening to kill. They did do these things (excepting the threat to murder) by agreement and preconcert of action; but they deny that a conspiracy existed, and assert that their agreement went only to the exercise of their legal rights upon the premises. They do not deny the breaking down of plaintiffs' fences, but assert that in so doing they were but removing obstructions to a navigable stream. In short, upon the nature of their acts, the summing up may be made in the language of respondents' brief: "There has for several years been a kind of scrambling contention between appellants and the citizens and residents of the community of Bolsas Bay as to the right of the general public to go upon the said water since the time when the plaintiffs claim to have procured the conveyance of the same; the people in the neighborhood, including many of these defendants, claiming that they had the same rights upon the water that they had before the conveyance or patent was made by the state, and that the plaintiffs had no legal right to build the dam across the mouth of said bay or to fence said waters. And this controversy has arisen because of these contentions." Such being the admitted attitude of the defendants, it needs but little knowledge, and no discernment, to perceive that they were using at least the waters of this preserve in all respects as though their rights thereon were the same as the plaintiffs. Thus, no substantial denial is made of the fact that some 40 or 50 of them overran the lands and waters upon November 26th, all carrying guns, all discharging them freely and shooting game. Yet the affidavits on this point would seek to have the court believe that they were there upon that occasion as invited guests of the plaintiffs, called to an amicable conference to adjust their differences. Just why some 40 or 50 should have come to the conference, instead of 1 or 2 spokesmen and leaders, just why, in coming to this conference, they should have carried shotguns and tramped the marshes over shooting at game, and just why they should never have attended, nor have sought to attend, this proposed conference, is, of course, nowhere explained. So much for the acts of the defendants, which acts, it may not be questioned, constituted such an invasion of plaintiffs' asserted rights as to have justified the continuance of the preliminary injunction.

As to the title and right of possession of the property, plaintiffs showed that the lands were part of a rancho to which patent had been issued by the United States. The plaintiffs' title was derived by mesne conveyance through the holders of the patented title. The lands comprised many hundreds of acres of upland as well as marsh lands, with an ocean frontage. An estuary from the ocean projected into these lands, the waters in which estuary, with its tributary sloughs, were affected by the flow of the tides. To the lands covered by all of these waters, the plaintiffs had acquired title by patent from the state of California under an act to provide for the management and sale of lands belonging to the state, approved March 28, 1868 (Stats. 1867-68, p. 507, c. 415). As to their allegations of exclusive possession and right of possession, and the insufficiency of defendants' denial thereof, defendants' answer thereto, as taken from respondents' brief, is that "defendants, being only laymen, are not supposed to know whether in law such possession as plaintiffs had amounted to exclusive possession, nor whether they were entitled to possession." No comment upon this seems necessary.

It further appeared, without contradiction, that from the upper reaches of land fresh water drained down into these sloughs and into Bolsas Bay, as a widening of this estuary was named, and that plaintiffs had constructed a dam across a narrow neck of the estuary to confine these waters, and by floodgate permitted the surplus waters to escape through an artificial channel into the ocean. Direct communication with the ocean was thus cut off, the waters became inland waters and not subject to the tides, and were and are wholly inclosed by the lands claimed by plaintiffs under their patents and deeds. Defendants assert that these waters were and are navigable waters, and that they have a right which they enjoy as members of the public, in common with the public, and not otherwise, to go upon navigable waters to take fish and to kill wild fowl—rights which unquestionably are enjoyed by the public in the navigable waters of the state or nation. But, as these so-called navigable waters are wholly surrounded by the lands of plaintiff, and as it is not asserted, and, indeed, it would require much rashness and temerity to assert, that the public has a right to invade and cross private lands to reach navigable waters, a lawful mode of ingress and approach to these navigable waters became necessary. This was conveniently at hand for defendants in the "Freeman river." Freeman river they declare is a navigable stream of water flowing into Bolsas Bay. It is down this navigable river they assert that they propelled their boats to its junction with that bay, and the only fences which they destroyed were fences which crossed this river and obstructed its navigability—mere purprestures. Such an invasion and destruction of the navigability of a stream should receive, as it would merit, the severest condemnation; but that condemnation would be unjust, and must be withheld in this case, in view of the facts. By them it is shown, indisputably, that Freeman river is a mere drainage ditch, the right to construct and maintain which was granted to the county of Orange by plaintiffs' predecessors in interest. This ditch, as actually existing, is from 12 to 15 feet wide and of a depth in some places of less than 2 feet. Growing vegetation so fills and clogs it that frequent cleanings are necessary. It is not possible to row even a light skiff down it, but it is possible at times to pole such a boat. It was where this ditch enters the lands of plaintiffs that across it a continuous fence had been erected, and it was this fence across the ditch and for 15 or 30 feet each side of it upon the right of way granted to the county of Orange for the maintenance of the ditch, that defendants, acting within their asserted rights to remove purprestures from navigable waters, destroyed the fence. Moreover, the meander lines of the United States patent crossed this so-called Freeman river at its mouth or junction with a tributary slough of Bolsas Bay. The whole length, therefore, of this Freeman river, or ditch, was conveyed into private ownership by this patent, which thus contains a distinct negation of the claim of navigability.

It should be unnecessary to add that the contention that such ditch constitutes a part of the navigable waters of the state, or of the nation, is a sham as shallow as the ditch itself. The county of Orange had no right to use the ditch and the right of way which went with it, except for the purposes of the grant—that of drainage. The county of Orange itself could not interfere with the fences of plaintiff, unless those fences themselves interfered with the drainage capacity of the ditch, and, even then, their interference would be limited to removing such obstructions as did in fact interfere with the drainage. The unlawful acts of W. W. Barton, John Blaylock, and other of the defendants, who cut down and destroyed the fences across the ditch and upon the right of way 30 feet upon each side thereof, are wholly without justification. They were acts which the county of Orange could not do, and the doing of which by another it could not authorize. As defendants, therefore, had no right of entry upon the lands of plaintiffs by the route which they took, and as this is the only method of approach to the so-called navigable waters to which they assert any right, it necessarily follows, aside from the question of the navigability of the waters of the inclosed Bolsas Bay, that defendants, were trespassers. Whether or not Bolsas Bay ever was, or, if it ever was, whether it is now, part of the navigable waters of the state, defendants certainly have no right to invade private property to gain access thereto. If, to approach such waters a right of way becomes necessary over private lands, such right of way does not run to the public with the use of the waters. It must be condemned and paid for by the public, as must any other right of way for public use.

As to the question of the navigability or nonnavigability of these waters, little need be said, and that little would not be said were it not for the fact that the court, in dissolving the preliminary injunction, would seem to have concluded that these waters were navigable. As has heretofore been stated, the right of the public to the use of the navigable waters of the state under proper restrictions by the state, for purposes of navigation and fishery, is unquestioned. So, also, and under like restrictions, will go unquestioned the right of the public to take other kinds of game upon such waters. While it is true, therefore, that one may take fish and shoot birds upon navigable waters, and while it is true also that one may go with boats thereon, the converse of these propositions is far from being true. Though the belief seems to be somewhat widely held, it is not true that wherever one may catch fish the waters are navigable, or that wherever one may row or pole a boat he has the right so to do because of the navigability of the water. Nor, it may be added, while dealing with these popular fallacies, is it true that one may go with his boat wherever the tides ebb and flow, upon the theory that wherever the tides ebb and flow waters are navigable. Still less is it true that the state may not convey lands under waters which are between high and low tide into private ownership. It may not only do this, but it may also convey lands which are perpetually covered by the tides. As to lands wholly covered by the waters of the ocean, it is sufficient to instance the fact that, in the city and county of San Francisco, land to the value of millions of dollars is made up by the actual filling in of the bay of San Francisco, and, as the Supreme Court of the United States has said, he would indeed be a rash advocate who should assert that the titles to these lands were not good because originally they were perpetually covered by the navigable waters of the bay. The state has sold into private ownership thousands and tens of thousands of acres of its swamp and overflowed lands adjacent to the shores of the ocean and its navigable bays, like Humboldt Bay and the Bay of San Francisco. To reclaim these lands the construction of levees has been necessary, and the building of these levees has imperatively called for the erection of dams across minor sloughs and estuaries, thus cutting them off from their original ocean or bay connections. So long as this work does not, in the view of the state or nation, interfere with the navigability of the remaining waters, no individual has cause of complaint. It is for the state, and not for the individual, to say whether its interests are best subserved by the damming or filling such creeks, sloughs, or estuaries. The simple truth of the matter is that the state, always, of course, subject to the paramount control of the general government touching matters of navigation and commerce, has the right to sell into private ownership any of these water-covered lands; the limitation upon its power in this regard being that such sales shall be in aid of, or at least not in derogation of, its governmental trust to preserve needed navigable waters for the benefit of its people. Ill. Cent. R. R. Co. v. Ill., 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018. The state, therefore, is not called upon to preserve the navigability of its waters because the public may desire to shoot wild game thereon. The state is interested in preserving the navigability of waters in the aid of commerce. And in a case such as this, where the so-called navigable waters begin and end wholly within the limits of private property, such waters are no more useful for navigation than is a duck pond in a man's back yard, over which pond a skiff may be propelled. What is here said is not to be construed as a determination of the validity or invalidity of the state patent. That question is not before us. It is but an enunciation of the general principle of the power of the state, in appropriate cases, to make grants of water-covered lands. As to the dam constructed by plaintiffs under color of title and authority which they derived from the state's patents to all these water-covered lands, it is sufficient to say that, from the showing here made, if it be a purpresture, it may be abated only at the instance of the state or national government. It cannot be said to interfere with the right of navigation of defendants, since the waters which it confines are wholly inclosed by the lands of the plaintiffs.

Indeed, respondents themselves assert that "the question of title could not be adjudicated upon a motion to dissolve." It is sufficient, therefore, to say, as indisputably appears, that plaintiffs' patents give them color of title, and they unquestionably have, and have been exercising, a right of possession; that the implied finding of the navigability of Freeman river is unfounded, and defendants have no right of ingress upon plaintiffs' land by means of this irrigating ditch; that they have failed to show any other right of ingress. Their claim of right as members of the general public to enter upon the lands of plaintiffs, therefore, falls to the ground and the court erred in dissolving the preliminary injunction.

For which reason the order is reversed, with directions to the trial court to restore the preliminary injunction pending the trial and final determination by the court of the questions involved.

We concur: BEATTY, C. J.; LORIGAN, J.

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## STEIN v. ARCHIBALD. (Sac. 1,429.)

(Supreme Court of California. May 13, 1907.)

1. CONTRACTS—CONSTRUCTION.

Where one construction of a contract will make it unreasonable, unfair, or unusual, and another construction, equally consistent with the language thereof, will make it reasonable, fair, and just, the latter construction will prevail.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 735.]

2. SAME.

In construing ambiguous contracts, the circumstances surrounding and known to both the parties at the time of the execution thereof may be taken into consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 752.]

3. VENDOR AND PURCHASER — CONTRACT OF SALE—CONSTRUCTION.

A purchaser of 9,680 acres at $4 per acre, $10,000 of which he paid, and for the balance of which he gave a note at 7 per cent. interest, agreed on the date of the purchase to convey to a third person an undivided half interest therein, provided the latter should "at any time within 3 years * * * pay * * * $4 per acre for the undivided one-half." The third person was given two additional years in which to perform his part of the contract. The contract gave him an equal voice in making a sale of the premises during the option period, bound him to bear equally with the purchaser the expenses incurred in farming the land, and gave him one-half of the gross income arising therefrom. The parties contemplated that the purchaser was to personally superintend the farming operations. *Held*, that the purchaser gave the third person the option to purchase an undivided half interest in the land within five years on his paying $4 per acre for the whole number of acres.

4. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE—FAIRNESS OF CONTRACT.

Under Civ. Code, § 3391, providing that specific performance cannot be enforced against a party to a contract who has not received an adequate consideration, etc., the contract, if construed to give the third person the right to purchase the undivided interest at the rate of $2 per acre for the whole number of acres, will not be specifically enforced against the purchaser; the consideration for the conveyance being inadequate and the enforcement thereof unreasonable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 140–152.]

In Bank. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by M. P. Stein against J. F. Archibald, continued after his death against W. J. Archibald as administrator. From a judgment for plaintiff, defendant appeals. Reversed.

Frank H. Farrar, for appellant. Nicol & Orr and Francis A. Fee, for respondent.

SHAW, J. This is an action to enforce specific performance of a contract for the conveyance of certain lands to the plaintiff. The action was begun against J. F. Archibald, the vendor in the contract. He died after the trial, and the defendant W. J. Archibald as administrator of his estate was substituted as defendant. Judgment was given for the plaintiff, and from that judgment and an order denying a motion for a new trial the defendant appeals.

The contract was executed on October 9, 1897, and is in the following words, the names of the parties being given instead of their designation as party of the first part or second part, respectively, as it appears in the contract, and the introductory paragraph being omitted: "The said J. F. Archibald in consideration of the agreements hereinafter expressed to be performed by M. P. Stein or his assigns, has agreed and does hereby agree at any time within three years from this date to sell and convey to said M. P. Stein an undivided one-half interest of, in and to all those certain lands, situate in the county of Madera, state of California, and described as follows, to wit: [here is inserted a description of the lands embracing 9,680 acres]. And if said M. P. Stein or his assigns, shall at any time within three years from this date pay to said Archibald $4 per acre for the undivided one-half of all said described lands, then and in that event and upon such payment being made the said Archibald hereby agrees to make, execute and deliver to said Stein or his assigns, a good and sufficient deed of grant, bargain and sale, conveying and assuring to said Stein, or his assigns, the undivided one-half of all said described lands free and clear of any and all incumbrances and liens done, made or suffered by the said Archibald. It is hereby further agreed that if during the term of this option and before said Stein or his assigns shall have made the payment above specified, a chance occurs affording to said Archibald the opportunity to sell said described lands at a sum in excess of the amount by said Archibald paid to the Stockton Savings & Loan Society for said lands, then and in that event, and notwithstanding this option, the said Archibald may sell said lands and the whole thereof, but he shall pay to the said Stein or his assigns the one-half of the net profits arising from such sale; provided, however, that he, said Stein, shall have an equal voice in making such sale and no sale shall be made without his being first consulted and giving consent thereto. It is hereby further agreed that during the life and term of this agreement said Stein is to bear equally with Archibald all the expenses incurred in farming said lands, and is to have and receive one-half of the gross income arising therefrom. It is hereby further agreed that, in the event said Stein at any time during the term and life of this agreement shall desire to sell and dispose of his interest in said lands under this agreement, he shall give to Archibald the option of purchasing the same and shall not dispose thereof until the opportunity shall have been first given to said Archibald." On the day this agreement was made Archibald had purchased the land from the Stockton Savings & Loan Society at the price of $4 per acre, amounting to $38,720, of which he had paid $10,000 in cash, and for the balance of

$28,720, had given his note bearing 7 per cent. annual interest. Before the expiration of the three years named in the option, it was extended for another period of two years. The court in its findings declared that prior to the expiration of this two years the plaintiff Stein had made due offer of performance to the vendor Archibald in pursuance of the contract, that he was entitled to a conveyance from said Archibald on payment of the amount agreed to be paid under the terms of the contract, and that this sum as expressed in the contract and as construed by the court was $19,280, or one-half of the original purchase price at which the whole interest in the land was sold by the Stockton Savings & Loan Society to Archibald, less $160. This $160 was deducted because the court found that the area of the land was only 9,640 acres instead of 9,680 acres, as it was supposed to be when Archibald executed the note for the balance of the purchase price to the savings and loan society. The decree was that, upon payment of this sum of $19,280, the plaintiff shall receive the conveyance of the undivided one-half interest in the land described in the contract.

The important question in the case is the construction to be given to the option contract with respect to the amount to be paid thereunder as the price of the undivided one-half interest in the land described. The plaintiff claims that its meaning is that the plaintiff was to pay at the rate of $2 per acre on the whole number of acres. The defendant's contention is that the contract calls for the payment of the sum of $4 an acre, on the whole acreage of the land. It is a well-settled principle applicable to the construction of contracts that where one construction would make the contract unreasonable, unfair, or unusual and extraordinary and another construction, equally consistent with the language, would make it reasonable, fair, and just, that the latter construction is the one which must be adopted. It is also a principle of construction with respect to ambiguous contracts that the circumstances surrounding and known to both the parties at the time of the execution of the contract may be taken into consideration in determining the meaning intended to be conveyed. Conceding for the present that the contract in question is ambiguous in this respect, we think it is clear that the construction contended for by the plaintiff cannot be given to it. The option was to continue for three years, and was afterwards extended for two years more. The vendor, Archibald, had on the same day bought the land for the price of $4 per acre, paying $10,000 down and agreeing to pay the balance in one year, with 7 per cent. interest. A note for this balance was renewed from year to year, and does not appear to have been paid. The interest thereon amounted to over $2,000 a year, and it appears that Archibald from year to year paid this interest. Under the terms of the option contract the purchaser Stein became, in practical effect, an immediate owner of a one-half interest in the property. He was to pay one-half of the expenses of farming it, and was to receive one-half of the receipts therefrom. From the evidence it appears to have been contemplated by the parties that Archibald was to personally superintend the farming operations. In effect, therefore, Archibald gave to Stein the privilege of purchasing a half interest in the land at any time within five years from the date of his own purchase, and gave him immediate possession of the half interest in the lands agreed to be conveyed, and gave him, also, the benefit of his own personal supervision of the farming operations thereon and of the profits thereof during the time which might intervene between the date of the option and the day when Stein should choose to avail himself thereof, and agreed to accept as the price of such purchase the then present value of the land without interest, while at the same time Archibald was himself paying 7 per cent. interest on the purchase money which he had agreed to pay to the loan society therefor. It is precisely the same in this respect as an agreement to sell land for a fixed price payable in five years without interest, the purchaser to have the immediate possession and use thereof. It was in effect a present or gift from Archibald to Stein of some $8,000 of interest which he himself paid on the balance of the purchase price to the Stockton Savings & Loan Society, and, in addition thereto, a one-half of all of the benefits in the way of interest or income from the $10,000 cash which he had paid on the price thereof to the said society. It is, of course, not impossible that such an agreement might have been made with full intention to give it this effect. Such agreements are sometimes made when the owner is anxious to sell, and makes a sacrifice for that purpose. But it is scarcely conceivable that a landowner would give another an option to purchase on such terms where the price fixed was the same as that which the owner himself had paid for the land immediately before the option was given, and particularly where he had bought on credit and was paying interest on that price. If the contention of the plaintiff is correct, this was the agreement which was made. That such an agreement would be unfair and harsh under any ordinary circumstances must be conceded. There are no circumstances appearing in the record to explain such a remarkable bargain.

On the other hand, it would not be unreasonable for an owner to give an option extending over a number of years and give the other party immediate possession, where the price agreed to be paid was in excess of the present price, and was large enough to give the owner a profit sufficient to compensate him for the loss of interest on the money and the rents and profits of the land in the meantime. Under these circumstances the option contract must be construed so as to give it the latter effect rather than the former, if it is fairly susceptible of that construction.

We think that it is not only fairly susceptible of that construction, but that it is not fairly susceptible of any other, even when considering its language alone. The contract describes 9,640 acres of land, according to the findings of the court. The number of acres is not stated in the contract, but, after describing the land, its language is that, if Stein "shall at any time within three years from this date pay to [Archibald] $4 per acre for the undivided one-half of all of said described lands," then he shall be entitled to a conveyance of said undivided one-half from said Archibald. The previous paragraph contains an agreement on the part of Archibald to sell and convey to Stein "an undivided one-half interest of, in and to all those certain lands," describing them. An undivided one-half interest in an acre of land is an interest which extends over the entire area. If a party agrees to buy the undivided one-half interest in 100 acres of land, and agrees to pay $4 per acre for that interest, it would seem clear that the effect of such an agreement is that he shall pay $4 per acre for the entire area, although he receives therefor only an undivided one-half interest. The phrase "$4 per acre" refers to the area, and not to the interest, and the price is found by computing the rate per acre upon the entire area of the land, and not upon one-half of such area. This is the plain meaning of the words of the contract without aid from the surrounding circumstances. And, when considered in connection with the surounding circumstances and the evident advantage which the other construction would give to the purchaser, no other construction is admissible, except that contended for on behalf of the defendant. A fair construction of the contract is that Archibald intended to give plaintiff the privilege of purchasing the half interest at any time within the period of the option upon the payment of $4 for each acre thereof, but that in the meantime, if either party could make sale of the entire interest at an advance over the original purchase price of $4 per acre, they were to have equal advantage of such sale, and that during the period that the option ran both parties should have equal advantage from the products of the land. Thus construed, it is neither unfair nor unreasonable. The conclusion of the court that the plaintiff was entitled to a conveyance on the payment of $19,280, or at the rate of $2 per acre, for an undivided one-half interest thereof, is not justified by the contract sued upon.

Furthermore, it is a principle of equity that specific performance of a contract to convey land will not be decreed unless it is just and reasonable and based upon an adequate consideration. Civ. Code, § 3391. From what we have seen, it is plain that the consideration which the plaintiff claims he agreed to pay for the land would not be adequate, and that to enforce performance thereof would be both unjust and unreasonable to the vendor; there being no circumstances which tended to explain the reason for giving such an unfair contract, or which suffice to show that, notwithstanding its apparent unfairness, it was nevertheless just and reasonable. The court in the application of this principle of equity should have refused a decree for specific performance.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

I concur in the judgment of reversal: McFARLAND, J.

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## DOUGLAS et al. v. SOUTHERN PAC. CO.

(Sac. 1,199.)

(Supreme Court of California. May 13, 1907.)

1. New Trial—Statement—Settlement—Extension of Time—Authority of Court.

Under Code Civ. Proc. § 659, subd. 3, providing that, when proposed amendments to the proposed statement on motion for a new trial are adopted, the statement shall be amended accordingly and presented for settlement, but, if not adopted, the proposed statement and amendments shall within 10 days thereafter be presented by the moving party to the judge on five days' notice to the adverse party or delivered to the clerk for the judge, and section 1054, authorizing the extension of time within which the proposed statement and amendments may be presented for settlement, and the time within which notice of such presentation may be given, the court, on the application of the party moving for a new trial, may extend the time for the settlement of the statement and amendments and the time within which to give notice of the time for presenting the same for settlement, though at the time of the application it was impossible for such party to give five days' notice for the settlement of the statements and amendments within the 10 days from the service of the amendments proposed by the adverse party.

2. Same—Notice.

Under Code Civ. Proc. § 659, subd. 3, providing that, when proposed amendments to the proposed statement on motion for a new trial are adopted, the statement shall be amended accordingly and presented for settlement, but, if not adopted, the proposed statement and amendments shall within 10 days thereafter be presented by the moving party to the judge on five days' notice to the adverse party or delivered to the clerk for the judge. The defeated party served in due time its proposed statement for a new trial. The adverse party proposed amendments thereto. The defeated party gave notice of its nonacceptance of the amendments, and stated that in "due time" it would present the same to the judge for settlement. *Held*, that the notice merely indicated that the defeated party would pursue the general course required by the statute as a result of the nonacceptance of the proposed amendments and applied to either mode of presentation.

3. Master and Servant—Injury to Servant—Contributory Negligence.

An employer operated a machine shop and a planing mill. An employé in the machine shop was killed by a piece of timber thrown from a gang saw operated in the planing mill. The employé at the time of the accident was returning from a water-closet to his place of work in the machine shop. The employer had provided safe routes for its employés in going to and returning from the water-closet. The route selected by the employé was obviously dangerous, in consequence of the operation of the machinery in the mill. *Held*, that the employé was guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 153, 706–709, 745.]

4. SAME.

The fact that the way selected by the employé was more convenient than the safe way provided by the employer did not relieve him from the duty of taking the safe way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706–709, 745.]

5. SAME.

An employé was injured while taking an obviously dangerous way from a water-closet to his place of work. Upwards of 100 men worked with the employé, but none of them took this way in going to and returning from the closet. At the time of the accident, the employé was familiar with the premises, and had worked there for 20 years. *Held*, that the employé must have been familiar with safe route provided by the employer, and he was required to select it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706–709, 745.]

6. SAME.

Under Civ. Code, § 19, providing that a person having actual notice of circumstances to put a prudent man on inquiry as to a fact has notice of the fact, an employé selecting, without any suggestion from any one an obviously dangerous way in going to and from a water-closet, instead of using a safe way provided by the employer, must exercise ordinary care to inquire whether there was a safe way, and his failure to do so when inquiry would have disclosed the safe way was negligence, precluding a recovery for injuries received while using the dangerous way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 710–722, 745.]

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Mabel H. R. Douglas and others against the Southern Pacific Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Grove L. Johnson, for appellant. A. L. Shinn and M. S. Wahrhaftig, for respondents.

PER CURIAM. After judgment in department 2, a rehearing was ordered, and the cause argued before the court in bank. Upon further consideration, we are satisfied with the conclusions heretofore reached, and, for the reasons stated in the opinion filed in department, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

The following is the department opinion referred to (Lorigan, J.):

"The plaintiffs are the widow and children of Robert C. Douglas, and brought this action to recover damages for his death, alleging that it was occasioned through the negligence of defendant. The trial resulted in a verdict and judgment in favor of plaintiffs, and this appeal is taken by defendant from said judgment and the order denying its motion for a new trial.

"It is insisted preliminarily that, on the appeal from the order denying the motion for a new trial, the statement settled on motion therefor cannot be considered by this court, because it was not presented to the lower court for settlement within the time allowed by law. This objection was urged by plaintiffs at the time of settlement in the lower court, and the facts upon which it was based are presented in the record. These facts are that defendant in due time served its proposed statement on motion for a new trial, and on February 16, 1903, plaintiffs served their proposed amendments thereto, of the nonacceptance of which defendant gave notice to plaintiffs next day, the notice also stating that 'in due time' defendant would present them to the judge for settlement. On February 24, 1903, defendant obtained an order granting it 15 days in addition to the time allowed by law within which to give notice of the time for presenting said proposed statement and amendments to the judge for settlement, and extending the time for settlement of the same for that period. The same day this extension was obtained defendant notified plaintiffs that said statement and amendments would be presented to the judge for settlement at 10 a. m., March 6, 1903. They were presented at that date and time and the settlement was continued by the court from said last date until April 10, 1903, on which day the statement was settled. It is provided by subdivision 3, § 659, Code Civ. Proc., that when proposed amendments are served, if they are adopted, the statement shall be amended accordingly, and presented for settlement, but, 'if not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge.'

"No question is raised but that the court could have extended, under section 1054 of the same Code and upon application duly made, the time within which the proposed statement and amendments should be presented for settlement, as likewise the time for giving notice of such presentation. Respondent, conceding this to be true, insists, however, that, as prior to February 24th, it became impossible for the defendant to give five days' notice to plaintiffs within the ten days from the service of the amendments—February 16th—its right to do so had lapsed, and the court had no power thereafter to extend the time for giving such notice. We think the construction contended for is too narrow and extreme to be given to the provision of the section immediately in question and is unwarranted upon a fair consideration of its purpose. The purpose of the provision is twofold—to fix a time when the statement shall be presented, and to provide different methods whereby the adverse party may have notice of the fact. The statement must, unless the time is extended, be presented within ten days, but the method of its presentation is optional with the moving party. He may present it on five days' notice to his adversary, or he may deliver it to the clerk for the judge. Mellor v. Crouch, 76 Cal. 594, 18 Pac. 685. In the one case the adverse party is actually advised by the notice when it will be presented, which may be at a time earlier than the ten days, and at which time the court may fix the date of settlement. In the other, he has constructive notice of its presentation by expiration of the time within which the law requires it to be presented, and will receive notice of the date of settlement from the clerk. Code Civ. Proc. § 659. In either event, however, the main purpose of the provision of the statute is fulfilled—he has notice of its presentation.

"Provisions of the statute must be construed liberally, with a view to promoting the rights of parties and in the interests of justice. Statements on motion for new trial are ultimately used as a basis for presenting the merits of a case upon an appeal, the right to which is constitutionally conferred, and no narrow construction should be placed upon a rule of procedure which will defeat that right. As we say, one purpose of the statute is to place a limitation on the time for presentation; the other is to provide an optional mode of presentation. In our judgment, under section 1054, Code of Civil Procedure, the time may be extended for all purposes, including an extension of time to give actual notice; the only requisite being that when such notice is given the adverse party must have five days' notice of the presentation. If a party on the seventh day after the service of amendments should obtain a general order of court granting additional time to present the statement for settlement, and should within the extension, and upon five days' notice to the adverse party, present it for that purpose, if the construction of the section now contended for by plaintiffs is correct, it would apply in the given case and defeat the right to the settlement, as the effect of the extension, under respondent's theory, would be to limit the moving party to a delivery of the statement to the clerk for the judge. He could not present it upon actual notice, because, under plaintiffs' contention, as he obtained the order of extension at a time when he could not have given actual notice, the court was without power to extend it for that purpose. This is not the understanding of the profession as to the meaning of the section, nor is it the practice under it, and no satisfactory reason is advanced now why the construction urged should be placed on it. Such a construction would not come within the intent or spirit of the section.

"It is claimed, as we understand it, that the notice served on plaintiffs by defendant was to the effect that the proposed statement and amendments would be presented on actual notice. We do not so understand it. It simply notified plaintiffs that 'in due time' defendant would present them for settlement. It contained no date or specified time when the presentation would be made, and the statement that they would be presented 'in due time' was evidently used in connection with the notice of non-appearance, as indicating that defendant intended to pursue the general course required by the statute as a result of such nonacceptance. The language used was general and applied to either mode of presentation which the section permitted. The objection to our consideration of the settled statement on the ground urged we think untenable.

"This preliminary objection disposed of, brings us to a consideration of the merits of the appeal. The defendant is a corporation operating extensive shops and factories in Sacramento and employs therein a large number of men. Robert C. Douglas was an employé of the defendant on April 30, 1900, on which date he was injured by a piece of timber thrown from a gang saw operated by another employé of defendant in that portion of the factory known as the 'planing mill,' from the effects of which he died. Deceased was at the time of his death 53 years of age, in full possession of all his faculties and members and had up to the time of his injury and death been for some 20 years in the employ of defendant as a skilled laborer, working in its car machine shop. At the lower or south side of this machine shop, near the center, was a door, and at the west side of the door and near to it was the bench at which the deceased worked, his employment being to mark irons to be drilled by other employés in the shop where he was working. Immediately to the south of this car machine shop, and separated therefrom by an intervening roadway or track 30 feet wide, was the planing mill building, in which was operated the gang saw referred to. On the north side of the planing mill building was likewise a door, located almost opposite to the door in the south side of the building where deceased was employed. On the south side of this planing mill building was still another door opposite the door at the north side thereof. Immediately to the south of the planing mill building, and fronting the south door thereof, was one of the water-closets used by the employés of the defendant company. It was not the custom to keep the doors of the planing mill closed, and some of the employés of defendant from other of its shops in the vicinity passed through the mill building on various errands. It appears also that Douglas frequently passed through there.

"Coming now to the time of the accident: The first that was noticed of Douglas in the planing mill building was immediately that he was injured by the piece of timber thrown by the gang saw. When struck, he was opposite the north door of the mill some 10 or 15 feet from the saw. This saw was located to the west of said door, was of the best manufacture and approved pattern, and was operated by competent men, but the evidence showed that, in common with all gang saws, it would occasionally in its operation, where a thin or warped piece of lumber was being sawed, throw pieces backward, and that it was from a warped piece so thrown back that Douglas was injured. It was necessary to have the gang saw located as it was, in proximity to a track run beside it, over which lumber and materials were brought in push cars to feed it, and thereafter reloaded in said cars and taken to wherever it was further required in the mill. At the time of the accident there was lumber lying near the saw across the north doorway to be used at the saw. While the evidence does not directly disclose what business Douglas had in the planing mill when injured, it may be assumed that there was evidence to warrant the jury in finding that he was returning through the mill from the water-closet at the south side of it to his place of work in the car machine shop.

"As to the planing mill, the evidence shows that at that time the mill was in full operation; that at all times when so in operation there were from 40 to 50 men employed in it; that two tracks ran into it from east to west, over which trucks loaded with lumber were constantly being run; that the mill was filled with machinery of various descriptions in operation; that there were no regular pathways through the mill from the north to the south doors and such as there were were usually blocked; that the central portion of the mill particularly was filled with machinery, benches, and tables, hand trucks of lumber upon the tracks, and lumber and material piled around the saws, planers, boring machines, etc. It was, by reason of machinery and other appliances, the movement of employés, the vast quantities of material handled at the machines and transferred from one point to another, and the general activities of the business, quite a crowded and obstructed place.

"As to the approaches to the water-closets used by the employés: The evidence shows that there were at least three other routes than the one taken by deceased in going to and returning from the closet at the rear of the planing mill. Mentioning two of these in a general way, they were routes from the machine shop through the south or west door thereof, along the passageway between the machine shop and mill, and thence around either the east or west side of the latter building to the closet at the rear thereof. Still another route, open to deceased, or any other employé of the machine shops, proceeded from the north end of said shop upstairs and thence south along the upper story of the machine shop and planing mill to a closet located immediately above the one at the rear of the ground floor of the mill building, from which deceased was apparently returning when injured. There was no evidence that any employé in the car machine shop, or in any other department of defendant's business in that vicinity (and there were others), ever took the route through the planing mill, either to or from the closet at the rear thereof, which was being taken by the deceased when the accident occurred; nor any evidence that they ever went through the mill for that purpose. On the contrary, the evidence shows that the co-employés of the deceased in the car machine shop either proceeded from the south or west door thereof, and went around on the outside of the mill on the east or west side routes to which we have heretofore referred or went upstairs and along the upper story of the building on the other route above indicated. These are the principal and controlling facts in the case, and all that are necessary to be stated in order to apply propositions of law which are determinative of this appeal.

"The gist of plaintiffs' action is that the defendant provided an unsafe and dangerous way through which it was necessary for its employés in the car machine shop to pass while going to and from the water-closet, and that deceased was injured while using such way for that purpose.

"Defendant at the close of all the evidence in the case moved the court for a nonsuit. The motion was made upon two grounds: First, that in using the way to and from the closet through the planing mill deceased assumed the ordinary apparent risks attending that route, and, second, that it appearing from the evidence that deceased had a choice of two routes to and from the closet, one of which—up the stairs from the machine shop and along the upper floors of the said shop and the planing mill—was safe, and the other—the way through the planing mill which he took—was dangerous, that in using the perilous rather than the safe route he was guilty of contributory negligence which barred a right of recovery for his death. The motion was denied, and the ruling of the court in that respect presents the important question for consideration on this appeal. The facts in the case are not disputed; the only dispute being as to the inference which should be drawn from them, and we think that the only legitimate inference which could be drawn is that they disclose no liability on the part of defendant, and hence the motion for a nonsuit should have been granted. While two grounds are urged for the nonsuit, and while we entertain but little doubt that under the evidence the motion could have been granted on both, we do not discuss the matter of assumption of risk by the deceased in passing through the planing mill under conditions of danger apparent to any man of ordinary intelligence and prudence, because it is beyond debate that, upon the second ground, that of contributory negligence, the court should have withdrawn the case from the jury. The evidence shows beyond any question that the defendant had provided a safe and secure way to a closet for the employés of the car machine shop from the stairway on those premises up and along the upper story of the building. Having done so, it had done all that the law cast upon it, and it was the duty of the deceased when occasion required to take that safe way. When a safe way is provided by an employer and a dangerous way exists, if an employé chooses to take the dangerous way and is injured, he is guilty of contributory negligence as a matter of law. This is the rule universally recognized. As said: 'Where a person having a choice of two ways, one of which is perfectly safe and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover. An employé must take care of himself as well as the master must take care of his duties and his employés. These obligations are mutual. And it is the law that if a man voluntarily puts himself in a dangerous position, does so unnecessarily when there are positions in connection with the discharge of his duties which are safe which he can be placed in, he cannot recover damages for the injury to which he has contributed by his own negligence.' Bailey's Personal Injuries, §§ 1123, 1124. In Hoffman v. American Foundry Co., 18 Wash. 287, 51 Pac. 385, the rule is expressed: 'Where there are two methods by which a service may be performed, one perilous and the other safe, an employé who voluntarily chooses the perilous rather than the safe one cannot recover for an injury thereby sustained.' And in Dandie v. S. P. Co., 42 La. Ann. 686, 7 South. 792: 'The servant cannot recover where his own want of care has contributed to the injury. If among the different modes of performing a duty he selects the most dangerous, which unnecessarily exposes him to danger, he is responsible for the selection.' It is hardly necessary to quote further from the authorities, but the following are cited: Labat, Master & Servant, § 333, p. 839; Colo. C. & O. Co. v. Carpita, 6 Colo. App. 248, 40 Pac. 248; Sladky v. Marinette L. Co., 107 Wis. 250, 83 N. W. 514; Sauer v. Union Oil Co., 43 La. Ann. 699, 9 South. 566; Richmond & D. R. Co. v. Bivins, 103 Ala. 142, 15 South. 515; Fritz v. Salt Lake & O. G., etc., Co., 18 Utah, 493, 56 Pac. 90; Wilber v. Wisconsin Central R. Co., 86 Wis. 535, 57 N. W. 356.

"Applying this rule to the undisputed facts, as we have said, there can be no question that under the evidence a way upstairs, reasonably safe and free from danger, was provided for the use of deceased and his co-employés in the machine shop, and it is equally clear that the way the deceased usually took through the planing mill was attendant with risks and dangers, and hence unsafe. To undertake to pass through the planing mill when it was in full movement—its planers, saws, and other machinery in operation; trucks, push carts, tables, benches, lumber and material occupying practically the entire mill, with no distinct passageway through it, and such ways as there were so blocked that one would have to pick a devious or uncertain route over or around permanent and temporary obstructions—was so obviously attendant with risk and danger as not to be open to discussion on that point. It is true that the route through the planing mill was more convenient as a direct route for the deceased than the route upstairs or, in fact, any of the other routes taken by his co-employés in the machine shops to the closets. The matter of convenience, however, could not qualify the rule that he should have taken the safe route. The mere fact that the dangerous way he took involved less trouble and was more direct than the safe route which was open to him furnished no excuse for not taking the latter. Labat, Master & Servant, § 333, p. 841.

"It is claimed, however, by respondent that this rule requiring an employé to select the safe route has no application to the case at bar, because it is insisted that there was no evidence that the deceased knew of any other route to a water-closet than the one he took through the mill. It is true there is no direct evidence to this point, but we do not think that it was necessary. It is to be presumed that the deceased knew it, and, aside from the presumption in view of the danger that was apparent to him as attending the route he was invariably taking, it was his duty in the exercise of ordinary care and prudence to have ascertained whether there was not a safer way which he might take, and that there was he could have ascertained by the slightest inquiry. There were employed in the car machine shop where deceased worked, as his fellow employés, upwards of 100 men. Of these employés not one of them took the route the deceased took to the closet. In fact, the evidence does not show that any employé of the defendant in any of its departments took that route for that purpose; that deceased alone took it. At the time of the accident deceased had been in the employment of defendant in the car machine shop for 20 years, and was familiar with the premises. Under these circumstances, as a man of ordinary observation, he must have been familiar with the various places and avenues which were provided for the benefit of the employés of the shop where he worked, and their use of them, and it would only be indulging in a natural and reasonable presumption to conclude that he did. But, independent of the presumption, it was his duty to ascertain whether a safe way to a water-closet had been provided by the defendant for the benefit of himself and his co-employés. He knew that it was his employer's duty to do so, and he knew that the way he was taking did not fill the legal requirement, but was perilous. He had no right to assume that the way he was taking was the only way. No one suggested to him that it was. He selected it for himself, and seems to have been the only one who used it for the purpose. Every time he passed through the planing mill on his way to or from the closet he was confronted with the risks of injury which he was taking by using that route. Under these circumstances, it ought to have suggested itself to him as a man of ordinary intelligence that the defendant, as the law required it to do, had provided a safer route, and as a prudent man it was his duty to inquire whether it had or not. He could not go on using the perilous route, heedless of its dangers, when a simple inquiry would have placed him in a position to avoid them. The danger he was incurring was a circumstance calling on him, in the exercise of ordinary care and prudence, to inquire if there was not a safer way, and his failure to do so when inquiry would readily disclose that there was another and a safer route was negligence of a contributory character. One who has actual notice of circumstances which are sufficient to put a prudent man on inquiry as to a particular fact has constructive notice of the fact itself, if he might have ascertained it by making the inquiry. Section 19, Civ. Code. There can be no question but that the circumstance of danger from the way he was pursuing placed the deceased upon inquiry, and, as that inquiry would have informed him of the fact that there was a safe way, in legal contemplation what he could have learned he knew.

"Many other points are presented by counsel, but from the conclusion we have reached it is unnecessary to discuss them.

"In our judgment the court should have granted the motion for a nonsuit on the ground urged by appellant that the evidence as a matter of law showed that the contributory negligence of deceased was the cause of his injury and death, and that, therefore, plaintiffs were not entitled to recover.

"The judgment and order are reversed, and the cause remanded for a new trial.

"We concur: HENSHAW, J.; McFARLAND, J."

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151 Cal. 216

DERNHAM v. BAGLEY. (S. F. 4,673.)

(Supreme Court of California. May 13, 1907.)

1. Appeal—Rules of Court—Bills of Exceptions—Settlement.

The phrase, "when there is a proceeding pending for the settlement of a bill of exceptions," in court rule 2 (78 Pac. vii), requiring the appellant in a civil action to file within 40 days after the appeal is perfected a transcript of the record, provided that, when there is a proceeding pending for the settlement of a bill of exceptions which may be used in support of such appeal the time for filing and serving the transcript shall not begin to run until the settled bill of exceptions has been filed, includes any proceeding looking to the settlement of a bill of exceptions actually inaugurated and pending undisposed of and not abandoned, regardless of questions whether the bill can be legally settled.

2. Same.

Where a proceeding for a settlement of a bill of exceptions has been inaugurated and is pending undisposed of, the adverse party who desires to avail himself of objections based on the ground that the proposed bill has not been served within the time allowed by law or order of the court or stipulation of the parties must interpose the defense before the judge settling the bill, thereby enabling the trial court to determine the facts and the appellate court to review its decision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1382.]

3. Same.

Where a proceeding for the settlement of a bill of exceptions is pending in the trial court, the appellate court will not determine the question whether the proposed bill has been served within the time allowed by law or by valid order of the court, or by stipulation of the parties on motion to dismiss the appeal.

In Bank. Appeal from Superior Court, City and County of San Francisco; John A. Hosmer, Judge.

Action by Henry Dernham against Mary C. Bagley. From a judgment for defendant, plaintiff appeals. Heard on motion to dismiss. Denied.

Thomas, Gerstle, Frick & Beedy, for appellant. John Hubert Mee, for respondent.

ANGELLOTTI, J. This is a motion to dismiss an appeal taken by plaintiff from so much of the judgment given in the above-entitled cause as was in favor of the defendant. The ground of the motion is that plaintiff has not served and filed the printed transcript of the record on appeal within the time prescribed by rule 2 of this court. (78 Pac. vii).

Several interesting questions have been ably argued by respective counsel, but we find it necessary to consider only one matter in disposing of the motion.

The appeal was duly perfected on April 2, 1906. At the time of the service and filing of the notice of this motion, September 11, 1906, and at the time of the hearing, October 1, 1906, no transcript of the record on appeal had been served or filed. There had been in due time a service and filing of a purported notice of intention to move for a new trial. It is claimed by defendant that this notice was so defective that it was ineffectual for any purpose. There had also been certain stipulations extending the time of plaintiff to serve a proposed bill of exceptions on motion for a new trial, and various orders of the court purporting to extend the time of plaintiff within which to serve his proposed bill of exceptions on appeal from the judgment and on motion for a new trial. Within the life of the last order, on September 1, 1906, plaintiff served on defendant his proposed bill of exceptions, on appeal from the judgment, and on motion for new trial. Defendant refused to admit service thereof, on the ground that, so far as it was a bill of exceptions on appeal from the judgment, it was not served in time, and, so far as it was a bill of exceptions on motion for a new trial, it could not be considered, for the reason that no notice of plaintiff's intention to move for a new trial had been served or filed within the time allowed by law. On September 11, 1906, defendant obtained an order of the judge of the lower court, extending by 30 days from that date her time within which to propose amendments to said bill, and this time, it will be observed, had not expired at the date of the hearing of this motion. At that time plaintiff's proceeding for the settlement of a bill of exceptions to be used on the appeal from the judgment, as well as upon the motion for a new trial, was pending undisposed of in the trial court, and no disposition had been made therein of his attempted proceeding to obtain a new trial.

By the express terms of rule 2 of this court, "when there is a proceeding pending for the settlement of a bill of exceptions or a statement which may be used in support of" the appeal, the forty-days' time, within which the transcript may be served and filed, does not commence to run until the settled or authenticated statement or bill of exceptions has been filed. It is not necessary to discuss the question as to the validity of the attempted notice of intention to move for a new trial, or the question as to the effect of its invalidity, if it be invalid, upon the right of plaintiff to have a bill of exceptions on motion for a new trial settled for use on the appeal from the judgment. We have, in this case, a proceeding still pending in the trial court for the settlement of a bill of exceptions for use on the appeal from the judgment. Defendant's claim on this motion, so far as such proceeding for settlement is concerned, is simply that the proposed bill of exceptions on appeal from the judgment was not served by plaintiff within the time allowed by law, or any stipulation of the parties, or valid order of court, and that consequently the court is without jurisdiction to settle the bill. We are satisfied, however, that the words "when there is a proceeding pending for the settlement of a bill of exceptions," etc., in the rule above referred to, must be held to include any proceeding looking to the settlement of such a bill actually inaugurated by a party and pending undisposed of, and not abandoned, regardless of all questions as to whether the proceeding can ultimately avail and the bill be legally settled. Those questions are primarily for the trial court to determine, subject to review by this court. This was recognized in Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112, where it was said that ordinarily this court "would not undertake to determine on a motion to dismiss an appeal, whether or not a party had so failed to comply with the requirements of the law in regard to the settlement of a bill of exceptions that his pending proceeding for such settlement must ultimately fail, but would leave that question to be determined by the trial judge, subject to review on appeal." It will readily be seen that this must be the proper rule of practice to be followed wherever a proceeding for the settlement of a bill of exceptions has actually been inaugurated by a party, and is pending undisposed of in the trial court, and the moving party is actively engaged thereunder in attempting to procure the settlement of his appeal. It is well settled that the adverse party desiring to avail himself of such an objection must interpose it in the trial court, or before the judge settling the bill, and that if no objection is there made the bill may be settled, and thereafter used on the appeal. Ryer v. Rio Land & Imp. Co., 147 Cal. 462, 464, 82 Pac. 62; Henry v. Merguire, 106 Cal. 142, 146, 39 Pac. 599. It may often happen that there is a dispute as to the facts upon which it is claimed that the bill was not served in time, and the determination of this question of fact is primarily for the trial tribunal, subject to review by this court to the same extent only as is its determination upon other questions of fact. It is further settled that it is entirely within the power of the trial court, under section 473, Code Civ. Proc., upon application in that behalf made within the proper time and upon sufficient showing of mistake, inadvertence, surprise, or excusable neglect, to relieve a party from the effects of his mere failure to serve his proposed bill of exceptions within the prescribed time, where objection to the settlement is made on that ground, and thereupon settle the bill. Stonesifer v. Kilburn, 94 Cal. 43, 29 Pac. 332; Banta v. Siller, 121 Cal. 414, 53 Pac. 935; King v. Dugan (filed Jan. 10, 1907), 88 Pac. 925. The question as to whether the facts are such as to warrant the relief in a case of this kind is primarily one for the trial court, and that court is vested with a large discretion in such matters. Obviously this court should not deprive a party of the substantial right of making an application for relief, and having the same heard and determined by the trial court, which it would do if it dismissed the appeal under such circumstances. The proceeding must be, of course, for the settlement of a bill of statement that may be used on the appeal, which, in the case of an appeal from the judgment necessarily includes a bill for use thereon, settled under the provisions of section 650, Code Civ. Proc. There being a proceeding pending in the lower court for the settlement of a bill of exceptions on the appeal from the judgment, the time for the filing of the transcript had not commenced to run at the date of the hearing of this motion. This is a complete answer to the motion to dismiss before us.

In what we have said we do not desire to be understood as intimating any opinion upon the question as to the validity of the notice of intention to move for a new trial.

The motion to dismiss the appeal from the judgment is denied.

We concur: SHAW, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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151 Cal. 263

## RECLAMATION DIST. NO 551 et al. v. SUPERIOR COURT OF SACRAMENTO COUNTY et al. (Sac. 1,535.)

(Supreme Court of California. May 15, 1907.)

1. Levees—Reclamation Districts—Public Property.

A levee constructed by a reclamation district on a right of way procured for that purpose is a part of the works which the trustees of the district are, under Pol. Code, § 3454, authorized to take materials for and construct for the purpose of reclaiming and keeping reclaimed the land within the district, and is public property acquired by the agent of the state for state purposes.

2. Eminent Domain—Property Subject to Appropriation—Public Property—Right of Way and Levee of Reclamation District.

Under Pol. Code, §§ 3454, 3471, authorizing the trustees of reclamation districts to acquire by condemnation a right of way for the construction of works, including drains, canals, etc., the easement of a reclamation district for the construction of a levee is "a right of way," within Code Civ. Proc. § 1240, enumerating the private property which may be taken under the right of eminent domain, and providing that "rights of way" shall be deemed private property for the purposes mentioned in section 1238, declaring that the right of eminent domain may be exercised in behalf of specified public uses; and hence the right of way procured by a reclamation district for the construction of a levee, together with the levee, may be taken by a railroad company under the right of eminent domain for its right of way, provided the right of way will not interfere with the right of way and levee of the district or affect the efficiency of its works.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 107.]

3. Same.

In a proceeding by a railway company to condemn for a right of way the right of way procured by a reclamation district for the construction of a levee, together with the levee, where the complaint alleges that the railway right of way will not interfere with the efficiency of the reclamation works, the court cannot, as a matter of law, say that a limited use by the railway company and the reclamation district in common cannot be so regulated that there will be no material interference with the reclamation works.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 560.]

4. Same—Jurisdiction of Courts.

Where the Legislature has provided that the right of way of a reclamation district for a levee and the levee constructed thereon may be crossed or intersected by another right of way, or subject to a limited use in common with the owner thereof, when necessary, it cannot be said that the court is without jurisdiction of a proceeding to condemn the right of way and levee for a railway right of way, merely because the complaint shows that the greater portion of the strip of land over 1,000 feet in length, sought to be condemned, is subject to an easement for a levee constructed thereon.

5. Prohibition—Adequacy of Other Remedies.

Where the complaint, in a proceeding to condemn land for a railroad right of way, shows a case where property of the kind sought to be taken may be taken for the use for which it is sought, the question whether the facts justify the taking is for the trial court in the exercise of its jurisdiction, and cannot be determined on prohibition to restrain the court from proceeding with the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 7.]

Original application for a writ of prohibition by reclamation district No. 551 and others against the superior court of the county of Sacramento and others. Denied.

A. L. Shinn, for petitioners. Devlin & Devlin, for respondents.

ANGELLOTTI, J. This is an application, on notice, by a reclamation district and the members of the board of trustees of said district for a writ of prohibition, restraining the superior court of Sacramento county from proceeding with the trial of an action instituted in said court by the Sacramento Southern Railroad Company, a corporation, for the condemnation of a strip of land 1,349.6 feet long, situate in said county, for the purposes of a railroad right of way. According to the allegations of the complaint in such action, the Onisbo Improvement Company, a corporation, is the owner of the strip of land and of the larger tract of which it forms a part, while one P. J. Van Loben Seis and the People's Savings Bank claim an interest therein. It further appears from the complaint in such action that the greater part of such strip is subject to an easement for a levee already constructed and now maintained thereon, known as the levee of reclamation district No. 551, which levee is under the control of the trustees of said district, and that it is designed to construct the proposed railroad on said levee in part; it being alleged that said levee easement and the easement sought in the action, can coexist without in any manner interfering with each other. All of the persons interested in said land, including the reclamation district and its trustees, are parties defendant in such action. A demurrer to the complaint has been overruled, and an answer has been filed, and the trial court will proceed with the trial of the action unless restrained.

Plaintiffs' claim is that the court has no jurisdiction to try, or otherwise entertain, said action, for the reason that there is no authority in law by which a railroad corporation is empowered to condemn or use the levees of a reclamation district, or to make a joint public use thereof, and because such use will necessarily obstruct the trustees of the district in the control, management, alteration, repair, and protection of the works of reclamation of said district.

This case differs from the ordinary case in which it is sought to subject private property to a second public use alleged not to be inconsistent with a former public use already imposed, in that it is here attempted to permanently appropriate to the second use, in common with the first use, not only the property of the owner of the land, but also the permanent structure constituting public property, placed and maintained thereon by the first taker in the exercise of its easement. The levee itself was constructed by the reclamation district on the right of way procured for that purpose, and is a part of the "works" which the trustees of the district are authorized to take materials for and "construct" for the purpose of reclaiming and keeping reclaimed the land within the district (Pol. Code, § 3454), and is "public property, acquired by the agents of the state for state purposes" (Reclamation Dist. v County of Sacramento, 134 Cal. 477, 66 Pac. 668). So far as the reclamation district is concerned, the object of the action in eminent domain is to subject its right of way for levee purposes, and the levee constructed thereon, to a limited use on the part of the railroad company for right of way purposes for the railroad; such use to be in common with that of the district. We think that under some circumstances such a use of the levee right of way and the levee itself might be acquired by a proceeding in eminent domain.

Section 1240, Code of Civil Procedure, enumerates the kinds of property, "which, for the purpose of the exercise of eminent domain, shall be deemed to be private property," which may be taken. Marin Co., etc., Co. v. Co. of Marin, 145 Cal. 586, 79 Pac. 282. Subdivision 5 thereof is, in part, as follows: "All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by any other right of way or improvements, or structures thereon. They shall also be subject to a limited use, in connection with the owner thereof, when necessary; but such uses, crossings, intersections and connections shall be made in the manner most compatible with the greatest public benefit and least private injury." There is no warrant for restricting the application of this provision to property owned by private persons and corporations. Section 1240, Code Civ. Proc., is not confined to property so owned, nor even to property owned by the state as a private proprietor which may be condemned for public use in the cases provided in subdivision 2 thereof It was held, in Marin Co., etc., v. County of Marin, supra, that, under subdivision 3, declaring that property appropriated to public use could be taken for a more necessary public use, all property appropriated to public use, both public and private, not excepted by some other provision, is private property for the purpose of the exercise of eminent domain, and can be taken for a more necessary public use, and an action by a water company for the condemnation to its use of the right of way for a public highway and the highway constructed and maintained thereon for the public use was sustained. Where the fee of the land already appropriated to public use is in the state, or a city, etc., it is excepted by subdivision 2. Subdivision 5 is most comprehensive in terms, including "all rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight," and "any and all structures," etc., thereon. Section 1238, Code Civ. Proc., is the general section stating the many and varied public uses in behalf of which the right of eminent domain may be exercised. It includes as well public uses managed by public officers of the state, or a subdivision thereof, as public uses managed by private persons or corporations. The object of subdivision 5 is clear. It was recognized that frequently a work of great public benefit might be rendered impossible by reason of the fact that land necessary to be used in connection therewith for right of way purposes was already subject to a use for such purposes, notwithstanding that it was entirely feasible for the matter to be so adjusted that the two uses could coexist without material injury to either. Mere crossings and intersections of rights of way present the most familiar instances of this, but we may easily conceive of cases where something more may be necessary, and for that reason "a limited use, in common with the owner thereof, when necessary," is authorized. The necessity is as great where the right of way is owned by the state, or some subdivision of the state, for a public use, as it is where the ownership is in some person or private corporation administering a public use. The fact, then, that the right of way here, and the levee constructed thereon, constitute "public property acquired by the agents of the state for state purposes" (Reclamation Dist. v. County of Sacramento, supra), does not preclude the application of this subdivision.

The easement of a reclamation district for its levee constitutes a "right of way" within the meaning of that term as used in subdivision 5 of section 1240, Code Civ. Proc. It is so characterized in the sections of the Political Code relating thereto. Sections 3454 and 3471. See, also, McCarty v. S. P. Co., 148 Cal. 211, 220, 82 Pac. 615. It is urged that it is not a right of way for any purpose mentioned in section 1238, Code Civ. Proc., and that subdivision 5 of section 1240 is expressly confined to such rights of way as are for the purposes so mentioned. It is true that the word "levee" is nowhere expressly used in section 1238, Code Civ. Proc. That section was, however, intended to include all public uses in behalf of which the right of eminent domain might be exercised. There is, of course, no doubt as to levees and embankments for reclamation purposes constituting a public use authorized by the Legislature. Pol. Code, §§ 3454, 3471. Section 1238 in terms specifies the raising of the banks of steams as one of the purposes for which the right may be exercised, and also "draining and reclaiming lands." We think that this makes the right of way for a levee or embankment for reclamation purposes a right of way for a purpose "mentioned in section 1238." Subdivision 5 of section 1240 was clearly intended to be most comprehensive, and a construction excluding such a right of way would be opposed to the whole spirit of the provision.

We are unable to see any sound constitutional objection to this provision of our statute, so construed as applicable to levee rights of way. The argument of learned counsel for plaintiffs in this behalf is based upon the fact that statutes of the state vest the full control of the reclamation work of a district, including the planning and constructing of the works, and changes and repairs therein, in the trustees of the district, and that, to the extent of the occupation by the railroad company which may be authorized by a court in eminent domain proceedings, the dominion of the officers designated by statute is necessarily interfered with; but the statute authorizing such judicial interposition is enacted by the same legislative body that defined the powers and duties of reclamation district trustees, and no good reason appears why the legislative department cannot make the power of the trustees subject to such provisions of a decree of eminent domain as may be necessary under subdivision 5 of section 1240, Code Civ. Proc. The power of boards of supervisors in regard to public highways is no less absolute than that of trustees of reclamation districts (see San Mateo Co. v. Coburn, 130 Cal. 631, 63 Pac. 78, 621), and it is settled that a public highway, where the fee of the land is in a private party, may be taken in eminent domain. Marin, etc., Water Co. v. County of Marin, supra. Where, as here conceded, the subsequent use is not a more necessary public use than that to which the property has been already appropriated, there can, of course, be no such interference with the former use as will substantially or materially affect the efficiency of the reclamation works. As already stated, it is alleged in the complaint in eminent domain that there will be no such interference. We cannot say, as a matter of law, that a limited use, in common, cannot be so regulated that there will be no material interference with the reclamation works.

The conclusion we have reached in regard to the matters already discussed necessarily disposes, in our judgment, of this application for a writ of prohibition. If the Legislature has provided that the right of way for a levee, and the levee constituting a structure or improvement thereon, may be crossed or intersected by another right of way, or subjected to a limited use, in common with the owner thereof, when necessary, in the manner most compatible with the greatest public benefit and least private injury, it can hardly be said that the superior court of Sacramento county is without jurisdiction of the action in eminent domain, simply because the complaint shows that the greater portion of the strip of land 1,349.6 feet in length, sought to be condemned, is already subject to an easement for a levee constructed thereon. It might very reasonably be contended that whether or not a complaint, in an action brought to enforce the right of eminent domain, shows a case in which the property sought is of such a character that it may be taken at all, is strictly a question to be determined in the exercise of its jurisdiction by by the trial court in the condemnation proceedings, subject to review in the ordinary way, and that prohibition will not lie to determine the sufficiency of a complaint in an action belonging to a class of which the superior court has jurisdiction. However this may be, it is certainly enough to preclude the remedy of prohibition that the complaint shows a case where property of the kind sought to be taken may be taken for the use for which it is sought. Whether or not the facts are such as to justify the taking in a particular case is for the determination of the trial court in the lawful exercise of its jurisdiction, and cannot be determined on prohibition. We are, by no means, prepared to decide that subdivision 5 of section 1240, Code Civ. Proc., or any other provision of law, would warrant the taking of the levee right of way as a right of way for a railroad simply because it would be advantageous for the railroad company to acquire a roadbed already constructed. The subdivision in question was, of course, not enacted for the purpose of giving the second taker the benefit of structures or improvements of the first taker, but was solely to enable the crossing of an existing right of way by a second right of way to be made, or a limited use thereof to be had, in common with the owner thereof, when necessary. The necessity here referred to can hardly be said to exist solely because of the existence of a structure of the first taker on the prior right of way that would serve as a roadbed for a proposed railroad. The right of the railroad company under this subdivision in regard to the acquirement of the use of the levee is perhaps no greater than it would be in a case where it was seeking to secure a limited use, in common with another railroad company, of the right of way and roadbed of the latter. It may be that the facts in this regard which may be shown under the issues, made in the eminent domain action, constitute a full defense to such action, under a proper construction of subdivision 5 of section 1240, Code Civ. Proc. As to this, however, we express no opinion, as the question is not properly before us. In fact, we do not wish to be understood as now definitely deciding any question as to the proper construction of subdivision 5 of section 1240, Code Civ. Proc., except in so far as we hold that it is applicable to a levee right of way, and the levee constructed thereon.

The application for a writ of prohibition is denied.

We concur: SHAW, J.; McFARLAND, J.; HENSHAW, J.; SLOSS, J.; LORIGAN, J.

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151 Cal. 159

## McDONALD v. CALIFORNIA TIMBER CO. et al. (S. F. 4,034.)

(Supreme Court of California. May 9, 1907. Rehearing Denied June 6, 1907.)

1. VENUE—CHANGE OF PLACE OF TRIAL.
Under Const. Cal. art. 12, § 16, providing that a corporation may be sued in the county where the liability arises, or where the principal place of business of the corporation is situated; and Code Civ. Proc. § 395, providing that all cases, other than those previously mentioned, which did not include personal injury actions, must be tried in the county in which the defendants, or some of them, resided at the time of the commencement thereof; and section 397, providing that the court may on motion change the place of trial when the county designated in the complaint is not the proper county—where an action for personal injury against a corporation is begun in a county other than that in which the injury occurred, if the corporation is the sole defendant, it has a right to demand a transfer to the county of its principal place of business.

2. SAME—FORM OF APPLICATION—MOTION—FRAUDULENT JOINDER.
Where a resident defendant is fraudulently joined with the real defendant for the purpose of preventing a transfer of the action to the proper county, a motion for change of place of trial upon the ground of that fraud is a proper proceeding.

3. SAME—NOTICE OF APPLICATION—STATEMENT OF FRAUDULENT JOINDER.
Where a defendant moves for a transfer of a cause to the county of its principal place of business, on the ground that a resident defendant was fraudulently joined for the sole purpose of preventing a change, the fraud relied on must be clearly stated in the notice of the motion, or the plaintiff will not be required, on the hearing of the motion, to support by specific proof the averments of his complaint showing a cause of action against the resident defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 106.]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by John R. McDonald against the California Timber Company and another. From an order denying a change of place of trial, the defendant company appeals. Affirmed.

See 83 Pac. 172.

Charles B. Younger, Jr., for appellant. Chas M. Cassin, Benj. K. Knight, and Cassin & Lucas, for respondent.

BEATTY, C. J. This is an appeal by the corporation defendant from an order of the superior court denying its motion for a change of the place of trial. The action is for damages for personal injuries received at the mill of appellant in San Mateo county during the course of plaintiff's employment there, but it was commenced in the county of Santa Cruz. The principal place of business of the corporation is at the city of San Francisco. As the action was not commenced in the county where the liability arose, appellant, if it had been the sole defendant, would have had the undoubted right to demand the removal of the cause to San Francisco for trial. Code Civ. Proc. §§ 395, 397; Const. art. 12, § 16; Cohn v. C. P. Ry. Co., 71 Cal. 488, 12 Pac. 498, and cases cited in note to that case. But the corporation was not the sole defendant named in the complaint, and since there was ample evidence to justify the superior court in finding that its codefendant, Dent, from the time of the alleged injury to the commencement of the action, had been a resident of Santa Cruz county, that fact was a complete answer to the motion of the corporation, based as it was upon the sole ground that the county of Santa Cruz was not the proper county for the trial of the action, unless it had a right to show, and succeeded in showing, as it attempted to do, that the plaintiff, without having any cause of action against Dent, or any reason to believe that he was liable to respond in damages for the injury alleged, had fraudulently named him as a defendant for the mere purpose of defeating the right of the real defendant to demand a change of the place of trial to the county of its legal residence. This, therefore, is the sole question which the case presents.

At the time of its appearance, the appellant filed an affidavit of merits, and the demand prescribed by section 396, Code Civ. Proc., and gave notice of its intention to move for a change of the place of trial to the city and county of San Francisco. The grounds of the motion specified in the notice were the following: "Said motion will be made on the grounds that the place where the principal business of said defendant, California Timber Company, is transacted, is situate in said city and county of San Francisco, and that said city and county of San Francisco has been the place where the principal business of said corporation is transacted since the incorporation of said defendant, California Timber Company, on April 14, 1894, continuously from said last-named date to and including the date of the commencement of this action; that the alleged cause of action described and set forth in the complaint in this action arose in the county of San Mateo, in said state of California; that all and singular the liability and obligation, if any, mentioned and set forth in the complaint in this action, arose in the county of San Mateo, in said state of California; that said defendant Dent was, at the time of the commencement of this action, a resident of said county of San Mateo, in the state of California; that neither of said defendants, at the time of the commencement of this action, was a resident of said county of Santa Cruz; that said county of Santa Cruz is not the proper county for the trial of said action; that said defendant California Timber Company has heretofore demanded, in writing, that the place of trial of said action be changed to the city and county of San Francisco, in said state." The affidavit of appellant's manager, which was served with the notice, contained the following averments: "That plaintiff at the time of the commencement of this action well knew that he was not in the employ of said Dent on April 24, 1903, and that said Dent was not engaged with said California Timber Company in operating and running, or operating or running, the sawmill in said complaint described. That affiant is informed and believes, and upon such information and belief alleges, that said George Dent was made a party herein for the sole purpose and with the object on the part of said plaintiff of attempting to prevent the trial of this action being had in the proper county," etc. The affidavit of Dent charges in like direct terms that the plaintiff at the time of commencing the action well knew that he had never been engaged in conjunction with the corporation or at all in operating the mill.

The respondent does not contend that a plaintiff has the right to join a person as defendant against whom he has no cause of action, and thereby defeat the right of the real defendant to have the cause removed to the proper county for trial. He admits that such a proceeding would be a fraud, but he doubts whether under our Code of Procedure it is remediable. We do not doubt that a motion based upon that ground is a proper proceeding, and one that ought in a proper case to be sustained; but we think that, where a fraud of that character is the ground of the motion, it should be distinctly specified in the notice of motion, and, unless so specified, that the plaintiff cannot at the hearing of the motion be held bound to support by specific proofs the allegations of his complaint showing a cause of action against the resident defendant. In this case the notice of motion distinctly specifies other and independent grounds and entirely fails to specify the particular ground of motion here relied on in support of the appeal.

The order appealed from is therefore affirmed.

We concur: SLOSS, J.; McFARLAND, J.; HENSHAW, J.; SHAW, J.; LORIGAN, J.; ANGELLOTTI, J.

151 Cal. 200

## PEOPLE v. CLARK. (Cr. 1,292.)

(Supreme Court of California. May 13, 1907. Rehearing Denied June 10, 1907.)

1. HOMICIDE — MURDER —TRIAL—EVIDENCE—SUFFICIENCY.

Evidence *held* to sustain a conviction of murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 523–532.]

2. CONSTITUTIONAL LAW — DUE PROCESS OF LAW—CRIMINAL LAW—RIGHT TO CONFRONT WITNESS.

Pen. Code, § 686, subd. 3, permitting testimony taken before a committing magistrate by question and answer in the presence of defendant, who has had an opportunity to cross-examine the witness, when authenticated and filed as expressly required by section 869, to be read in evidence on the trial, where the witness is dead, etc., does not violate Const. art. 1, § 13, guarantying accused due process of law.

3. CRIMINAL LAW—APPEAL—PRESUMPTION.

On a criminal appeal, there being nothing to show that the transcript of decedent's testimony before the committing magistrate was not properly authenticated and filed as expressly required by Pen. Code, § 869, or that it was not a true statement of the testimony and proceedings at the examination, in the absence of specific objection in the trial court, those things must be assumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2736.]

4. SAME—APPEAL—WAIVER OF OBJECTIONS.

Under Pen. Code, § 686, subd. 3, permitting testimony taken before a committing magistrate "by question and answer" in the presence of defendant, etc., to be read in evidence at the trial, where the witness is dead, objection to the reading of testimony taken in narrative form was waived, where no specific objection was made when the testimony was offered, and a motion to strike it out was based only on a general ground, and no exception reserved to a denial of the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2654, 2662, 2672, 2674.]

5. SAME—HARMLESS ERROR—IMPROPER CROSS-EXAMINATION.

Where, in a murder trial, defendant testified that a few months before the killing he went to the house where his family was living to see an injured son, any error in allowing him to be asked on cross-examination whether he had been to the house for two years before that time, tending to show neglect of his family, was harmless; the theory of his case being that the relations between himself and his wife had been irrevocably terminated by his wife, acting under decedent's influence, it appearing that his failure to call at the house could not be discreditable to him, and defendant having elicited testimony that he was not at his wife's house from the time she left him until the son's accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137, 3138.]

6. SAME — OPINION EVIDENCE—MENTAL CONDITION.

Since, in a criminal trial, the determination of the question whether one is an "intimate acquaintance" of defendant, and hence competent under the express terms of Code Civ. Proc. § 1870, subd. 10, to judge as to his mental sanity, is largely within the trial court's discretion, and its ruling will not be disturbed unless that discretion is abused, allowing a witness who had known defendant for four or five years, and talked with him frequently, to testify as to his sanity, was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1054.]

7. SAME—HARMLESS ERROR—EVIDENCE.

In a murder trial, any error in allowing defendant's daughters to testify that they did not visit him in jail, because he never requested it, and they thought he never cared to see them, was harmless, where it appeared from his case that relations between himself and his family had been terminated through decedent's influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3137.]

8. SAME—INSTRUCTIONS—ARGUMENTATIVE.

In a murder trial, an instruction distinguishing between the diseased and deranged condition of the mind rendering a person incapable of distinguishing between right and wrong, constituting insanity, which the law recognizes as a defense, and mere moral insensibility, passion, etc., which is not a defense, and cautioning the jury to observe the distinction, was not objectionable as argumentative and manifesting partisanship against defendant.

9. SAME—MISCONDUCT OF COURT AND COUNSEL — CONFLICTING AFFIDAVITS — COURT'S FINDING—CONCLUSIVENESS.

If, in a murder case, a claim that the trial judge and district attorney had been guilty of prejudicial misconduct may be urged on a motion for new trial, and the facts may be presented by affidavits, where all matters set forth as to which complaint might be made are controverted by the district attorney's affidavit, creating a substantial conflict of testimony, the trial court's finding thereon is conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3076.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Joseph Clark appeals from a conviction of murder in the first degree. Affirmed.

Daniel O'Connel and Louis P. Boardman, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., J. Charles Jones, and Louis F. Byington, Dist. Atty., for the People.

ANGELLOTTI, J. The defendant was convicted of murder in the first degree, and adjudged to suffer life imprisonment. He appealed from the judgment, and from an order denying his motion for a new trial. Although judgment was pronounced in the lower court on May 27, 1899, the bill of exceptions was not settled therein until January 15, 1905, and the transcript on appeal was not filed until August, 1905. We have no means of ascertaining where the blame rests for this delay. The District Court of Appeal, by its decision given on such appeal, reversed the judgment and order; but within due time thereafter this court vacated that decision and ordered the cause to be heard and determined here (section 4, art. 6, Const.), and the same has now been submitted for our consideration.

There can be no question as to the sufficiency of the evidence to sustain the verdict. The deceased, one Joseph T. Gross, between whom and the defendant considerable enmity had existed for a long time, was, on the evening of November 30, 1898, on duty at a station of the San Francisco fire department, standing with two or three other firemen at a rope stretched across the main doorway on the public street, when the defendant came along, and, without a word being spoken by any one, pulled out his pistol and fired two shots at him. The first shot was fired while the deceased was facing defendant, and at very close range; the parties not being over a foot or two apart. The deceased turned away, and immediately the defendant fired a second shot at him, when, according to the defendant's own testimony, the deceased fell. He died almost instantly, without having spoken a word after the shooting. No other shot was fired by anybody. Upon the person of deceased were found two wounds. On his very cursory examination, the surgeon immediately summoned, and who found the man dead, saw only a gunshot wound over the liver on the right side. Others who were present immediately after the shooting saw the two wounds. There was no pretense on the trial that the defendant did not kill the deceased, the defenses urged being self-defense and insanity; and, entirely independent of the deposition of the autopsy surgeon, the evidence was such that it was impossible to reasonably escape the conclusion that the cause of the death of the deceased was one or the other or both of the shots fired by defendant. The evidence in support of the plea of self-defense was most shadowy and unsubstantial, and directly opposed by the evidence of the several eyewitnesses. The most that can be said for the plea of insanity is that the evidence upon that subject presented a substantial conflict, and under well-settled rules the finding of the jury thereon is conclusive here.

Complaint is made that the trial court erred in admitting in evidence the deposition of Dr. Gallagher, the autopsy surgeon, taken upon the preliminary examination of the defendant. Although several specific objections are made upon this appeal to such evidence, the only objection made in the trial court, in addition to a general objection of immateriality, irrelevancy, and incompetency, was that the defendant had the constitutional right to be confronted with the witness. As to this objection, the claim is that subdivision 3 of section 686, Pen. Code, in so far as it permits testimony received on the preliminary examination of the defendant before a committing magistrate, and taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, when authenticated and filed in the manner prescribed by section 869, Pen. Code, to be read in evidence upon its being satisfactorily shown that the witness is dead, or insane, or cannot with due diligence be found within the state, is in violation of section 13 of article 1 of our Constitution. This court has repeatedly held to the contrary. People v. Oiler, 66 Cal. 101, 4 Pac. 1066; People v. Chin Hane, 108 Cal. 597, 607, 41 Pac. 697; People v. Sierp, 116 Cal. 249, 250, 48 Pac. 88; People v. Cady, 117 Cal. 10, 48 Pac. 908; People v. Plyler, 126 Cal. 379, 382, 58 Pac. 904. The matter was exhaustively discussed in People v. Sierp, supra, where it was pointed out by the court, speaking through Mr. Justice McFarland, that we have no constitutional provision entitling a defendant to be confronted with the witnesses against him; the only provision guarantying such right being the one contained in this very subdivision 3 of section 686, Pen. Code, where it is immediately followed by the exception and provision authorizing the reading of testimony taken on the preliminary examination in the manner and under the circumstances already stated. It was further shown that the constitutional provision relied on does not apply to testimony given at the judicial proceeding known as a preliminary examination, but refers only to "an ordinary extrajudicial deposition, taken, as it is called, de bene esse." In view of the decisions upon the subject, the matter should be considered finally settled.

There is nothing in the record tending to show that the transcript of testimony and proceedings before the magistrate was not properly authenticated or certified and filed as required by section 869, Pen. Code, or that it was not a true statement of the testimony and proceedings taken and had on the preliminary examination of defendant on this charge, and therefore, in the absence of specific objection in these regards in the trial court, all of these things must be assumed. See People v. Buckley, 143 Cal. 375, 383, 77 Pac. 169; People v. Witty, 138 Cal. 576, 578, 72 Pac. 177. The only objection to the testimony now urged which appears to have any merit is that it appears from the testimony itself that it was not taken down "by question and answer," as the statute requires, but was in narrative form. We have no doubt that compliance with this requirement of the statute is essential to the admissibility on the trial of the so-called deposition of a witness taken at the preliminary examination; but no objection on that ground was specifically made at the time the testimony was offered, or before it was read in evidence, and it was stated to the court at the time, by counsel offering it, that it appeared to be in compliance with the law. In the absence of such specific objection, the court was warranted in assuming it to be in proper form, and therefore did not err in overruling the general objection made. While a motion to strike out the testimony was made after the reading, such motion was based only on the general ground before stated, and no exception was reserved to the ruling denying the motion. Under these circumstances, the defendant must be held to have waived this objection. We therefore conclude that there was no error on the part of the trial court in the matter of this deposition. It is, however, proper to say in this connection that the testimony of this witness was, simply, that he held an autopsy on the body of the deceased, that he found two gunshot wounds thereon, and that the deceased came to his death from an internal hemorrhage following these wounds. It was so clearly shown by the other uncontradicted evidence that the cause of death was the shooting by defendant, that this deposition did not materially add to the case against defendant.

The defendant was a witness on his own behalf. He testified that a few months before the homicide, he went to the house on Green street, where his wife and children were living, for the purpose of seeing his son, who had just been severely injured by being thrown from a bicycle. On cross-examination he was asked, "Have you been to the house on Green street for two years before you went to see your son?" and answered, over objection that the same was not cross-examination, "No." The objection was good. There was nothing in the direct examination warranting this question on cross-examination, and the matter elicited thereby was of such a nature that, under ordinary circumstances, it might well prejudice the defendant, by carrying with it the implication that he had unduly neglected his family; but, under the peculiar circumstances of this case, there could have been no such prejudice. The defendant and his wife had been living separate and apart for several years. The children were with the wife, and, up to the time of the boy's accident, had visited him at frequent intervals. The defendant's claim was that his wife had abandoned him and the family home by reason of the persuasion of the deceased, and was living apart from him, and associating with the deceased, in open defiance of his wishes in the matter. It was this that constituted the basis of his plea of insanity. The theory of his case, as evidenced by his counsel's opening statement, and the evidence of his witnesses, was that the relations between himself and his wife had been absolutely and irrevocably terminated by his wife, acting under the influence of the deceased. Inasmuch as his children came to see him at his own house, it could not be discreditable to him that he should fail to call at the house occupied by the wife, between whom and himself all relations had been severed. Moreover, on the cross-examination of one of his daughters, defendant himself elicited testimony to the effect that he was never in the house occupied by his wife, from the time she left him until the accident to his son.

We cannot say that error was committed in allowing witness Strothers to give his opinion, as an intimate acquaintance, as to the sanity or insanity of defendant. The witness had been acquainted with the defendant for four or five years, and saw and talked with him frequently. As we have said before, the determination of the question as to whether one is an "intimate acquaintance," and, therefore competent, under subdivision 10 of section 1870, Code Civ. Proc., to give an opinion as to the mental sanity of another, is necessarily to a great extent within the discretion of the trial court, and the ruling of that court will not be disturbed except where the evidence is such as to leave no just room for question that the discretion has been improperly exercised. People v. Suesser, 142 Cal. 354, 75 Pac. 1093; People v. McCarthy, 115 Cal. 255, 258, 46 Pac. 1073.

On cross-examination by defendant of a daughter, Miss Lottie Clark, a witness for the prosecution, she was asked whether she, or her mother, sister, or brother, had visited defendant in prison, and answered in the negative. The only possible object of this testimony was to show bias on the part of the witness and the others named against the defendant. On redirect examination, she was asked why she had not visited her father in prison, and, over objection, said that he had never requested it, and she thought he never cared to see her. In view of the cross-examination, this was probably proper redirect examination. However this may be, in view of the evidence given in support of defendant's case as to the relations between himself and his family, we do not see how this testimony could have prejudiced him. The same may be said of testimony of a similar nature given by the other daughter, which was undoubtedly erroneously admitted; there having been nothing in her cross-examination to warrant it.

The court instructed the jury quite fully and correctly upon the defense of insanity, and, among other instructions on that subject, gave an elaborate one, wherein it was attempted to show the distinction between the diseased and deranged condition of the mental faculties rendering a person incapable of distinguishing between right and wrong in relation to the act with which he is charged, constituting the insanity which the law recognizes as a defense, and mere moral insensibility, passion, hatred, anger, etc., which do not constitute a defense, and to caution the jury to observe the distinction. We find in this instruction no proposition that is not absolutely correct as a matter of law. The complaint made of it is that it is argumentative, and manifests such a strong partisanship adverse to defendant and his defense, as would lead the jury to infer that the court believed the defense of insanity here interposed was without foundation. We cannot assent to this conclusion. There is not in it the assumption of any fact, or, so far as the printed words show, the slightest intimation of any opinion on the part of the court, as to the merits of the defense in this case, and we cannot see that such was its general effect. It indicates no more than a commendable desire on the part of the court to have the jury thoroughly understand what is and what is not, in the eyes of the law, insanity constituting a defense in a prosecution for crime. The other instructions complained of were so manifestly correct as not to require notice here.

On the motion for a new trial, affidavits were presented in support of a claim that the trial judge and district attorney had been guilty of misconduct prejudicially affecting defendant's cause. If we assume, purely for the purposes of this decision, that such a claim may be urged in support of a motion for a new trial, and that the facts upon which it is based may be presented by affidavits, we find that all matters therein set forth as to which complaint might justly be made are controverted by the counter affidavit of the district attorney, and that, in regard thereto, a substantial conflict of testimony was thus made, which it was the province of the trial court to determine.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

151 Cal. 190

## MOSS v. JACK. (Sac. 1,349.)

(Supreme Court of California. May 9, 1907.)

CANCELLATION OF INSTRUMENTS—GROUND—FRAUD—EVIDENCE—SUFFICIENCY.

In a suit to set aside an assignment and a deed on the ground of fraud, evidence *held* insufficient to establish fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 102.]

In Bank. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by Bradley S. Moss against Edward H. Jack. From a judgment for defendant, plaintiff appeals. Affirmed.

Buck & Middlecoff and Thomas S. Louttit, for appellant. Ansel Smith and Nicol & Orr, for respondent.

HENSHAW, J. This is an action in equity to have a certain assignment and deed executed by plaintiff to defendant set aside, as having been fraudulently procured, and to recover from defendant the sum of $15,000 for moneys and property of the plaintiff obtained by defendant under this deed and assignment. The trial resulted in findings wholly exonerating the defendant from the charges and imputations of fraud, and judgment followed the findings in defendant's favor.

The essential facts are the following: Plaintiff is a son, heir, and devisee of William S. Moss, deceased. Upon his death William S. Moss, who was a resident of California, left a will, whereby were appointed as executors of his estate Judge Baldwin and defendant, Jack. Defendant, Jack, had married a daughter of William S. Moss, and is a brother-in-law of plaintiff. Besides property in California, Moss left property and property interests in the state of Illinois, which were, and for years had been, deeply involved in litigation. It is not necessary to particularize in this regard further than to say that this litigation involved the adjustment of partnership accounts, awards to Moss in the accounting, the levy and execution sales of pieces of real property, the purchase of them by Moss, appeals resulting in setting aside these decrees, the clouding of the titles so obtained by Moss, affirmance of the execution sales as to certain pieces, and disaffirmance as to others, litigation over this, outstanding liens upon these pieces of property, with resulting confusion and uncertainty as to what would be the ultimate outcome of the litigation. An administrator in Illinois had been appointed to take charge of the property of Moss in the state of Illinois, which property was, of course, first subject to the claims of the Illinois creditors. Jack himself had been the attorney in fact of his father-in-law during his lifetime, and after his death presented to his coexecutor, Judge Baldwin, a claim for $13,000, $10,000 of which were for services rendered as his attorney in fact, $3,000 being for advancements and payments of money. Judge Baldwin, with the consent of all of the heirs and devisees, approved this claim, and it was, in turn, approved by the judge in probate, but thereafter objection having been made by one of the devisees, Jack, with the consent of the court, withdrew his claim for the purpose of presenting it, and it was presented to the probate court in Illinois. Some time before, while Judge McCulloch in Illinois was acting as attorney and adviser for the California executors and the heirs of Moss, Jack, at McCulloch's suggestion, had purchased certain outstanding trust deeds which were liens upon the Illinois property, in which the estate of Moss was interested, for the purpose of protecting the Moss interest from loss by hostile and aggressive foreclosure, as in the then uncertain condition of the Moss title or interest, it was extremely doubtful whether it would be expedient for the estate to attempt to redeem from such forced sales; that is to say, whether its own interests were sufficiently secure to justify these added expenditures. Thus Jack came to have large demands against the property in Illinois, both by reason of his ownership of the trust deeds, as well as by reason of his $13,000 claim against the estate. In addition to this, there was other claims filed for approval in Illinois, some of which were unquestionably valid, others of which were doubtful, and there were in addition court costs and attorney's fees for the litigation already had and still pending. In August, 1891, all of the heirs and devisees of Moss joined in the conveyance and assignment to Jack of the Illinois property, and it is this conveyance and assignment which is here attacked for its fraudulent procurement. At the time when plaintiff executed it he was over the age of 25 years, and some 12 years passed thereafter before this action was commenced. The specific allegation of fraud charged in the complaint is that on the 29th day of August, 1891, while Jack was acting as executor of the last will and testament of Moss, he (Jack) requested plaintiff to convey to him the property belonging to the estate of Moss in Illinois, and, acting upon the request of Jack, he joined in and executed to Jack a deed of conveyance; "that at said time Jack did not inform plaintiff that he had collected said sum of $7,395.14 from Louisa H. McCall, and did not inform plaintiff that he had collected said sum of $1,000 from said sheriff, and did not inform plaintiff of the true value of the real property. and plaintiff alleges that the procuring of said conveyance and said assignment from said plaintiff was and is fraudulent as to this plaintiff; that this plaintiff did not know the true description or value of the real property, and did not know that Jack had collected the moneys or had received said rents until within six months prior to the commencement of the action." It is then alleged upon information and belief that at the time of the execution of the deed and assignment there was nothing whatever due to Jack from the estate of Moss, and nothing due to Jack from plaintiff, and that plaintiff received no consideration for the deed.

Without discussion as to whether or not Jack, so far as the property in the state of Illinois is concerned, was chargeable to this plaintiff with the high duty and faith of a trustee, and, indeed, declaring that he was so chargeable, the evidence completely answers and disposes of the specific charges of fraud made in the complaint. Thus, as has been said, it was established that Jack was directly through his claim, and indirectly through his liens upon the property, title to which was claimed by the estate of Moss, a heavy creditor of the estate. It is established that Jack did not collect any sum of money in settlement of the litigation or otherwise from the Illinois property until after the deed and assignment to him by the heirs, and these collections were made under and by virtue of that assignment. It is established that he did not collect the sum of $1,000 from the sheriff, excepting by virtue of the assignment and deed, and it is still further established that the $1,000 was $1,000 which he himself had advanced to protect the interest of the Moss estate. It is established that the plaintiff did know the true description and value of the real property, not only from the letters of Judge McCulloch in Illinois and the explanations of Judge Baldwin in California, but from a personal visit which he himself made to Peoria, and from examinations and inquiries which he there instituted, and from information which he there personally received from Judge McCulloch. Upon every matter of fraud concerning which the complaint speaks, the answering evidence of the defense is full and complete. It establishes, as the court finds, that Judge McCulloch in Illinois, representing the interests of the heirs, wrote frequently at great length to Judge Smith, who was the attorney for the California executors and to the California executors themselves. Judge Baldwin, one of these executors, is dead. But it is abundantly established by the testimony of Judge Smith and of the defendant, Jack, that the heirs were kept advised with most painstaking care of all the transactions and complications in the progress of the settlement of the estate. Moreover, as to the values of the property, and aside from the finding of the court that plaintiff knew of these values, the court declares that the total amount of property received by Jack under this deed and assignment was $31,443, as against which there were unquestionably, in the shape of incumbrances and undisputed payments by defendant, attorney's fees, taxes, assessments for street work, and the like, claims totaling $25,379.95. With the difference between these sums ($6,063), defendant's claim of $13.-000 was to be satisfied, in addition to other claims, unquestioned as to their validity, amounting to $896.69, with the disputed claim of one Mrs. Odell of $23,790. Moreover, it does not appear that the heirs placed any reliance upon the representations of Jack in executing this deed and assignment; but, to the contrary, it does affirmatively appear that they placed implicit reliance upon the instructions and advice of Judge Baldwin, the coexecutor, who had been William Moss' attorney during his lifetime, and who continued as the attorney and adviser of the heirs after his death. Thus Mrs. Griffith, a daughter of William Moss, testifying as to the circumstances attending the execution of the deed and assignment, said: "I had known Judge Baldwin ever since I was a child, and I relied upon his statements. His statements in regard to the property in Illinois was that Mr. Jack would not probably get more than was due him; that I had better join in with the other heirs, and he did not think Mr. Jack would ever trouble us any further. * * * Judge Baldwin came to me as a friend, not as an attorney, and advised me to sign these papers, rather than to have any further trouble with Mr. Jack; that Mr. Jack would take whatever he might get there in Illinois, and, if he did not get enough to justify his claim, he could come here and recover, but Judge Baldwin said he did not think he would if we would all sign this deed, and he so advised me as a friend, and, having implicit faith in Judge Baldwin, I did as he told me, as he advised me. All the Moss heirs were present when the deed was signed with the exception of Bradley and Billy." Mrs. McDougald, another daughter, testifies: "We had talked over with Judge Baldwin the actual condition of the property in Illinois and the liens upon it. I can't tell you how many times; it had been talked over a number of times at the meetings. I presume Judge Smith was there when the matter was talked over, although my conversation was usually with Judge Baldwin. Whatever I asked Judge Baldwin he advised me." Judge Smith testifies that full information was conveyed to the heirs by himself and by Judge Baldwin touching all these matters. Upon January 16, 1891, Judge McCulloch from Illinois wrote a letter containing a most elaborately complete statement of the condition of the Illinois properties. It was addressed to Messrs. Jack and Baldwin, executors of the estate of Moss, was received by them, and indisputably its contents were communicated and explained to the heirs. In that letter Judge McCulloch writes: "We have taken everything of a doubtful nature, and have put a valuation upon the several items fully as high as they will bear. The whole affair can now be closed up upon the above basis," etc. It would seem to be demonstrated that this charge of fraud, if it is to be sustained, can be sustained only upon the theory of a conspiracy between Judge Baldwin and Jack to swindle the heirs, since it was upon Judge Baldwin's advice that the transaction was consummated. Such conspiracy is not charged, and to entertain the idea of it would strain credulity to the breaking point.

But (and this seems to be the gravamen of appellant's complaint upon appeal) it is said that a certain provisional agreement was entered into by McCulloch with Mrs. McCall, and with Mr. Frazer, who were the principal parties in litigation with the estate of Moss, whereby the litigation was to be compromised upon a certain basis, and that there is no evidence that the terms of this provisional agreement were made known to the heirs before they executed the deed and assignment. The provisional agreement in itself amounted to little. Mrs. McCall had paid into the bank some $7,000, the amount of a judgment against her, and of this the heirs had been advised. They had been advised also that it was unwise to accept the amount at that time, lest it might complicate the pending litigation with Frazer. The provisional agreement of July did not change the terms and conditions as to Mrs. McCall. She paid no more nor less than the amount which she had already deposited. It did compromise the litigation with Frazer. Judge McCulloch testifies that the agreement was provisional, because it would first have to be ratified and accepted by the heirs, and that he sent on to California and to the executors the terms and provisions of this agreement, that the heirs might act upon it. It is true that Mrs. McDougald and Mrs. Griffith testify that they were not informed of this provisional agreement, but the plaintiff Moss does not so testify. Indeed, he offers no word of testimony himself to support any of the charges of fraud which he prefers. The testimony of Jack, which was taken by deposition in Florida, contains no specific mention of the matter, and this, for the very obvious reason that this charge of fraudulent concealment is not preferred in the complaint. His examination was directed to the fraud actually charged, and his deposition completely covers these matters. It is not surprising that he did not testify in reference to a matter concerning which he was in no way advised that he would be attacked. Judge Smith, though living, was not present at the conference whereat these matters were made known to the heirs, and whereat by Judge Baldwin they were advised to execute the deed. Judge Baldwin himself, as has been said, had died. The testimony, however, shows generally that the heirs were kept fully advised upon all matters touching their interests. It is unquestioned that Judge Baldwin knew of the compromise agreement. It is proved out of the mouths of plaintiff's witnesses that Judge Baldwin advised the execution of the deed and assignment to Jack, with this knowledge, and excepting, as we have said, upon the highly improbable theory that Judge Baldwin was a corrupt conspirator to defraud his clients, as it was upon his advice they relied, it will not be concluded that upon this point the charge of fraudulent concealment has been established by convincing evidence, or at all.

The court's findings declare, not only the fairness of the transaction, but the payment of a full price, and we see no reason why these findings should in any respect be disturbed.

None of the rulings of the court in admitting or rejecting evidence calls for particular consideration, and for the foregoing reasons the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

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4 Cal. App. 199

## PERCIVAL v. JACK. (Civ. 214.)

(Court of Appeal, Third District, California. Aug. 3, 1906. Rehearing Denied Sept. 3, 1906.)

1. APPEAL—REVIEW—IMMATERIAL QUESTIONS.
Where findings supported by the evidence are sufficient to warrant the judgment, the question of the sufficiency of the evidence to support other findings will not be considered on appeal.

2. WITNESSES—COMPETENCY—WAIVER.
Where a party calls her husband as a witness, the adverse party is entitled to cross-examine him as to all matters brought out on the examination in chief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 781, 782.]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by Mary B. Percival against Edward H. Jack. From an order denying a motion for new trial after findings for defendant, plaintiff appeals. Affirmed.

Louttit & Middlecoff, for appellant. Ansel Smith and Nicol & Orr, for respondent.

McLAUGHLIN, J. The controlling facts in the case at bar are identical with the facts in the case of Moss v. Jack, this day decided.[1] Here, as there, one of the devisees of the estate of William S. Moss, deceased, is seeking to have the assignment and deed, so frequently mentioned in the opinion in Moss v. Jack, declared fraudulent and void, to compel an accounting and annul certain decrees settling the accounts of defendant as executor of the estate of William S. Moss, deceased.

The only essential difference between the two cases is that here the plaintiff is seeking to recover the sum of $45,000, and specifically alleges the misappropriation of $68,000 worth of bonds in addition to the property mentioned in the other suit. The court found that the decedent never owned and that defendant never received the bonds in question, and the other findings are substantially the same as the findings in Moss v. Jack, with the single exception that there is no specific finding on the question of laches. Plaintiff appeals from the order denying her motion for a new trial. The findings are fully supported by the evidence. It is unnecessary to indulge in a lengthy review of the testimony showing the reasons for so holding. Suffice it to say that the evidence in all substantial particulars is to the same effect as was the evidence in the case above mentioned.

It is contended that the finding relating to the statute of limitations is erroneous for the reason that defendant was out of the state, but we deem it unnecessary to dwell upon the evidence in this regard, for the reason that, if this finding was the other way, the judgment would still be supported by proper findings. Costa v. Silva, 127 Cal. 354, 59 Pac. 695; Hayden v. Collins, 1 Cal. App. 266, 81 Pac. 1120.

The court did not err in allowing Ansel Smith to testify touching communications between himself and the devisees. McCabe v. Healy, 138 Cal. 91, 70 Pac. 1008. The husband of plaintiff had testified in her behalf and was cross-examined by defendant. Later the witness was recalled for further cross-examination, and then the objection was interposed that he could not be examined without plaintiff's consent. The court overruled the objection, and appellant insists that such ruling was error. We do not think so. If a wife calls her husband as a witness, the other side is certainly entitled to cross-examine him as to all matters brought out on the examination in chief. Besides, the only testimony elicited was entirely immaterial and came from the witness voluntarily after the court had sustained objections to the testimony on the ground that it was not cross-examination. The other rulings of the court were similar to rulings passed upon in Moss v. Jack, and, citing the opinion in that case as an elaboration of the opinion here on this and other points in the case, we conclude by saying that there is no prejudicial error in this record.

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[1] Case referred to transferred to Supreme Court and reported in 90 Pac. 552.

The order is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

5 Cal. App. 435

## PEOPLE'S LUMBER CO. v. GILLARD et al.

(Civ. 338.)

(Court of Appeal, Second District, California. April 24, 1907. Rehearing Denied by Supreme Court June 20, 1907.)

1. Appeal—Law of Case—Dictum.

Where, in an action on a contractor's bond for the construction of a high school, the constitutionality of Code Civ. Proc. § 1203, providing for such bonds, and the validity of the bond in question given thereunder, were directly presented and decided by the court, to the effect that the bond was enforceable as a common-law bond voluntarily given, regardless of the validity of the statute, such decision was not obiter, but constituted the law of the case, and was conclusive on the parties on a subsequent appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4361–4379.]

2. Pleading—Amendment—New Cause of Action.

A contract to build a high school provided that the board of trustees might request alterations, additions, or omissions, which should not affect the contract, but that the cost should be added to or deducted from the amount of the contract price. An original complaint on the contractor's bond counted on material furnished under, and a breach of the contract generally, as the measure of defendant's liability on the bond. *Held*, that an amendment to the complaint after appeal, alleging changes and alterations made in conformity with the contract, did not state a new or different cause of action foreign to that originally charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 686–709.]

3. Appeal—Objections—Waiver.

An assignment of error, not urged in appellant's brief, will be presumed to have been waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256–4261.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the People's Lumber Company against Alex Gillard and others. From a judgment against defendants other than defendant Darancette, and from an order denying defendants White and Hickson a new trial, they appeal. Affirmed.

J. S. Chapman and Ward Chapman, for appellants. Blackstock & Orr and L. B. Slosson, for respondent.

TAGGART, J. Appeal from judgment in favor of plaintiff and from an order denying motion of defendants White and Hickson for a new trial.

Plaintiff furnished material to the defendants Gillard and Leary as contractors to be used in the construction of a high school building in the town of San Buenaventura. Defendants White, Hickson, and Darancette were sureties on a bond in the penal sum of $7,000 given to insure the faithful performance of the contract entered into by Gillard and Leary with the trustees of the high school district, and the payment of all just claims against said building for labor and material. Said bond being conditioned to inure to and for the use and benefit of any and all persons who perform labor for or furnish materials to the said contractors (in pursuance of said contract), etc. The action is brought against the contractors and sureties on the bond. It was dismissed as to Darancette and judgment given against the other defendants for $1,753.97 and costs. Gillard and Leary made default, and the defendants White and Hickson appeared and defended and now appeal from the judgment and order aforesaid.

Appellants urge in support of their appeal and as reasons for reversing said judgment and order (1) that the bond upon which their liability rests was given pursuant to section 1203 of the Code of Civil Procedure, that that section is unconstitutional and any bond given in pursuance of it is void and unenforceable; (2) that the action was barred by the statute of limitations; and (3) that the court erred in sustaining plaintiff's objections to certain testimony offered in evidence by the defendants.

This is the second appeal. On the former appeal the Supreme Court directly decided the question raised by the first ground of appeal here presented. It was held that the bond in question "derives force from its provisions and not from the statute," and that it "may be enforced." No such other or different attack is now made upon the sufficiency of the bond as to bring the case within the rule declared in Anderson v. Hancock, 64 Cal. 455, 2 Pac. 31, and similar cases. The determination of the character and validity of the bond was the decision by the Supreme Court of a question of law, as distinguished from an inference or finding of fact made by that court. Wallace v. Sisson, 114 Cal. 45, 45 Pac. 1000. The validity or enforceability of the bond did not then, and does not now, depend upon the determination of any issue of fact. The ruling on the former appeal was predicated on the admitted truthfulness of the allegation in the original complaint that the bond was "given in pursuance of section 1203." The question arises now upon the undisputed finding of the court to the same effect. The finding "that said bond was given by defendants, Gillard and Leary, in pursuance of the provisions of section 1203 of the Code of Civil Procedure," responds to and covers all the issues raised by appellants' answer to the amended complaint as to the validity of the bond. Appellants contend that an issue of fact was presented by the pleadings upon the second trial as to whether or not the bond was voluntarily given. The answer to the amended complaint does not allege that the bond was not voluntarily given, and the record fails to show that any such issue of fact was before the trial court.

The objections to the sufficiency of the complaint in the respect here under consideration, made on the first appeal, were: (1) Section 1203 is unconstitutional; (2) the act being void, the bond made pursuant to it is void; and (3) "the bond being a statutory bond, the right to sue on it comes alone from the statute, and that the complaint must set forth the facts on which the statutory right of action depends, which it is claimed the complaint fails to do." 136 Cal. 57, 68 Pac. 576. The Supreme Court says, in effect, passing over the objection as presented by the first two grounds and admitting that the bond is, in form, a statutory bond, the right to sue on it does not come alone from the statute. It was voluntarily made, and may be enforced as a common-law bond. If the determination of the law of the case here resolves itself into a question of whether or not the opinion of the Supreme Court on the former appeal in relation to the validity of the bond under consideration was dictum, the rule in this state is clear. Other jurisdictions have taken other views, and the range of the authorities on this question is thus stated in Bouvier: "According to the more rigid rule, an expression of opinion, however deliberate upon a question, however fully argued, if not essential to the disposition that was made of the case, may be regarded as a dictum; but it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point." Since an early date the Supreme Court of this state has refused to adopt the rule which confines the law of the case to that portion of the opinion of the appellate court which can be said to be strictly essential to the disposition made of the case. Dewey v. Gray, 2 Cal. 374; Gunter v. Laffan, 7 Cal. 589; Davidson v. Dallas, 15 Cal. 84; Phelan v. San Francisco, 20 Cal. 39; Table Mountain v. Stranahan, 21 Cal. 548; Gwinn v. Hamilton, 75 Cal. 266, 17 Pac. 212; Page v. Fowler, 37 Cal. 105; Porter v. Muller, 112 Cal. 366, 44 Pac. 729. In Phelan v. San Francisco, Field, C. J., states the rule of the law of the case as follows: "A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified or overruled according to its intrinsic merits; but in the case in which it is made it is more than authority, it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves." The reason for the rule of the law of the case is said in some of the cases to rest upon the doctrine of res adjudicata (Soule v. Dawes, 14 Cal. 250); in others, upon the want of power, when the cause has gone beyond the jurisdiction of the appellate court, for it to annul or reverse its decree or judgment for any error of fact or law, and because the rule is necessary as a matter of public policy (Sharon v. Sharon, 79 Cal. 654, 22 Pac. 26, 131). Considered by the rule of res adjudicata the authorities are conclusive, and no clear distinction can be drawn between the rule of res adjudicata and the rule of finality of decision declared in the latter case (Sharon v. Sharon, supra). It is immaterial that the decision was erroneous. The rule is the same in all cases, regardless of the correctness of the decision. Page v. Fowler, supra; Sharon v. Sharon, supra. As we read the opinion in Wixson v. Devine, 80 Cal. 385, 22 Pac. 224, there is nothing in conflict with the decisions in the foregoing cases in respect to this question. In that case the court is considering expressions of opinion which are purely "obiter." Of the portions of the opinions referred to in that case the court says: "They were not the subject of review on his appeal. There was no occasion, therefore, for this court on that appeal to say anything as to the correctness or incorrectness of these rulings."

The language here under consideration was in no sense "obiter." The questions of the constitutionality of section 1203 of the Code of Civil Procedure, and the validity of the obligation upon which this action was brought, were directly presented and argued by counsel, and decided by the court on the former appeal; and, had the decision of the court at that time upon this question been in favor of appellants, it would have concluded the case. If it be conceded that the opinion was dictum at all, it would have to be classified as judicial as distinguished from obiter. Whatever opinion we may entertain as to the policy of the rule, or the validity of the bond, it is clear from the authorities that it was the duty of the superior court and it is our duty to hold the bond valid and enforceable, under the law of the case. The contract contained the following clause: "Third. Should the said board of trustees at any time during the progress of said building request any alterations, deviations, additions, or omissions from the said contract, specifications, or plans, they shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of said contract price, as the case may be, by a fair and reasonable valuation." The original complaint counted upon material furnished under, and a breach of, the contract generally, as the measure of defendants' liability on the bond. After the former appeal the complaint was amended to meet the suggestions of the Supreme Court in regard to these matters upon which the reversal of the judgment was based. In the amended complaint certain changes in the contract and building are alleged to have been made under and pursuant to the above mentioned clause, after the execution of the said contract. Issues of fact were joined by the answer, upon the questions whether or not these changes were made pursuant to the provisions of the contract or otherwise, and whether or not the changes so made materially altered the contract so as to relieve the defendant sureties from their obligation on the bond. The trial court found the changes to have been made pursuant to the contract and not otherwise. This finding was in conformity with the allegations of the amended complaint.

To sustain their plea of the statute of limitation, appellants contend that, because of the additional allegations as to the changes made under this contract, the amended complaint states a new and different cause of action, and that as to the cause therein stated the action was not commenced until the amended complaint was filed. The language of the opinion of the commissioner on the former appeal is quoted in appellants' brief as an apparent authority for the contention that the amended complaint counts on a "different contract." The language quoted shows upon its face that it refers to the claim of the appellants that the contract was changed and modified independent of its own provisions. Changes or alterations made in conformity with the provisions of the contract were not being considered when the language quoted was used. The allegations setting out the changes provided for in the contract do not state a new or different cause of action foreign to the original complaint. Frost v. Witter, 132 Cal. 425, 64 Pac. 705, 84 Am. St. Rep. 53. The measure of the recovery asked is still based upon the material furnished for the high school building under the contract, and defendants' liability to pay is based upon a breach of the same conditions of the bond, under the amended complaint, that it was under the original complaint.

The error specified in the record relating to the refusal of the court to permit the witness Leary to continue his statement in regard to the board of trustees not agreeing to pay for alterations made is not urged in appellants' brief. The testimony was in direct conflict with the provisions of the written contract, and the ruling of the court might be justified on that ground; but, since the matter is not presented, we assume that it is not relied upon by appellants. We see no error in the record to justify a reversal of the judgment or order complained of.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 408

## SAN FRANCISCO NAT. BANK v. AMERICAN NAT. BANK OF LOS ANGELES.

(Civ. 281.)

(Court of Appeal, First District, California. April 18, 1907.)

1. Banks and Banking—Collections—Selection of Agent—Negligence.

Plaintiff accepted a check on an Arizona bank from a customer for collection, and, in accordance with plaintiff's custom, forwarded the check the same day to defendant bank in Los Angeles for collection, defendant, on receiving the check, immediately forwarded it to a bank in the place where the check was payable for presentment and collection. This bank was in fact insolvent, and its draft, sent to defendant bank for the proceeds of the collection, was protested, and remained unpaid on the bank's failure shortly thereafter. *Held* that, when the bank making the collection obtained the money on the check, it became the debtor of plaintiff's depositor, and that defendant was therefore not liable for the collecting bank's default, not having been negligent in selecting the bank to make the collection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 586.]

2. Same—Method of Payment.

Defendant not having accepted the collecting bank's draft as payment, and it not appearing that any other method might with reasonable probability have resulted in collection from the collecting bank, defendant was not in default in accepting the collecting bank's draft, instead of insisting on payment in money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 592, 609.]

3. Customs and Usages—Customs of Banks—Collections—Knowledge.

Where the holder of a check deposited it in plaintiff bank in San Francisco, by which it was forwarded for collection to defendant bank in Los Angeles, and defendant forwarded the check for collection to a bank in a town where it was payable, plaintiff was chargeable with knowledge of a custom of banks in Los Angeles that in receiving checks on banks in other places, either for collection or credit, the receiving bank shall transmit it in the usual manner for collection, either to the bank on which it is drawn, or to such bank or persons as it may deem reliable, or some other proper collecting agent, for the convenience of the depositor, and shall not be liable for such collecting agent's default, nor for the loss of the proceeds, until the proceeds in actual money have come into the receiving bank's possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, §§ 23, 24, 26.]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by the San Francisco National Bank against the American National Bank of Los Angeles. From a judgment for plaintiff, defendant appeals. Reversed.

Lynn Helm, for appellant. S. C. Denson, for respondent.

KERRIGAN, J. The plaintiff placed a draft with the defendant for collection. The defendant forwarded the draft to a bank at Arizona for collection, which bank collected the draft, failed, and no part of the proceeds has ever reached any of the parties hereto. The action was tried by the court on an agreed statement of facts. Judgment was rendered therein for plaintiff, from which judgment the defendant appeals.

The agreed statement of facts, in part, is as follows: The Judson Dynamite & Powder Company, of San Francisco, held a check, dated December 17, 1903, on the Sandoval National Bank of Nogales, Ariz., for the sum of $637.97, which check was, December 21, 1903, by the powder company, indorsed to the San Francisco National Bank, and deposited with it for collection. The same day that bank indorsed the check to "any bank or banker," and sent it to the American National Bank of Los Angeles "for collection and return." The American Bank of Los Angeles received the check December 22, 1903. It thereupon examined a directory of banks and bankers, and learned that there were two banks at Nogales—one the bank on which the check was drawn, and the other the International Bank of Nogales—whereupon it indorsed the check "American National Bank of Los Angeles, to any bank or banker," and forwarded it to the International Bank of Nogales for collection, by which bank it was received and collected in cash December 28, 1903. On the same day the International Bank of Nogales sent the American National Bank of Los Angeles a draft for $636.72, drawn on the National Bank of Commerce of New York, which was received in due course of mail and immediately forwarded by the Los Angeles Bank to the Corn Exchange Bank in New York for collection, by which bank it was received January 7, 1904, and the next day presented to the National Bank of Commerce for payment. Payment was refused because of insufficient funds, and the draft was duly protested for nonpayment. The International Bank of Nogales failed January 15, 1904, and was utterly insolvent. In the meantime, on January 8, 1904, the Corn Exchange Bank of New York telegraphed the defendant of the nonpayment of the draft, and that the draft had gone to protest, and thereupon, on the same day, defendant telegraphed to the International Bank of Nogales as follows: "Your draft of December 28 on National Bank of Commerce for six hundred thirty-six is protested. Protect and wire the money to pay." In response the International Bank of Nogales telegraphed the defendant: "Draft protested for reason that currency remittance to our New York correspondent went astray. We follow your instructions and cover same by wire." January 15, 1904, the defendant telegraphed the National Bank of Commerce that the protested draft was being returned for collection, that the International Bank had wired funds covering said draft, and requested the National Bank of Commerce to hold the amount for return of draft to it. On the same day the National Bank of Commerce replied that the account was not good for the check mentioned, and that it could not meet the request of the defendant. The defendant wrote to the plaintiff January 14, 1904, and as the contents of that communication are sufficiently referred to in the reply thereto, dated January 19, 1904, only the reply need be given: It is: "We are in receipt of your favor of the 14th inst., confirming your telegram of even date, and note your suggestion in regard to charging back item of $637.97, on Sandoval National Bank of Nogales, and replying to same we have referred the matter to our client, and he wired to the maker of the check, in Nogales, and has reply to-day stating that the check was paid, and that the money was in the hands of your agent at Nogales. Our client therefore declines to reimburse us in the matter, and inasmuch as we cannot return to them the original check, we are inclined to think that they are right, and that at the time the check was paid to your agent our responsibility in the matter ceased. Is this not correct?"

It is the custom of banks in each of the cities of San Francisco and Los Angeles, by recommendation of their several clearing houses, that, in receiving notes, drafts, and checks on points other than said respective cities of San Francisco and Los Angeles, either for collection or credit, the bank with which said check is deposited for collection shall transmit the same in the usual manner for collection, either to the bank on which it is drawn, or to such bank or persons as it may deem reliable, with the express understanding that the same is done simply for account and convenience of the depositor, and that the bank so receiving said item for collection shall in no wise be liable for default of any such bank, person, or agents, or for loss in transit, or for any other cause whatever, until the proceeds in actual money shall come into its possession.

There is a great diversity and conflict of opinion on the question mainly discussed in the briefs, namely, what is the extent of the duty and responsibility of a bank which receives an instrument for collection at a place different from its place of business, and how far it is liable for the acts of its correspondents or agents in the performance of their duty. One class of cases maintains the absolute liability of a bank for any default or neglect of its correspondent or collection agent in the same manner as it would for the default of its own employés, regarding the correspondent or collector as the agent of the bank, and not the agent of the owner of the commercial paper. Another class of cases holds the bank receiving the claim for collection at a place distant from the place where it conducts its business liable only for failure to exercise due care and diligence in selecting a trustworthy agent or correspondent, and if it exercise such care and diligence the bank is exonerated from all liability. The view, however, we have reached in the case on other points, renders it unnecessary to analyze and discuss the various conflicting decisions on this question.

1. The trial court held that the defendant was guilty of negligence in accepting and forwarding for collection the draft on New York sent it by the International Bank of Nogales; that it should have insisted upon payment of the money. In reaching this conclusion, the court doubtless relied upon the general principle of law that, as commercial paper is payable in money only, a collecting bank is not authorized to receive in payment anything but money (Selover on Bank Collections, §§ 46, 47), but defendant did not take the New York draft as payment. At the time of receiving the draft on New York the defendant might have sent it back to the International Bank of Nogales, and demanded payment of the money, or it might have pursued some other course than the one it did adopt, but no fair inference can be drawn from the statement of facts that any other method might with reasonable probability have resulted in a collection from the International Bank of Nogales. There are respectable authorities which hold that it is the custom of banks to remit by check or draft or certificate for the proceeds of any collection, instead of remitting the exact money collected, and that this custom is so general and universal that courts take judicial notice of it (Selover on Bank Collections, § 127, and cases cited); but we do not rest our decision on this line of authorities. We take the position that there is nothing in the record which would warrant the conclusion that the defendant was remiss in any duty or obligation it owed the plaintiff. By the custom before referred to, the Judson Dynamite & Powder Company, when it deposited the draft with plaintiff for collection, authorized the plaintiff to transmit the same through the usual channels for such collection. It was not expected that the plaintiff would send a messenger from San Francisco to Nogales for the purpose of collecting the draft. Under the custom plaintiff only undertook to transmit the draft, through the usual channels, either to the bank on which it was drawn or to such bank as it might deem reliable, with the one understanding that the same was done simply for account and convenience of the Judson Dynamite & Powder Company, and that it should not be responsible for the default of any such bank, or for any cause whatever until the proceeds in actual money should come into its possession. The plaintiff transmitted the draft to the American National Bank of Los Angeles, a bank which it deemed reliable. It was not guilty of any negligence in making such selection of the Los Angeles bank, and is not liable to the Judson Powder Company for any default of such bank. The money never came into the hands of the plaintiff. The same may be said as to the deposit of the draft by the plaintiff with the Los Angeles bank for collection. The Los Angeles bank sent the draft to the International Bank of Nogales, in the usual manner, and was guilty of no negligence in selecting the International Bank as its agent at Nogales. The Los Angeles bank never received the money, and the proceeds of the draft never came into its possession. When the International Bank of Nogales collected the money, it collected it under the custom as agent for the Judson Dynamite & Powder Company; it having been selected through the agencies of which the plaintiff availed itself, and which the powder company impliedly agreed to when it left the draft with plaintiff for collection. From the time the International Bank of Nogales collected the money, it became the debtor of the Judson Dynamite & Powder Company. It appropriated the money and has not paid the powder company. It would not be in accord with the custom to hold the defendant for the default of an agent not in its employ, and of whose services it availed itself with no fault or negligence in the selection.

2. At the time the plaintiff bank sent the draft in question to the defendant bank at Los Angeles for collection, there was a custom among banks of that city, to which reference has already been made. That part of it pertinent here, in substance, absolved the banks at Los Angeles from default of their correspondents in collecting checks or drafts at other points than Los Angeles. While the identical custom prevailed in San Francisco as in Los Angeles, there is nothing in the agreed statement of facts from which we can conclude that the plaintiff knew of the existence of the custom in Los Angeles. Knowledge of a custom must, according to some decisions, be brought home to parties who are bound by it; but the better authorities declare that the custom of banks of a place is binding on parties who deal with a bank there, whether they are aware of its existence or not. In Jefferson County Sav. Bank v. Commercial National Bank, 39 S. W. 338, 98 Tenn. 337, it is said: "A principal who selects a bank as his collecting agent, thus availing himself of the facilities which it holds out, in the absence of special directions, is bound by any reasonable usage prevailing and established among the banks at the place where the collection is made, without regard to his knowledge or want of knowledge of its existence." In Sahlien et al. v. Bank of Roanoke, 16 S. W. 374, 90 Tenn. 221, it is held that the great weight of authority is that a reasonable custom of all the banks

of a place, though not known to a party sending paper for collection to one of them, is binding upon the sender as a part of the contract of agency, to which the sender impliedly assents by selecting the bank without inquiry or without especial instructions. Selover on Bank Collections, § 10, says: "Where the custom is general and reasonable, the depositor of paper for collection is bound thereby, though he did not know of it." In Morse on Banks & Banking, § 231, it is said: "Knowledge of the usage, either express of implied, must, it has been said, be brought home to the parties who are to be bound by it. Mills v. Bank of United States, 11 Wheat. (U. S.) 431, 6 L. Ed. 512; Peirce v. Butler, 14 Mass. 303. But other cases of high authority declare that the usage of the bank in collections will bind the person dealing with it in this business, whether such usage be known to him or not (Smith v. Whiting, 12 Mass. 6, 7 Am. Dec. 25; Bank of Washington v. Triplett, 1 Pet. [U. S.] 25, 7 L. Ed. 37; Dorchester & Milton Bank v. New England Bank, 1 Cush. [Mass.] 177; Farmers' Bank & Trust Co. v. Newland, 97 Ky. 472, 31 S. W. 38; Jefferson County Sav. Bank v. Commercial Nat. Bank, 39 S. W. 339, 98 Tenn. 337); and this is certainly the correct rule. Indeed, the opposing cases can be easily reconciled by the link which appears to be suggested in one of them. The facts that one deals with a bank without taking the trouble to inquire as to its system will raise the implication that he already knows and is satisfied with that system. It is clear that, if a person hands over a note to a bank for collection without any species of remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course, and to retain him until the whole theory has been expounded to him, when his conduct unmistakably shows that either he already knows it, or else does not desire to know it. Either he knows and approves it, or he voluntarily trusts to the wisdom of the bank, at his own deliberately assumed risk of its sufficiency. In such case the bank not only has the right to assume, but it is even positively bound to assume, that his desire is that the ordinary and established usage be pursued. And an unordered deviation from that usage, though the usage were unknown to him, would lay the bank open to his suit for damages; and the court must, as has been already shown, hold as matter of law that the pursuance of this custom was an implied condition of the contract. It is clear, then, that he could not plead ignorance of it in order to lay a foundation for a suit against the bank for acting according to it. The knowledge on his part would be implied conclusively." See, also, Morse on Banks & Banking, § 9. This is the rule in California. See Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 50 Pac. 666.

A custom must be general as to place, and not confined to any particular bank or banks. Selover on Bank Collections, § 10. The custom under discussion was general as to Los Angeles; it was reasonable, and under the authorities cited the plaintiff was bound by it.

The judgment is reversed.

We concur: COOPER, P. J.; HALL, J.

5 Cal. App. 427

## PEOPLE v. JAMES. (Cr. 37.)

(Court of Appeal, Third District, California. April 23, 1907. Rehearing Denied June 17, 1907.)

1. CRIMINAL LAW—HYPOTHETICAL QUESTIONS—OBJECTIONS.

Where there was evidence in the record of a criminal case of all the facts embodied in a hypothetical question asked of a medical expert, an objection that it was not founded on the facts proven by the prosecution was properly overruled, as it was not necessary that the question should have embraced all the evidence in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1073–1076.]

2. SAME—APPEAL—OBJECTIONS NOT RAISED AT TRIAL.

An objection to a hypothetical question, not urged at the trial, is unavailable on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2639–2642.]

3. SAME—FORM OF OBJECTIONS.

An objection that a hypothetical question was not warranted by law was ineffective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1633–1636.]

4. SAME—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Where other instructions clearly charged that it was the people's duty to prove beyond a reasonable doubt all the elements of the crime charged, defendant was not prejudiced by an instruction that every fact and circumstance relied on by the prosecution to establish defendant's guilt must be proved by evidence beyond all reasonable doubt, and, if the jury were not satisfied beyond all reasonable doubt that each fact and circumstance had been so proved, it was their duty to find defendant not guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3158; vol. 14, Criminal Law, § 1990.]

5. SAME—PRESUMPTION OF INNOCENCE.

An instruction that the presumption of innocence remains with defendant throughout the trial was not erroneous for failure to continue such presumption until verdict rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1847.]

6. SAME—APPEAL—INVITED ERROR.

Accused cannot complain on appeal of an instruction given in the identical language of his request to charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3007–3009.]

7. SAME—INSTRUCTIONS—DUTY OF OFFICER.

In a prosecution for homicide, a request to charge that the law presumes that if defendant was an officer, and acting as such at the time of the homicide, that he was doing his duty, was obscure and misleading, and not justified by Code Civ. Proc. § 1963, subd. 15, declaring the presumption that official duty had been regularly performed.

Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Philip James was convicted of manslaughter, and he appeals. Affirmed.

Chas. B. Harris and Jas. L. Copeland, for appellant. U. S. Webb, Atty. Gen., for the People.

**BURNETT, J.** Appellant was tried on an information charging him with murder, and he was convicted of manslaughter. He has appealed from the judgment and order denying his motion for a new trial. The assignments of errors relate to certain instructions given and refused, and to the action of the trial court in overruling an objection to a hypothetical question addressed to one of the witnesses for the people. We will notice in the order presented in his brief all of the points upon which appellant relies for a reversal of the judgment.

Dr. Stevenson, a medical expert for the people, was asked this question: "Suppose a man weighing 130 pounds or thereabouts was struck with sufficient force by a man weighing 180, 190, or 200 pounds to knock him down twice within a short period of time, the first blow being succeeded by a struggle, and during that struggle the smaller man was choked for a period of half a minute, at first lightly and then gradually increasing it until he let go his hold upon a revolver; after the second blow he had some difficulty in arising, but got up, walked a space of 15 or 20 feet, or 10 feet; then walked a space of 30 or 40 or 50 feet without staggering; his muscles co-ordinating, and during that period talks coherently—what can you say as to the mental condition of such smaller man?" Counsel for defendant made this objection: "I object to the question as not founded upon the facts as proven by the prosecution in this case." Thereupon, in response to the question by the court, "Wherein is it defective or wherein does it not conform to the facts?" counsel answered: "In this, that the witness Bridge called by the prosecution testified that, when the defendant first got up, he staggered to the bar; that after he got the pistol he walked in a stooping position; that he gradually braced up and walked a little better, so it is not founded upon the testimony." "Very well," said the district attorney, "after he got the pistol, there was a little swaying, but he quickly gathered himself and walked naturally, without staggering or swaying, all of his muscles apparently co-ordinating?" Counsel for appellant again objected "on the same grounds. On the further ground that it calls for an opinion on a hypothetical question not warranted by law." The objection was overruled and an exception taken. There is evidence in the record of all the facts embodied in the foregoing question; and, as the objection went only to that point, the ruling of the court was obviously correct. It was not necessary for the question to embrace all the evidence in the case. Indeed, if that were the rule, hypothetical questions would generally be impossible on account of the conflict usually created by the testimony.

The rule is clearly stated in People v. Hill, 116 Cal. 566, 48 Pac. 712, by Mr. Justice Van Fleet, as follows: "While the question should have for its basis some probable, or at least possible, theory to be deduced from the evidence in the case, counsel have a right to frame the question to accord with their theory of what the material facts are as shown by that evidence, and in so doing may omit facts which from their point of view have no material bearing upon the subject." Thompson on Trials is therein quoted to the following effect: "The hypothetical questions must be based either upon the hypothesis of the truth of all the evidence, or upon a hypothesis specially framed of certain facts assumed to be proved for the purpose of the inquiry. Such questions leave it for the jury to decide in the first case whether the evidence is true or not, and in the second case whether the peculiar facts assumed are or are not proved." And again: "It is no objection to a hypothetical question that the state of facts which it assumes is erroneous, if within the possible or probable range of the evidence. * * * It is the privilege of counsel in such cases to assume within the limits of the evidence any statement of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed. The facts are assumed for the purposes of the question, and for no other purpose." 2 Jones on Evidence, § 372, cited by appellant, states the rule also in line with the other authorities: "While it is impossible to lay down any unyielding rule as to the form of the hypothetical question in such cases, it is clear that the question should be so framed as to fairly and clearly present the state of facts which the counsel claims to be proved and which the testimony on his part tends to prove."

But appellant contends that facts, and not opinions, must be assumed in the question (Rogers on Expert Testimony, § 30), and that the objection should have been sustained because the words "co-ordinating" and "coherently" presuppose the mental condition which it is the exclusive province of the jury to determine. Granting that these words are objectionable as involving a conclusion, it is difficult to see how their use could have prejudiced appellant. But a complete answer to the contention is that no such objection was made in the court below as is presented here. The additional objection that it was "a hypothetical question not warranted by law" raises no issue and amounts to nothing. In the case of People v. Mahoney, 77 Cal. 532, 20 Pac. 74, the district attorney asked one Dr. B. F. Carpenter the question: "From an examination of the wound and the course of the bullet, in your opinion would it have been possible for the deceased to have shot himself?" Defendant objected on the ground that it was "incompetent, no foundation having been laid for it." The district attorney then declared he would lay the foundation, and he proceeded to interrogate the witness as to his competency. The hypothetical question was then repeated, and it was objected to by defendant's counsel as "incompetent and irrelevant, no foundation being laid for the testimony." The objection was overruled and an exception taken. The answer of the witness to the question was, "No, sir; he did not." The Supreme Court, in discussing the matter, said: "It appears quite clear, therefore, that the only question upon which the court was asked to pass was, whether the witness had not sufficient experience in such matters to enable him to speak as an expert—to give his opinion—not whether the opinion, if given, was competent evidence. The objection made was not specific, if the point now urged was the one which counsel desired the court to pass upon at the trial." The above question addressed to Dr. Carpenter was of the gravest importance and clearly called for incompetent testimony; and his answer may have caused the conviction of the defendant, and it is apparent that if the proper objection had been made, in case of an adverse ruling below, the defendant would have secured a reversal in the appellate court. Here it could be demonstrated that the objectionable words, assuming them to be objectionable, could not have prejudiced the defendant. But we uphold the order of the court upon the ground that, in view of the particular objection made, the ruling was undoubtedly sound.

It is urged that the court erred in giving the following instruction: "You are instructed that each and every fact and circumstance relied upon by the prosecution to establish the guilt of the defendant must be proved by the evidence beyond all reasonable doubt, and, if the jury are not satisfied beyond all reasonable doubts that each such fact and circumstance has been proven, it is your duty to find a verdict of not guilty." The suggestion made in reference to this instruction seems exceedingly hypercritical and destitute of any merit. It would be unreasonable to hold that to the average mind the language used could mean anything more or less than that the burden is upon the prosecution to establish beyond a reasonable doubt the crime charged against the defendant, and that, if any fact or circumstance necessary to constitute such crime is not so established, the defendant must be acquitted. The only other inference likely to be drawn is that the burden is upon the people to prove all the facts and circumstances which the prosecution has introduced in evidence, whether material or not, to establish the crime. This, it is needless to say, is stating the law more favorably to defendant than he has a right to demand. But if we concede that the instruction, standing apart, might be deemed somewhat obscure, no such imputation can be made when we consider it in connection with the other instructions given by the court wherein the people's duty to prove beyond a reasonable doubt all the elements of the crime charged was clearly set forth.

Appellant also assails the following portion of one of the instructions given: "This presumption of innocence attaches to every stage of the case and to every fact essential to a conviction and remains with the defendant throughout the trial until the contrary is established by proof beyond a reasonable doubt." The contention is made that the presumption of innocence remains with the defendant until a verdict is rendered, and not simply "until the contrary is established by proof beyond a reasonable doubt." In People v. Arlington, 131 Cal. 235, 63 Pac. 347, 349, a similar instruction was upheld by the Supreme Court in the following language: "The court told the jury that 'it is a presumption that abides with him throughout the trial of the case,' and we do not think the language 'until the evidence convinces you to the contrary beyond all reasonable doubt' conveyed the impression that the presumption ceased to operate at the close of the evidence of the prosecution or at any time before the jury had finally determined upon a verdict. The court meant, and, we think, must have been by the jury understood to mean, that the presumption remained to the last with defendant and until in their deliberations upon the evidence they became convinced of his guilt." That decision is controlling here. But, again, appellant cannot complain of the instruction because he requested the court to so instruct the jury, as shown in the transcript. The court instructed the jury in the identical language requested by appellant. It needs no citation of authorities under such circumstances to show that appellant cannot complain, even granting that the instruction fails to state the law correctly.

The only other point made is that the court erred in refusing to give all of a certain instruction requested by defendant. The part eliminated reads as follows: "And you are further instructed that the law presumes that if the defendant was an officer and acting as such at the time of the alleged homicide that he was doing his duty." Appellant seeks to justify his contention by citing subdivision 15 of section 1963 of the Code of Civil Procedure, which provides that it is presumed "that official duty has been regularly performed"; but the proposed instruction goes far beyond the presumption of the regular performance of official duty. It conveys the suggestion that, if the defendant was an officer, he had a right to kill the deceased. Peace officers are justly invested, under our law, with considerable discretion and power, but it could hardly be contended seriously that a homicide committed by one is presumed to be justifiable simply because of his official position. At best, the instruction was obscure and misleading. As far as is inferentially contained a correct legal principle it was covered by instructions given. Besides, it does not appear that it was requested by appellant.

We have examined with anxious care all the suggestions made and authorities cited by counsel, but we find in the record no error whatever. The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

151 Cal. 279

## TRINITY COUNTY v. MENDOCINO COUNTY. (Sac. 1,504.)

(Supreme Court of California. May 15, 1907.)

1. COUNTIES — BOUNDARIES—ESTABLISHMENT —STATUTES—IMPLIED REPEAL.

Pol. Code, §§ 3969–3972, provided that all common boundaries of counties not adequately marked by natural objects or legal surveys should be definitely established, either by a joint survey of the respective county surveyors or by the surveyor general. Act March 30, 1872 (St. 1871–72, p. 766, c. 531), authorized a commission of survey to be chosen by the boards of supervisors of the counties concerned in locating the line between Trinity, Humboldt, and Mendocino counties, the commission to appoint a surveyor, who was directed to accurately run, thoroughly mark, and place monuments on the line between such counties, previously declared to be the fortieth parallel of north latitude and declared that the line so run should be the boundary line between the counties. *Held*, that such act was not so inconsistent or repugnant to the sections of the Political Code that either would repeal the other by implication.

2. SAME.

The Legislature, after having provided by Pol. Code, §§ 3969–3972, that any county lines not adequately marked should be run and marked by the surveyor general, was still authorized to enact a special law (Act March 30, 1872; St. 1871–72, p. 766, c. 531), for the survey of a line dividing particular counties, and declaring that the line so surveyed should be conclusive until the Legislature should change the line or order another survey.

3. SAME—LEGAL BOUNDARY.

A survey under such special act was a legal survey.

4. SAME—STATUTES—SPECIAL AND GENERAL LAWS—DATE OF ENACTMENT.

Sp. Act March 30, 1872 (St. 1871–72, p. 766, c. 531), providing for the establishment of a boundary line between certain counties, having gone into effect subsequent to Pol. Code, §§ 3969–3972, providing generally for the establishment of county boundaries not adequately marked, the special act would prevail over the Code provisions in case of inconsistency.

5. SAME—SPECIAL ACT—REPEAL BY GENERAL LAW.

Sp. Act March 30, 1872 (St. 1871–72, p. 766, c. 531), providing for the survey and establishment of a boundary line, between certain counties, was not repealed by Pol. Code, §§ 3969–3972, a general law, which took effect after the passage of the special act and provided generally for the establishment of county boundaries not adequately marked.

6. CONSTITUTIONAL LAW—LEGISLATIVE POWER—DELEGATION.

Act March 30, 1872 (St. 1871–72, p. 766, c. 531), providing for the establishment of a boundary line between certain counties, section 10 (page 767) of which declares that the line, when run, marked, and defined, should be the true boundary line between the counties, was not unconstitutional as a delegation of legislative power to establish a boundary line to a ministerial or executive officer, to wit, the surveyor appointed to run and mark the line.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 110.]

7. COUNTIES — BOUNDARIES—ESTABLISHMENT —STATUTES—CONSTRUCTION.

Act March 30, 1872 (St. 1871–72, p. 766, c. 531), provided for a commission to appoint a surveyor to run and mark the boundary line between certain counties previously fixed as the fortieth parallel of north latitude. The surveyor was required to "accurately run" and thoroughly mark the line, and the act declared that the line so run, marked, and defined should be the boundary line between the counties. *Held*, that the words "accurately run" were directory only, and that the line surveyed and marked constituted the legal boundary between the counties, though it did not in fact accurately coincide with the fortieth parallel of north latitude.

8. SAME—SUBSEQUENT SURVEY.

Where a boundary line between certain counties was run by a surveyor and established in accordance with Sp. Act March 30, 1872 (St. 1871–72, p. 766, c. 531), providing for the establishment of such line, there was neither necessity nor authority for a resurvey of the line by the surveyor general, as provided by Pol. Code, § 3969, authorizing resurvey of inadequately marked lines between counties, unless the monuments of the line run under the special act had been displaced or destroyed, so that the line was no longer adequately marked.

9. SAME — STATUTES—RE-ENACTMENT — APPEAL.

The acts of 1851 and 1853 fixed the fortieth parallel of north latitude as the dividing line between certain counties, and Act March 30, 1872 (St. 1871–72, p. 766, c. 531), provided for a commission and the appointment of a surveyor to run, mark, and place monuments on such line, declaring that the line, when marked, should constitute the dividing line between the counties. *Held*, that Pol. Code, §§ 3914, 3918, 3919, declaring that the fortieth parallel of north latitude should be the common boundary between such counties, constituted merely a re-enactment and codification of the prior laws, and did not, therefore, repeal by implication the act of March 30, 1872, nor nullify the line run and marked thereunder as the boundary line between the counties.

In Bank. Appeal from Superior Court, Tehama County, J. F. Ellison, Judge.

Suit by Trinity county to enjoin Mendocino County from further claiming certain territory pursuant to a dispute with reference to the boundary line between such counties. From a judgment in favor of complainant, defendant appeals. Affirmed.

H. R. Girven, Dist. Atty., and D. J. Hall, for appellant.

SHAW, J. By the acts of 1851 and 1853 the fortieth parallel of north latitude was made the dividing line between the counties of Trinity, Humboldt, and Mendocino, and constituted the north line of Mendocino and the south line of Trinity and Humboldt. The line was not well defined or marked on the ground, and the Legislature, by the act of March 30, 1872 (St. 1871–72, p. 766, c. 531), provided for a commission of survey to be chosen by the boards of supervisors of the counties concerned, and authorized such commission to appoint a surveyor, who was directed thereupon to "accurately run, thoroughly mark, and place monuments on the line between" the respective counties. The commission appointed and employed one W. H. Fauntleroy, a surveyor, to survey and mark the line. He proceeded to make the survey and place the monuments as required by the act, completing and filing the same in the respective counties on October 30, 1872. Section 10 (page 767) of the act provided that "the lines run out, marked and defined as required by this act are hereby declared to be the true boundary lines of the counties named herein." Doubts appear to have arisen in regard to the accuracy of Fauntleroy's survey and location on the ground of the fortieth parallel, constituting the boundary between Trinity and Mendocino counties. In 1891 the board of supervisors of Mendocino county, proceeding under section 3969 of the Political Code, requested the surveyor general of the state to survey and establish the line between the two counties. Upon this request, and under the supposed authority of the Code, the surveyor general appointed Sam H. Rice, a surveyor, to survey and mark the line. This Rice proceeded to do, and the survey by him was completed and approved by the Attorney General on December 18, 1891. Both Rice and Fauntleroy undertook to locate the true position on the ground of said fortieth parallel of north latitude. It so happened, however, that the line thereof, as established by Rice, is located parallel to the line established by Fauntleroy and about 2 miles north thereof, thus leaving a strip about 2 miles in width and some 31 miles long between the two lines. Since that time each of these counties has claimed this strip of land as part of its territory, and both have attempted to exercise jurisdiction over and to levy and collect taxes on the property situated thereon. This action was begun by Trinity county to enjoin the county of Mendocino from further claiming this territory, or from exercising, or attempting to exercise, sovereignty over it. Findings and judgment were given in the lower court in favor of Trinity county. The defendant appeals.

The court below, in its findings, declared that the line established by Rice is in fact on the fortieth parallel of north latitude, and that the line established by Fauntleroy is in fact nearly two miles south of said parallel. The judgment was given for the plaintiff upon the theory that the Fauntleroy survey established the situation of the county boundary, regardless of the fact that it did not correctly locate the position of the said north parallel. By virtue of the special act of March 22, 1872, which took effect at its passage, all of title 1, part 4, of the Political Code, including sections 3969 to 3972, took effect on May 1, 1872. These sections provide that all common boundaries of counties not adequately marked by natural objects or legal surveys were to be definitely established, either by a joint survey of the respective county surveyors, or by the surveyor general. If these sections had been the only law applicable to these counties at the time of the Fauntleroy survey in October, 1872, that survey would have been unauthorized and void. But the act of March 30, 1872, also took effect upon its passage. It was not necessarily so inconsistent or repugnant to the sections above cited that either would by implication repeal the other. The state may provide for as many surveys of county boundaries as the Legislature may deem best. After having provided in these sections that any county lines not adequately marked should be run and marked by the surveyor general, it was still in the power of the Legislature to enact a special law for the survey of any particular county lines, and make it conclusive until it should itself change the lines, or order another survey. A survey under such a special act would be a legal survey. The act of March 30th was a special act for the survey of the common lines of these particular counties, and the Fauntleroy survey made under it in October, 1872, was a legal survey, even if the provisions of section 3969 were also in force at the time. There was at that time no constitutional objection to a special law on the subject. Even if the act of March 30, 1872, was inconsistent with section 3969 in this respect, it would not be the Code, but the special act which would prevail. This is evident from the dates of the respective acts and the rule of law on the subject. The Code was passed March 12, 1872, and is to be considered as if passed December 4, 1871. Pol. Code, § 4478. The act putting these parts of it in force on May 1st, was enacted on March 22, 1872. The special act of March 30, 1872, being the later enactment, would prevail over the Code. Where two inconsistent laws are enacted at the same session of the Legislature, the one last adopted prevails. Ex parte Sohncke, 148 Cal. 262, 82 Pac. 956, 2 L. R. A. (N. S.) 813; Estate of Wixom, 35 Cal. 320; People v. Phœnix, 6 Cal. 93; People v. Dobbins, 73 Cal. 259, 14 Pac. 860; Smith v. McDermott, 93 Cal. 424, 29 Pac. 34; Davis v. Whidden, 117 Cal. 622, 49 Pac. 766; Mariposa Co. v. Madera Co., 142 Cal. 55, 75 Pac. 572; State v. Halliday, 63 Ohio St. 165, 57 N. E. 1097; 26 Am. & Eng. Ency. of Law, 736. Furthermore, as it is a special law relating to one of a particular class of subjects, according to the rule of statutory construction in such cases, it would not be repealed by a general law subsequently passed embracing the entire class of subjects, including that treated in the special law. Sutherland on Stat. (1st Ed.) §§ 157, 158; People v. Quigg, 59 N. Y. 88; Anderson v. Hill, 42 N. J. Law, 351; Vail v. Easton, 44 N. J. Law, 239; State v. Mills, 34 N. J. Law, 180; People v. Palmer, 52 N. Y. 88; Crane v. Reeder, 22 Mich. 322; Robbins v. State, 8 Ohio St. 191.

It is claimed by appellant that section 10 of the act of March 30, 1872, declaring that the line to be run by the surveyor selected in accordance with its provisions, when it was so run, marked, and defined, should be the true boundary line of the counties, is unconstitutional. It is said that the act delegates to the surveyor the power to fix the limits of the territory of the respective counties, that this is a legislative act which cannot be delegated by the Legislature to a ministerial or executive officer, such as a surveyor, and hence that it is contrary to the provision of section 1 of article 3 of the Constitution of 1849, to the effect that the powers of one department of the state cannot be conferred upon another department. We cannot agree to this view. The Legislature had established the boundary of the respective counties, and had declared that the fortieth parallel of north latitude is the line which separates them. That line was not marked on the ground, so that its position could be known to the citizens and parties interested, nor was its precise location ascertained. It was deemed necessary that it should be so located and marked. The Legislature could not itself, go into the field and survey and mark the line. Nor is the process of surveying and marking a line a legislative function. It is purely ministerial in character. Holley v. Orange Co., 106 Cal. 424, 39 Pac. 790. It was, therefore, not only proper, but necessary, that the Legislature should provide for the employment of a surveyor to do the work.

It is conceded that if, after the survey was made, the Legislature had enacted a law providing that the line so marked should be the boundary line between the counties it would thereupon constitute such boundary, no matter how much it deviated from the true line or position of the fortieth parallel, and that, even if such subsequent act was passed in ignorance of the mistake or error in the survey, it would make no difference in this respect. But it is contended that it is not competent for the Legislature to declare, in advance of the work, that the line which might be surveyed and marked by the surveyor should be the true line. We can see no essential difference between the two propositions, so far as the mere matter of legislative power is concerned. The rule in regard to such legislation is thus stated by the authorities: "The Legislature cannot delegate the power to make laws, but it can delegate the power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 722; State v. Thompson, 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950, 83 Am. St. Rep. 468; Boyd v. Bryant, 35 Ark. 69, 37 Am. Rep. 6; Pueblo Co. v. Smith, 22 Colo. 534, 45 Pac. 360, 362, 33 L. R. A. 465; In re Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529; 8 Cyc. 830; 6 Am. & Eng. Ency. 1029, 1032. The case is similar in principle to those cases where it is held it is not a delegation of legislative power to commit to some officer, person, or board the power to determine the fact that an applicant for some license or privilege is or is not of good character, or possesses or does not possess some other qualification necessary to entitle him, under the law, to the license or privilege, and empowering such officer, person, or board, if it shall determine that such person has the necessary qualifications, to forthwith issue the license. In such cases the law declares that a certain class of persons are entitled to the license. The determination of the fact that a particular applicant is of the class described in the law as so entitled is not a legislative act, but one which is either ministerial or judicial, and hence to commit the power to make such determination to any other person or body is not a delegation of legislative power. The cases above cited are chiefly of this class. Here, the Legislature having declared that the county boundary should be the fortieth parallel, it further provided that its location should be established by a surveyor and marked accordingly, and that the line so fixed and marked should be the true boundary. The surveyor was directed to ascertain the position of that parallel on the ground in accordance with the rules of his science and by means of the instruments of his profession. The exact position was presumably unknown. Perhaps it may be said that it cannot, by human means, be ascertained with absolute certainty. It was therefore competent for the Legislature to settle all controversy over the question by providing for a survey and declaring in advance that the line as surveyed should be the true boundary line. It cannot be conceded that the Legislature cannot delegate the power to determine contrary to the fact. The power to decide necessarily includes the power to decide erroneously; but the fact, once decided, whether true or false, is nevertheless effective for its purpose.

The act provided that the surveyor, when employed, should "accurately run" the line of the fortieth parallel. It is contended that the effect of this language is that if he ran it inaccurately his survey would be void; that the words quoted were a limitation upon his power, such that he could make no legal survey unless it was absolutely correct. We deem the language quoted directory only. This is made sufficiently clear by section 10 above quoted. That section manifestly was made in view of the contingency that the survey might not be absolutely correct, and its purpose and effect was that, whether correct or not, the line surveyed and marked should thereupon be the true line. The construction contended for would leave the county lines always subject to change and uncertainty; for if the line must be absolutely accurate in order to be valid, if the true line of that parallel and not any particular surveyed line thereof is to be the true county line, it would be subject to relocation and change whenever new discoveries, more accurate instruments, or more careful surveys should demonstrate that the previously surveyed line was incorrectly located on the ground. If the true line of the parallel, and no other, was to be the lawful line, the surveying and marking of any line would accomplish nothing. It would, indeed, indicate the place where the particular surveyor ascertained and believed the position of the true line to be; but such location would be merely tentative, and subject always, whenever the location of the line was in issue, to dispute upon the claim that it was not the true line, and to prove which might show it to be false, and there would be no remedy, except by legislative act. The matter of establishing a county boundary is for the Legislature. If it has declared that the true line of the parallel is the line, the courts cannot declare any other line to be the boundary, in the absence of legislative authority to so declare. The court can declare and construe the law on the subject, but it cannot declare and establish the fact that the parallel is situated elsewhere than in its true location; and, if that location is to be the sole criterion, the court's decree must be as much subject to such inquiry and dispute as the survey of any surveyor. It is not to be supposed that the Legislature intended to reduce the proposed survey and location of such a mere idle ceremony.

It is said that under this theory of the law the surveyor might arbitrarily locate the line 10, 15, or even 50 miles from the true line. There is no charge that the surveyor fraudulently located the line. What the effect would be if he did act fraudulently we need not decide. But, so far as mere inaccuracy is concerned, it seems clear that it would not affect the question. In any event, the location of the county lines is a political question, to be settled by the legislative power of the state, and subject to change from time to time as the legislative power may direct. If the line as fixed in accordance with its directions is inaccurately located by the person whom it has directed to make the survey and place the marks, the correction of the error lies with the Legislature, and not with the courts, unless it has provided that the courts shall determine the true location, which it has not done. The finding of the court is that the common boundary line between Mendocino and Trinity counties was, and ever since the Fauntleroy survey has been, adequately marked by monuments, lines, and surveys lawfully made. Such being the fact, there was no necessity or authority for a resurvey by the surveyor general, under section 3969 of the Political Code, unless it appeared that the monuments of the Fauntleroy survey had been displaced or destroyed, so that this line was no longer adequately marked. In that event the surveyor general could be called upon to resurvey and mark the line under the provisions of the Political Code above cited; but, if he should be called upon to make such survey, it would be the Fauntleroy line which he must survey and mark, and not the actual position of the fortieth parallel of north latitude.

It is entirely immaterial whether there was, or was not, a dispute concerning the location of the line when the act of March 30, 1872, was passed and the survey made thereunder. The matter was within the power of the Legislature, regardless of the existence of any such controversy. The surveyor was to locate the line; but, if by error he did not truly locate it, nevertheless the line he marked was to be the dividing line, and his act was made binding upon the respective counties and all citizens and inhabitants of the state, the Legislature alone having power to correct or change it. The rules regarding surveys of disputed boundary lines between coterminous owners of land have no application to this case. The sections of the Political Code, declaring that the fortieth parallel of north latitude should be the common boundary, did not, when they took effect on May 1st, work any change or in any way affect the act of March 30, 1872. The same parallel had been previously fixed by law as the boundary, and the act is to be construed merely as a re-enactment and codification of the previous law on the subject, and not as a new enactment, and therefore it does not operate as a repeal by implication of the act of March 30, 1872, declaring that the Fauntleroy line, when fixed, should be the true line. Swem v. Monroe, 148 Cal. 741, 83 Pac. 1074. The survey of Fauntleroy had fixed, for all legal purposes, the position of the county line, and section 10 of the act in effect declared that this line was for that purpose, in contemplation of law, the fortieth parallel of north latitude.

The judgment is affirmed.

We concur: SLOSS, J.; McFARLAND, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

151 Cal. 313

## BECKER et al. v. SUPERIOR COURT OF THE STATE OF CALIFORNIA et al.

(S. F. 4,644.)

(Supreme Court of California. May 21, 1907.)

1. Courts—Procedure—Propriety of Overruling Prior Decisions.

Where no property rights could have grown up on the faith of a former decision announcing an erroneous doctrine, there is no impropriety in establishing the correct rule of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 311.]

2. Equity—Jurisdiction—Retention of Jurisdiction Acquired—Denial of Equitable Relief—Foreclosure of Lien—Personal Judgment.

In an action to recover a money judgment, and to establish a mechanic's lien, though the lien fails and the amount claimed is not in itself sufficient to confer jurisdiction, in the absence of fraud the court may render a personal judgment for the amount due, since legal and equitable remedies may be pursued and granted in the same action, and the court having jurisdiction of the cause as originally presented has jurisdiction to grant the proper relief.

In Bank. Certiorari by A. Becker and another against the superior court of Santa Clara county, Cal., and Hon. A. L. Rhodes, judge thereof, to review a judgment. Writ dismissed.

Will M. Beggs, for petitioners. Jackson Hatch, for defendants.

SLOSS, J. A writ of certiorari was issued to review a judgment of the superior court of the county of Santa Clara. It appears that the Glenwood Lumber Company, a corporation, on the 10th day of November, 1904, filed in said superior court of Santa Clara county a complaint against Frances L. Mason, A. Becker, and James H. Tooze, as defendants, to recover $81.23 claimed to be due from Becker and Tooze for lumber furnished to and used by them in the construction of a building which, as contractors, they erected for Frances J. Mason, as owner, and to foreclose a mechanic's lien of said Glenwood Lumber Company upon said building. The complaint was in proper form, and its allegations, if proven, would have entitled the plaintiff to the relief claimed. The defendants answered, denying some of the allegations of the complaint. At the conclusion of the trial a nonsuit was granted as to defendant Mason upon the ground that the claim of lien filed by the plaintiff did not truly state the terms of the contract between said plaintiff and Becker and Tooze, in that the time of payment for the lumber was not correctly stated. The court, however, filed findings of fact, in which it found that the claim of the lien truly and correctly stated plaintiff's demands against Becker and Tooze in all other respects, and that Becker and Tooze were indebted to plaintiff for materials furnished in the sum of $81.23. Upon these findings judgment went in favor of plaintiff against said defendants for such sum, together with interest and costs.

It is this judgment that the petitioners herein, defendants in the former suit, seek to annul. Certain preliminary objections are made by the respondent to the consideration of the writ. These are based upon the failure to serve the petition upon the real party in interest and upon the delay in seeking this relief. The conclusion we have reached upon the merits makes it unnecessary to consider these preliminary points.

The petitioner contends that, since the amount of the plaintiff's claim in the action of the Glenwood Lumber Company v. Mason et al. was less than $300, the jurisdiction of the superior court to entertain the action depended entirely upon the fact that the foreclosure of a lien was sought, thus making the action one of equitable cognizance; that, when the plaintiffs failed to establish their right to the foreclosure, the equitable character of the action was lost, and it became a simple action at law for the recovery of money, and, the amount sought to be recovered being less than $300, the superior court was without jurisdiction. This contention finds support in a decision of a department of this court in Miller v. Carlisle, 127 Cal. 327, 59 Pac. 785. Five plaintiffs had there united to enforce alleged liens for labor done by them upon certain mining ground. The court made findings declaring that "the liens of plaintiffs do not attach to said land," and that there was due to the plaintiffs from the defendants personally the several sums demanded, each of which was less than $300. Judgment against said defendants for such sums was accordingly entered in favor of the plaintiffs. The defendant Carlisle appealed from an order denying his motion for a new trial. This order was reversed upon the ground taken by the petitioner here; the court holding that, where "the lien fails and the court can administer no equitable relief whatever, it must logically follow that the residue of the action —a dispute concerning money less than three hundred dollars in amount—can no longer engage the attention of the court." If this case correctly states the law, the judgment rendered by the superior court of Santa Clara county in favor of the Glenwood Lumber Company against Becker and Tooze was beyond the jurisdiction of that court and void; but we think that the rule declared in Miller v. Carlisle was based upon an insufficient consideration of the true basis of the jurisdiction of the superior court. As we are not confronted by a situation in which property rights can have grown up on the faith of the decision, there can be no impropriety in now correcting the error, if error was committed. And there is the more justification for reconsidering the doctine declared in Miller v. Carlisle, since it appears from the opinion in that case that the department in reaching its conclusion was not aided by any argument or presentation of authorities on behalf of the respondents who were relying upon the judgment there declared to be void. See page 329 of 127 Cal., page 785 of 59 Pac.

There can be no doubt that upon the filing of the complaint, setting forth a cause of action for the foreclosure of a mechanic's lien, the superior court was invested with jurisdiction of the cause a suit for such foreclosure being a suit in equity. Curnow v. Blue Gravel Co., 68 Cal. 262, 9 Pac. 149; Brock v. Bruce, 5 Cal. 279. And the court, having jurisdiction to hear and determine the cause so presented, had jurisdiction to grant the relief demanded in whole, or to refuse it in whole, or to grant it in part or refuse it in part. Whatever action it took, whether rightly or erroneously, was in the exercise of the jurisdiction conferred upon it. It has frequently been held that, when a court of equity once obtains jurisdiction of a case, it will decide the whole case as between the parties, and not leave any part of it for future litigation. Watson v. Sutro, 86 Cal. 528, 24 Pac. 172, 25 Pac. 64; Whitehead v. Sweet, 126 Cal. 67, 76, 58 Pac. 376. The test of the jurisdiction of a court is ordinarily to be found in the nature of the case made by the complaint and the relief sought. The fact that the plaintiff does not succeed in establishing all that he claims does not oust the court of its jurisdiction to give judgment for so much as is established.

It is unquestioned that in an ordinary action at law where the jurisdiction of the superior court depends upon the amount of the "demand," the court may, where more than $300 is demanded in the complaint, render judgment for less. Dashiell v. Slingerland, 60 Cal. 653; Greenbaum v. Martinez, 86 Cal. 459, 25 Pac. 12; Rodley v. Curry, 120 Cal. 541, 52 Pac. 999. The same result was reached under the former Constitution, giving the district courts jurisdiction in cases "where the amount in dispute exceeds two hundred dollars." Jackson v. Whartenby, 5 Cal. 94. And in other states it is the general rule that the jurisdiction, under similar constitutional or statutory provisions, is to be determined by the amount claimed by the plaintiff without regard to the amount found due. 9 Cyc. 775, and cases cited. Again, the superior court has, under the Constitution, jurisdiction in "all criminal cases amounting to felony." Yet a defendant may be convicted in the superior court of a lesser offense, if he was charged with felony which included the lesser offense. Ex parte Donahue, 65 Cal. 474, 4 Pac. 449. We see no reason why the same rule should not apply where the jurisdiction of the superior court attaches by reason of the case being one in equity. The nature of the action as an equitable one is fixed by the allegations of the complaint. The fact that the plaintiff fails to establish all of his claims does not change the nature of the action. In the opinion in Miller v. Carlisle the court cites several cases in which it was held that in a suit to foreclose a mortgage made to secure a promissory note, where the proof at the trial showed that the mortgage was invalid, the court sitting in equity had no power to render judgment for the sum due on the note, and should dismiss the bill without prejudice. Dowell v. Mitchell, 105 U. S. 430, 26 L. Ed. 1142; Cramer v. Cohn, 119 U. S. 355, 7 Sup. Ct. 277, 30 L. Ed. 439; Rose v. West, 50 Ga. 474; Gamage v. Harris, 79 Me. 531, 11 Atl. 422. But these cases all arose in jurisdictions where equitable and legal remedies were not administered in the same tribunal, and in such jurisdictions legal and equitable claims cannot be blended together in one suit. Scott v. Armstrong, 146 U. S. 512, 13 Sup. Ct. 148, 36 L. Ed. 1059.

In this state, on the contrary, legal and equitable remedies may be pursued and granted in the same tribunal, and in a single action (White v. Lyons, 42 Cal. 279), and the fact that the equitable relief is not obtained furnishes no reason in itself for the refusal of legal relief in the same action. As was pointed out in Miller v. Carlisle, "it is nothing uncommon to render judgment for money due to the lien claimant from a defendant personally liable to him, although the lien itself fails of enforcement." Kennedy-Shaw Lumber Co. v. Priet, 113 Cal. 291, 45 Pac. 336; Lacore v. Leonard, 45 Cal. 394. If the views hereinbefore expressed be correct, the fact that the amount claimed is less than $300 does not affect the power of the court to grant this relief. The jurisdiction in all such cases rests, not upon the amount claimed, but upon the fact that the suit is one to foreclose a mechanic's lien, and is therefore a suit in equity within the meaning of the Constitution.

It may be remarked that we are not dealing with the question whether jurisdiction can be fraudulently conferred upon the superior court by the assertion in bad faith of an unfounded claim. We have no doubt that an action at law in which the actual demand amounts to less than $300 cannot be brought and retained within the jurisdiction of the superior court by adding a fictitious claim for a larger sum, or by making a fictitious showing as a basis for a purported prayer for equitable relief. But no such question is presented here. There is nothing to indicate that the Glenwood Lumber Company was not seeking, in good faith, to foreclose a lien claimed by it. It follows that the lower court must be held to have acted within its jurisdiction in rendering the judgment complained of.

The writ is dismissed.

We concur: HENSHAW, J.; BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.

151 Cal. 352

## GRAY v. LAWLOR. (S. F. 3,916.)

(Supreme Court of California. May 23, 1907.)

1. JUDGMENT—VACATING JUDGMENT BY DEFAULT—SERVICE BY PUBLICATION—EXCUSES FOR DEFAULT.

Code Civ. Proc. § 473, provides that, when the summons has not been personally served on defendant, the court may allow him at any time within one year after the rendition of judgment to answer to the merits. *Held*, that a defendant served by publication need not present any excuse for his failure to appear, except the fact that he was not personally served with the summons; but, if there is any neglect on his part which would make it inequitable to grant him the relief, proof of that fact must come from the plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 253.]

2. SAME—TERMS ON GRANTING APPLICATION.

The provision in Code Civ. Proc. § 473, that the court may allow a defendant not personally served to answer on the merits at any time within one year after rendition of judgment "on such terms as may be just" does not give the court power to refuse the relief when the statutory conditions are met, but merely confers the power, when it finds the defendant entitled to the relief, to consider whether he may not have been negligent in a degree not amounting to laches, and whether the plaintiff may not have incurred expenses on the faith of the judgment which the defendant should in justice refund.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 326.]

3. SAME—MERITORIOUS DEFENSE.

A defendant served by publication, moving to vacate a judgment by default and to be allowed to answer to the merits, must show that he has a good defense to the action on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 293.]

In Bank. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by W. W. Gray against William M. Lawlor. From a judgment for plaintiff, and an order denying defendant's motion to vacate the judgment and allow him to answer to the merits, he appeals. Reversed.

Curtis Hillyer and H. F. Peart, for appellant. W. M. Beggs, for respondent.

SHAW, J. This is an appeal from the judgment, and from an order after judgment denying the defendant's motion to vacate the judgment and allow him to answer to the merits of the action.

The complaint states a good cause of action to quiet title to a tract of land, and the record shows due service of the summons by publication and a judgment regularly entered. There is no merit in the appeal from the judgment, and it need not be further considered.

The affidavit of the defendant, in support of his motion to be allowed to answer to the merits, stated that during the times mentioned in the complaint the defendant was the owner of the property, and that he had not been personally served with the summons and had no knowledge of the attempted service by publication until within two weeks next before the filing of the motion. No showing was made of mistake, surprise, inadvertence, or excusable neglect as preventing causes for his failure to appear before judgment. The motion was made about four months after the rendition of the judgment. The third clause of section 473 of the Code of Civil Procedure declares that, "when from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in said action, to answer to the merits of the original action." The clause preceding this applies to all parties to the action, whether plaintiff or defendant, who have been personally served with summons, or who have appeared thereto, and, in order for such party to obtain the relief there provided, he must show that he failed to make his claim or defense through "his mistake, inadvertence, surprise, or excusable neglect." No such showing is required in the case of a defendant served by publication only. This difference in the requirements shows the different scope and purpose of the respective provisions. Under the latter clause the defendant need not present any excuse for his failure to appear, except the fact that he was not personally served with the summons. It is manifest that in the majority of cases it would be utterly futile to require any further showing, for he would be ignorant of the entire proceeding, so far as any actual notice is concerned. Accordingly it is said that "there is no presumption against him of lack of diligence in interposing his defense, as in a case where he was personally served." Frankoviz v. Ireland, 35 Minn. 278, 28 N. W. 508. This is the key to the different effect of the two clauses. In the case where he is personally served, if he fails to appear in due time through mistake, surprise, inadvertence, or excusable neglect, when, in fact, he had a good defense, he is required to set forth in his application for relief the circumstances which caused his lack of diligence. Where he has had no personal service, there is, with respect to his right to relief in such cases, no presumption of knowledge, or of inexcusable negligence, on his part, and he is only required to show the lack of personal service. If there was any neglect on his part to the injury of the opposite party, which would make it inequitable to grant him the relief, proof of such neglect and of the circumstances causing injury must come from the plaintiff.

The authorities are uniform to the same effect. With respect to this class of cases, Mr. Freeman says: "On complying with the conditions of the statute, the moving party secures an absolute right to have the judgment opened, which the court has no discretion to deny." 1 Freem. Judgts. (4th Ed.) § 105, p. 154. In Frankoviz v. Ireland, supra, it is further said that the defendant "is not required, at least in the first instance, to show that he had not actual notice of the action in season to interpose his defense within the ordinary time." The Minnesota statute is substantially the same as our own. Section 125, c. 66, Gen. St. 1878 (Gen. St. 1894, § 5267), provides for relief where there is personal service. Section 66 provides that, where there is no personal service of the summons, "on application and sufficient cause shown," the defendant "may * * * be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just." In Washburn v. Sharpe, 15 Minn. 63 (Gil. 43), and Frankoviz v. Ireland, supra, there was some intimation, not necessary to the decisions, that the court had some discretion to refuse such applications. In Lord v. Hawkins, 39 Minn. 73, 38 N. W. 690, these cases were overruled on this point, and the court said: "It was assumed [in the above cases] that the application is addressed to the discretion of the court. Upon a more careful examination and comparison of the two sections, we are satisfied that herein lies the chief difference between them. The latter section (125) provides that the court may, in its discretion, grant the relief, the other, that the defendan, on application and good cause shown, before judgment, shall be allowed to defend, and may in like manner be allowed to defend after judgment. The section does not—certainly not in terms—leave it to the discretion of the court. A good defense to the action must certainly be considered 'good cause shown.' The construction we place on section 66 is that it provides to the defendant who comes within its terms, and who shows that he has a good defense, and who has not lost his right by laches, an opportunity to defend as a matter of right, and not of discretion." This case was approved in Boeing v. McKinley, 44 Minn. 392, 46 N. W. 767, and in Bausman v. Tilley, 46 Minn. 66, 48 N. W. 459. The same doctrine has been declared in Savage v. Aiken, 14 Neb. 315, 15 N. W. 693; Albright v. Warkintin, 31 Kan. 442, 2 Pac. 614; Kinney v. O'Bannon, 6 Bush (Ky.) 692; McLean v. McLean, 84 N. C. 366; Satterlee v. Grubb, 38 Kan. 234, 16 Pac. 475; Brown v. Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640; Snow v. Hawpe, 22 Tex. 168; Lyon v. Robbins, 46 Ill. 276. In all the states, except Minnesota, the statutes differ from ours, in that they omit the phrase "on such terms as may be just." This does not change the effect of those statutes in the particular here under consideration. The effect of that qualifying phrase in our statute is not to give the court power or discretion to refuse the relief when the statutory conditions, expressed and implied, are met, but merely confers upon it the power, when it finds the defendant entitled to the relief, to consider whether or not the defendant may not have been negligent, in a degree not amounting to laches or creating an estoppel, and whether or not the plaintiff, or his successor, may not have innocently, on the faith of the judgment, incurred costs or expenses which the defendant in justice should refund, and to impose on the defendant such terms as may be necessary to do complete justice between the parties, or to fix the time for filing the answer and limit and define its character so that it shall be addressed to the merits. See 15 Ency. Plead. & Prac. pp. 290, 291.

From the fact that the relief to be afforded is the privilege of answering "to the merits of the original action," the condition is implied that the defendant must have a sufficient answer to present; that is, he must have a good defense to the action on the merits. This being one of the conditions of the statute, the defendant must show that such defense exists. The defendant in this case has complied with this rule. He avers in his affidavit that he is now, and at all times mentioned and for more than 10 years last past has been, the owner of, and entitled to the possession of, the property described in the complaint. This, if true, is a complete defense to the cause of action sued on.

There do not appear to have been any circumstances which would constitute laches on the part of the defendant, or which would create an estoppel against him. It is not shown that he had any personal knowledge of the pendency of the action, nor that the plaintiff has suffered or will suffer any injury from the vacation of the judgment, other than that of being compelled to meet the defense that may be made. The defendant states that he had no knowledge of the attempt to serve the summons upon him until a few weeks before instituting proceedings on his motion for relief.

The order is reversed. The court below is directed to set aside the default and judgment and allow the defendant to answer to the merits of the original action, on such terms as may be just. If no further proceedings are had in furtherance of the motion, the judgment will stand affirmed.

We concur: BEATTY, C. J.; HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

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**HENSHALL v. MARSH et al.** (Sac. 1,426.)

(Supreme Court of California. May 15, 1907.)

1. PUBLIC LANDS—SCHOOL LANDS—APPLICATION FOR PURCHASE—PURPOSE OF APPLICANT.

An agreement by an applicant for the purchase of school lands to pay one for services in attending to the matter in the land office, payment to be made on the land being sold, does not show that the applicant did not apply to purchase the land for her own use and benefit, within Pol. Code, § 3495, requiring an applicant for the purchase of school lands to aver in his affidavit that he desires to purchase for his own use and benefit.

2. SAME.

An arrangement between an applicant for the purchase of school lands and another for the borrowing by the applicant of sufficient money to make payment for the land, to be repaid on a sale of the land or to be secured by a mortgage after obtaining the certificate of purchase, constitutes simply a loan, and does not give the lender an interest in the land, and does not show that the applicant did not desire to purchase the same for her own use and benefit, within Pol. Code, § 3495.

3. EVIDENCE—PRESUMPTIONS.

The inference that an applicant for the purchase of school lands proceeded in good faith to acquire the land in compliance with the law should be indulged in, rather than that he was proceeding fraudulently and by perjury to acquire title to it.

4. PUBLIC LANDS—SCHOOL LANDS—PURCHASE—VALIDITY.

Under Pol. Code, § 3495, providing that an applicant for the purchase of school lands must state in his affidavit that "he desires to purchase the same for his own use and benefit, and for the use and benefit of no other person, * * * and that he has made no contract or agreement to sell the same," when considered in connection with section 3515, providing that certificates of purchase may be sold by deed or assignment, as well as independent thereof, an applicant for the purchase of school lands may at the time of making the application contemplate the sale of it for a profit at any time after obtaining the certificate of purchase therefor.

5. SAME—APPLICATION FOR PURCHASE—AFFIDAVIT—SUFFICIENCY.

An affidavit by a female applicant for the purchase of school lands, which avers that she is entitled to purchase and hold real estate in her own name, is not void under Pol. Code, § 3496, declaring that, where the applicant is a female, the affidavit must "show" that she is entitled to purchase and hold real estate in her own name, where on a contest for the land it appears that she is unmarried.

In Bank. Appeal from Superior Court, Plumas County; C. E. McLaughlin, Judge.

Action by Richard P. Henshall against Corinne Anna Marsh and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Towle & Henshall and James W. Cochrane, for appellant. A. E. Bolton, for respondents.

LORIGAN, J. This action involves conflicting applications to purchase from the state a section of school land in Plumas county, and was brought upon a reference made to the superior court of said county by the surveyor general of the state under section 3414 of the Political Code. Upon the trial the superior court found, among other facts not involved on this appeal, that on April 15, 1902, the defendant Corinne A. Marsh made, and on April 16, 1902, filed in the land office of the surveyor general of the state, an affidavit and application to purchase the land in question, the affidavit, among other things, stating that she was over the age of 21 years, a native-born citizen of the United States, and for over 15 years a resident of the state of California; that she desired to purchase the land described in said affidavit for her own use and benefit, and for the use and benefit of no other person or persons whomsoever, and that she had made no contract or agreement to sell the same; that said land was not suitable for cultivation and was timbered land. The court found that these facts, set forth in her affidavit, were true, and particularly that at the time said defendant Marsh filed on said land she desired to purchase the same for her own use and benefit, and for the use and benefit of no other person or persons whomsoever; nor had she made any contract or agreement to sell the same. In addition it was found that on August 23, 1902, her application to purchase was approved by the state surveyor general, and on August 28, 1902, she presented a copy of such approval to the county treasurer of Plumas county, paid him the amount due for said land and the amount required for a certificate of purchase; that on September 2, 1902, the registrar of the state land office issued to her a certificate of purchase, and on the following day she sold and transferred by deed, for a valuable consideration, her certificate of purchase and all her rights thereunder to the defendant Thomas B. Walker; that thereafter, and on August 29, 1903, plaintiff filed his affidavit and application with the surveyor general to purchase the same land from the state, together with a protest against the application by the defendant Marsh, which resulted in the reference for trial to the said court. As conclusions of law the court found against the right of plaintiff, and in favor of the right of the defendant Marsh, to purchase the land in question; that the certificate of purchase issued to her was valid, and that the defendant Walker as the purchaser thereof from her was entitled to a patent for the land. Judgment was accordingly entered in favor of defendants, and plaintiff appeals therefrom; his appeal being accompanied by a bill of exceptions.

The appellant attacks the principal findings in the case, and insists that the evidence, instead of supporting them, shows that the certificate of purchase issued to defendant Marsh was void, because, first, said Marsh did not apply to purchase the land for her own use and benefit, within the meaning of section 3495 of the Political Code; secondly, that her affidavit accompanying her application to purchase did not show the necessary jurisdictional facts, and therefore did not constitute a legal foundation of a right of purchase; and, lastly, that it appears from the evidence that she applied to purchase the land for the benefit of a person named N. E. Sager as well as herself.

The first and last points made by appellant are based upon the testimony of the defendant Marsh and N. E. Sager, the only witnesses in the case speaking as to the circumstances surrounding the application and purchase from the state of the land, and its sale to the defendant Walker. A reference to that testimony shows that when the defendant Marsh on April 16, 1902, applied to purchase the land, she obtained a description of it from a friend of the family, N. E. Sager. She prepared the application, and sent it to the land office herself, inclosing therewith the requisite fee of $25 from money she had saved from her earnings. She testified that she had no agreement with any one to take up the land for his use and benefit, no agreement with any one that after taking it up she should turn it over to them or dispose of it to them; that her object in seeking to purchase it was because she thought she was entitled to take it up; that she took it up for her own use and benefit, knowing that she had a right at some future time, if she saw fit, to sell it; that she took it up on what is called speculation—that is, to make what she could out of it by the sale of it—that when Mr. Sager furnished her with the description of the land, and she made her application to purchase it, nothing at all was said about selling the land to any one, or at all; that she promised to pay Mr. Sager for his services in attending to the matter, preparing and making the proofs for her, and expected to do so if she sold the land and made enough out of it; that Mr. Sager told her it would cost her $800 to purchase the land from the state, and agreed to borrow that amount for her, which he did, this advance was to be secured by a mortgage when the certificate of purchase was issued; that with this borrowed money she paid the state for the land and obtained the certificate of purchase. After the certificate was issued Mr. Sager asked her how much she was willing to take for the land, that he had found a purchaser who was willing to buy it. He did not say what he could obtain for it, but she fixed the price herself at $1,200, he to make his commission and secure payment for his services out of whatever sum he might sell the land for over $1,200. Through a Mr. Hovey, a real estate dealer, Mr. Sager sold the land to the defendant Walker. Twelve hundred dollars was paid to the defendant Marsh by Sager, out of which she repaid him the money borrowed to pay for the land, and retained the balance. The defendants Marsh and Walker were strangers to each other. No negotiations relative to this land took place between them personally. Mr. Sager was not in any way connected with or acting for the defendant Walker in the transaction. There is nothing in this evidence upon which it can effectually be insisted in this court that there was any agreement or contract between defendant Marsh and Sager whereby the latter was to acquire any interest in this land. All that the evidence shows is that Marsh was to pay Sager for his services in attending to the matter for her in the land office. Payment for these services the defendant Marsh did not expect to make, nor did Sager expect to receive, until the land was sold. The agreement to pay, then, was simply a personal obligation. It did not give Sager any interest in the land. It did not disturb her absolute control over it. She could hold or sell it just as she pleased. Their agreement did not affect the title. This was to vest absolutely in the defendant Marsh, unaffected by the claim of Sager against her for the payment for his services. Their agreement did not involve any action upon her part, or the doing of anything by her whereby any interest in the land, either directly or indirectly, should accrue or be transferred to him. He had no legal right to compel a sale of the land, and, if upon a sale she neglected to compensate him for his services, he could not, under any circumstances, assert any right against the land. The only extent to which the title to be secured by Marsh figured, relative to payment for these services, was that payment therefor was to be made to Sager when the land was sold. This merely determined the time for payment. It did not give Sager any interest directly or indirectly in the land.

In Hafemann v. Gross, 199 U. S. 342, 26 Sup. Ct. 80, 50 L. Ed. 220, an arrangement similar to the one at bar was considered by the court. A party contemplating taking up public land under the pre-emption act of the United States, which contains provisions similar to our act relative to school lands, entered into a contract with a third person whereby he agreed to give said third person one-fourth of the proceeds which he might obtain by a sale of the land, after obtaining title from the United States, in consideration of said third party locating him on land and paying one-fourth of the expenses in making his final proof. It was insisted that under this agreement the land was not to be acquired by the pre-emptor for his sole use and benefit, as the federal statute required, but operated indirectly to transfer the title in part to such third party. The court, after discussing the matter fully, holds that such contract vested no interest in the land in such party, concluding (to quote briefly what was said by the court concerning such contract) that "it was simply a promise to pay money in case of a sale by the patentee, the amount of the payment to be determined by the sum received on the sale. It was a promise which in no event could be enforced against the land. It was only a personal obligation of the patentee. It might never be enforceable against him, and could not be except upon his sale of the land. Of course, it would not be contended that a simple promise to pay money by one seeking to acquire title under a homestead was not binding, and, if the only effect of the contract is to measure the sum which the patentee agrees to pay by that which he may receive when he sells the land, it cannot be held that a contract has been made for an alienation of the title in whole or in part, or that the land was not acquired for the sole use and benefit of the patentee." Neither did the arrangement between Marsh and Sager for the borrowing of sufficient money to make payment for the land give the latter any interest in it, or constitute an agreement for an interest therein. The transaction consisted simply of a loan to be repaid on a sale of the land, or to be secured by mortgage after the certificate of purchase was obtained. It became unnecessary to mortgage because the sale was made immediately upon the issuance of the certificate and obviated it. There is no law which prevents a purchaser from the state from borrowing money with which to make payment for the land under an agreement to mortgage the land to secure its repayment after the certificate of purchase is obtained.

Appellant insists, it is true, that the court should have found as a necessary inference from all the facts surrounding the purchase by Marsh that it was for the joint benefit of herself and Sager; that the fact that Sager called her attention to the land; that she was to pay him for his services relative to it; the borrowing through or from him of the money to make payment therefor, and the sale to Walker immediately on obtaining the certificate of purchase showed by necessary inference that an agreement relative to acquiring this land for the benefit of both of them existed. But both of these persons testified positively that no arrangement existed. It was for the trial court to determine what were the facts respecting the matter, and to draw all such inferences as the evidence warranted. All these were determined in favor of the defendant Marsh. In the face of the positive statements of Marsh and Sager that no agreement existed, the court would hardly be warranted in indulging in inferences to the contrary. If their statements could be considered as equivocal, an inference against the existence of any agreement prohibited by statute, and that the defendant Marsh was proceeding in good faith to acquire this land in compliance with the law, should be indulged in, rather than that she was proceeding fraudulently and by perjury to acquire title to it, and that Sager was a party to her acts.

Coming now, however, to the main contention of appellant on this appeal: It is provided by the Political Code (section 3495), among other things, that an applicant to purchase school lands not suitable for cultivation, such as the land in question here, timber land, must state in his affidavit "that he desires to purchase the same for his own use and benefit and for the use or benefit of no other person or persons whomsoever, and that he has made no contract or agreement to sell the same." It is further provided by section 3515 of the same Code that "certificates of purchase and all rights acquired thereunder are subject to sale by deed or assignment," etc. It is claimed by appellant that one who applies to purchase school land from the state must not have in contemplation at the time of the application a sale of the land when he obtains the certificate of purchase; that, if he has, he does not come within the terms of the section as a purchaser of the land for his own use and benefit; and that, as the defendant Marsh when she applied to purchase had in contemplation a sale of the land, if she could obtain a satisfactory price therefor, as soon as she obtained the certificate, her purchase with this object in contemplation was a fraud upon the state, rendering her certificate subject to cancellation. In other words, it is contended that the purchase by the defendant Marsh was solely with a view to speculation; that is, with a view of selling it after she obtained the certificate of purchase and could obtain the price she wished. But it will be observed that the Code (section 3515) authorizes a sale of the land—a sale of the certificate of purchase which carries the applicant's rights thereto—immediately it is obtained, and we can perceive no good reason why, where the law says the land may be sold when the certificate of purchase is obtained, one may not have in mind, at the time the application to purchase is made, a purpose to do with the land in the future what the law authorizes may then be done. The Code provision does not, as does the federal statute relative to the acquisition of government lands—say timber and stone lands—require the applicant to make oath "that he does not apply to purchase the same on speculation," etc. All that the Code requires is that the applicant when he applies to purchase shall do so for "his own use and benefit, and for the use or benefit of no other person," and that "he shall have made no contract or agreement to sell the same." This does not mean that the applicant must go into possession and occupy the land, and personally devote it to the uses of which it is capable. Occupation of the land at the time one applies to purchase school land is only required when it is capable of cultivation. It does not apply when the land is timber land. The provision of the section simply means that, when one makes application to purchase, he does so with the intention and purpose of deriving whatever profit or advantage may accrue through such purchase for himself alone, as contradistinguished from a purchase for the profit and advantage of some other person. As an element entering into that benefit he may properly have in contemplation a sale of the land at a profit, sometime after he has obtained his certificate of purchase, and when the law expressly authorizes such a sale.

While counsel for appellant has argued elaborately the proposition that a purchase from the state in which the element of speculation enters—the contemplation at the time of purchase of a future sale at a profit when the certificate of purchase is obtained—is a fraud necessitating the cancellation of such certificate, we do not think it necessary to follow that discussion or to pursue this matter any further than to consider the authorities cited both by himself and the respondents, and see if they tend to a solution of the question. These authorities all have reference to the construction given to the provisions of a federal statute relative to the location and purchase of a certain character of government lands, namely, stone and timber lands. They are pertinent to this inquiry because the federal statute authorizing the location of stone and timber lands contains provisions in some respects identical with, and in all similar in effect to, those of section 3495 of the Political Code, with a special provision against purchase for speculation, which our Code provision does not contain. Our section of the Political Code as it stood prior to the year 1880 contained no provision whatever requiring the applicant to swear that he desired to purchase the land for his own use and benefit and for the use or benefit of no other person, and that he had made no contract or agreement to sell it. It was amended in 1880 to so require, and the provision in that respect was undoubtedly copied from the federal statute providing for the sale of stone and timber lands of the government. This federal act provides, as to the purchase of such lands, that "the applicant must make oath that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever by which the title which he may acquire from the government of the United States should enure in whole or in part to the benefit of any person except himself." It will be noted in passing that, while following in the main the federal act, our Legislature eliminated the provision therein with reference to speculation. This omission in our statute is significant; but in view of the authorities to which we are presently to call attention, comment on it will be unnecessary. Now, this provision of the federal act, in as far as the purchase of timber lands from the government on speculation was involved, came before both the land department and the federal courts for consideration.

It is claimed by appellant that both the Interior Department and the federal courts have sustained the contention made by him that a purchase of public lands in contemplation of a future sale for a profit was such a speculation as vitiated the purchase, as not being for the sole use and benefit of the applicant. In this regard appellant relies on U. S. v. Bailey, 17 Land Dec. Dep. Int. 468, a decision of Commissioner Smith; Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157; United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 67 C. C. A. 1. In United States v. Bailey, and Hawley v. Diller, the same timber land entries were involved and were held void as being speculative entries. But the entries involved in those cases were of vast tracts of timber land procured to be located by a land agent named Lohr, working in the interests of one Bailey. He picked up clerks, bartenders, grocerymen, school teachers, lawyers, in a word everybody who was willing to make a location, or to be concerned in it for a consideration. He induced them to make the purchase, telling them that he would buy their claims and give them $50 more than anybody else would. They made the entries solely under the inducement and he made the payments, and had the entrymen convey their claims to Bailey immediately after their entries were made. In Hawley v. Diller the timber entries were made by large numbers of sawmill employés for the use and benefit of the Martin-Alexander Lumber Company, and not in good faith to appropriate them to their own use and benefit.

These decisions are not based upon a finding that when the entries were made the entrymen, while taking the land for their own use and benefit, had in contemplation generally the sale of it in the future for a profit and hence the entry was speculative under the act, but upon a finding that the entries were made not in good faith or for the use and benefit of the entrymen themselves, but for the use and benefit of certain specified third persons. In the first cases, the entries were made under an express agreement with Lohr and for his benefit, or the benefit of Bailey, at a designated profit, and in the last case, under a tacit understanding, for the use and benefit of the Martin-Alexander Company. These cases do not support the contention of appellant that because an applicant to purchase has in mind a future sale of the land at a profit when he acquires the title, though he does not apply to purchase it for the use and benefit of some particular person, and has made no contract for its sale, he therefore does not purchase it for his own use and benefit. They are authority only to the proposition that an entry for the benefit of a particular third person, under an express or implied agreement to convey to him upon entry for an advance over the government price, is not for the use and benefit of the entrymen, which is, of course, true. But that is not this case. Here the court found that defendant Marsh did not apply for the land for the use or benefit of any third person, and that she had no contract or agreement to sell the same, which the evidence sustains, and the real point is, having in contemplation a sale in the future, whether her application to purchase with that contemplation can be said to be for her own use and benefit, and that it can we are satisfied is sustained by two authorities of the federal courts, the only tribunals to which this exact question seems to have been presented. These cases also arose under the federal timber lands act, the provisions of which, as similar to our own, we have heretofore quoted. These cases are United States v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384, and Olson v. United States, 133 Fed. 849, 67 C. C. A. 21.

In the Budd Case, in construing this statute relative to the purchase of timber land, the court, after reciting the facts (unnecessary to be stated here because the proposition we are concerned with is declared in the quotation we made), said: "It simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase them. This was perfectly legitimate and implies or suggests no wrong. The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement—the acting for another in the purchase. If when the title passes from the government no one save the purchaser, has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity and make generally known or to individuals a willingness to buy timber lands at a price in excess of that which it would have cost to obtain it from the government, and any person knowing of that offer might rightfully go to the Land Office and make application and purchase a timber tract from the government." As we understand this decision, it holds in effect that under the federal statute providing against the entry of land for speculative purposes, or for other than the sole use and benefit of the entryman, it is none the less an entry for his use and benefit under the act, because he makes the entry in contemplation of a future sale to any person who may be willing to purchase when he has secured the title.

In the Olson Case the same federal act was under consideration and involved the same proposition. The court there said: "The statute did not limit the dominion which the purchaser had over the land after its purchase from the government, or restrict in the slightest his power of alienation. The statute only prohibits his entering the land under an agreement whereby he was acting for another. He might make a valid entry of such land, though with a view of disposing of the same after he had completed the purchase, providing that at and before the time of such purchase he had not entered into an agreement with another whereby such other should receive any of the benefits of such purchase. * * * What the statute prohibited was not alone a prior agreement that the title, or any part thereof, which the purchaser should acquire should be conveyed to another, but that the land should not be acquired on speculation for the use and benefit of another. We have no hesitancy in holding its true meaning to be that any citizen of the United States may purchase land as therein provided where such purchase is for his own exclusive use and benefit, notwithstanding at the time of the purchase he may have in contemplation a future sale for a profit. What the statute denounces is that a party shall not at the time of the purchase have, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons, by which the title which he may acquire shall inure, in whole or in part, to the benefit of any person except himself. The application for the land must be made in good faith, for his own exclusive use and benefit, and not as the agent or hireling of another to obtain the land for someone besides himself."

Under these authorities (and independent of the proposition that as section 3515 of the Political Code authorizes a sale of the land upon issuance of the certificate of purchase it could hardly be considered fraudulent to contemplate doing, when making the application, what the law says may be done in the future) we are satisfied that defendant Marsh had a right, when she made her application to purchase this land, to have in contemplation a sale of it for profit at any time after obtaining a certificate of purchase therefor. These authorities, construing the statute of the United States similar in all respects to ours, hold that it is perfectly legitimate and proper to have such a disposition of the land in contemplation when applying to purchase it, and we are not disposed to place upon our Code section a different construction than the United States Supreme Court has placed upon an act of congress containing similar provisions. These authorities construe the meaning of the words "use and benefit" in the federal act as imposing no limitation upon the entrymen as to the contemplation at the time he makes his entry of a future sale of the land when he has secured the title from the government, and, adopting that construction and applying it to similar language in our Code provision, it imposed no limitation on the defendant Marsh as to having in contemplation at the time she made her application a sale of the land on obtaining the certificate of purchase. The only limitation upon her right to purchase was that she should not apply for its purchase for the use or benefit of any other person, and should have made no contract or agreement by which the title she might obtain would inure to any person other than herself, and on these matters the court found in her favor.

The only other point made by appellant is that the application of defendant Marsh did not show the necessary jurisdictional facts, and therefore did not make the legal foundation of a right to purchase, and this is based upon her failure, being a female applicant, to show in her affidavit that she was entitled to purchase real estate in her own name as provided by section 3496 of the Political Code. In her affidavit as regards this requirement she stated simply that she was entitled to purchase and hold real estate in her own name. A proper compliance with the section required that she should have shown she was entitled to purchase, not simply state the fact that she was. Price v. Beaver, 73 Cal. 625, 630, 15 Pac. 356. She did, however, state the fact, though imperfectly, and, as upon the contest it appeared she was an unmarried woman and hence entitled to hold real estate in her own name, we are not inclined to hold her application void for this imperfection of statement.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.

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151 Cal. 303

## PEOPLE v. AMER. (Cr. 1,371.)

(Supreme Court of California. May 16, 1907.)

1. CRIMINAL LAW—NEW TRIAL—GROUNDS—STATUTORY PROVISIONS.
   Pen. Code, § 1181, providing that a new trial may be granted only on the grounds therein specified, is exclusive of other grounds.

2. SAME—MISCONDUCT OF DISTRICT ATTORNEY.
   Neither Pen. Code, § 1181, subd. 5, providing for the granting of a new trial where the court has misdirected the jury in matter of law or has erred in the decision of any question of law arising on the trial, nor subdivision 6, providing for the granting of a new trial where the verdict is contrary to law or evidence, authorize the granting of a new trial for misconduct of the district attorney.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2197-2201.]

3. SAME—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.
   On a trial for embezzlement, testimony that a few days before the discovery of the shortage defendant paid witness a certain amount on an interest-bearing indebtedness not matured was not prejudicial.

4. SAME—TRIAL—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.
   An instruction, calling attention to the testimony of a witness for the people as opposed to the testimony of a witness for defendant, which carried with it the intimation that the people's witness was to be distrusted, was properly refused.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1772, 1773.]

5. SAME—APPEAL—HARMLESS ERROR—INSTRUCTIONS.
   Where, on a trial for embezzlement by a county treasurer, there was no question as to the truth of the uncontradicted evidence of the officers who made the official count of the money in the county treasury as to the amount and kinds of money and vouchers, etc., then in the treasury, the refusal of a requested instruction that it was the presumption of law that the report then made by them was correct could not have affected the verdict in any degree.

6. SAME.
   In a prosecution for embezzlement by a county treasurer, the information charged the embezzlement of an amount named, lawful money of the United States; the same being public funds of that county received by defendant for the use of the county. The uncontradicted evidence showed that at the time of the official counts of the money in the county treasury, made preceding the disclosure of the shortage, there was on hand, as a portion of the balance, in place of coin, certificates of deposit, checks, and money orders, which had been received as money by the treasurer from the tax collector, and which were apparently carried as money by him and counted as money by the auditing board. *Held*, that an instruction that, if the sworn statement made by defendant showed a balance of money on hand, the presumption was that the balance was lawful money of the United States, and that the county treasurer was not authorized to accept checks or certificates of deposit in payment of taxes, though given without good reason therefor, was not prejudicial.

McFarland, J., dissenting in part.

In Bank. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

W. M. Amer was convicted of embezzlement, and from an order granting a new trial the state appeals. Order reversed, with directions to enter an order denying a new trial.

U. S. Webb, Atty. Gen., and R. R. Fowler, Dist. Atty., for the People. F. G. Ostrander, Lewis H. Smith, G. G. Goucher, and Raleigh E. Rhodes, for respondent.

ANGELLOTTI, J. This is an appeal from an order granting a motion for a new trial made by defendant after conviction of the crime of embezzlement of public funds while treasurer of Madera county. The language of the order granting the motion was such as to exclude insufficiency of the evidence as a ground of the action of the court. The trial court, according to the language of the order, granted the motion solely on the ground of misconduct of the district attorney in his closing argument to the jury. It is not claimed that there was any error of the trial court in relation to the alleged misconduct. In fact, it affirmatively appears that the learned trial judge, immediately upon the making by the district attorney of the remarks alleged to constitute misconduct, emphatically and at length correctly instructed the jury as to the law applicable to the matters referred to by the district attorney, and admonished them to disregard such remarks. The same thing was more elaborately done by the court in its charge to the jury.

The principal question presented by this appeal is as to whether, in a criminal case, misconduct of the district attorney, unaccompanied by any error of the court, can warrant the granting by the trial court of a motion for a new trial. In view of the positive and unambiguous language of section 1181 of the Penal Code, it is clear that a motion for a new trial can be granted only in the cases therein mentioned. That language in terms limits the authority of the court to grant a new trial to the grounds therein specified. That the section means exactly what it says was held by this court in People v. Bernstein, 18 Cal. 699. The statutory provision as to new trials then in force was substantially the same as the present provision, except that when that case arose newly discovered evidence was not specified as one of the grounds upon which a new trial could be granted; that ground having been subsequently added by amendment. The defendant moved for a new trial upon the ground of newly discovered evidence, and this court disposed of the motion in these words: "It will be seen that the statute not only does not allow this as a ground for setting aside the verdict, but that it enumerates certain other grounds as those exclusively allowable to that end. This was done designedly, and we have no power to supply the omission. The Legislature had full power to prescribe the cause and grounds of this application. If, in any case, injustice be done in consequence of this omission, the resort is not to the courts, but to the executive." A substantially similar question was presented in People v. Fair, 43 Cal. 137, 147, where this court held, expressly overruling People v. Plummer, 9 Cal. 298, that an objection to the competency of a juror, taken for the first time after verdict, cannot be availed of on motion for a new trial. The court said: "In reference to a motion for a new trial, the statute has not only enumerated the grounds upon which it may be made, but has expressly excluded all others." See, also, People v. Shainwold, 51 Cal. 468; People v. Bawden, 90 Cal. 195, 199, 27 Pac. 204; People v. Simmons, 119 Cal. 1, 50 Pac. 844. Whatever may be the rights under the Constitution of a defendant on an appeal from a judgment, whether or not the remedy by motion for a new trial shall exist in any class of cases, and, if so, upon what grounds, are questions for the exclusive determination of the Legislature.

Misconduct of the district attorney is not, eo nomine, specified by the statute as a ground upon which a new trial may be granted, and, in our judgment, there is no specification therein that can, by any possibility, be held to include it. There is no claim that it is so included, unless it is covered by the language of subdivision 5 or subdivision 6 of section 1181 of the Penal Code. Subdivision 5 provides for the granting of a new trial when the court has misdirected the jury in matter of law, or has erred in the decision of any question of law arising during the course of the trial, and subdivision 6 provides for the granting of a new trial "when the verdict is contrary to law or evidence." These were the grounds specified on the motion for new trial. We have already seen that the court did not misdirect the jury in this matter, or err in the decision of any question of law arising in regard thereto. It, of course, cannot be claimed that the mere fact that the district attorney has been guilty of misconduct renders a verdict contrary to the evidence. A verdict is contrary to the evidence only when the evidence introduced upon the trial does not warrant the conclusion reached by the jury. Nor can it be held that the verdict is "contrary to law" simply because there has been misconduct on the part of the district attorney, however prejudicial to defendant's rights the court may deem such misconduct to have been. If the verdict itself is in no degree opposed to the law applicable to the case, in the light of the evidence received by the court on the trial, it is not "contrary to law," within the meaning of that term as used in subdivision 6, § 1181, Pen. Code, no matter what causes may have operated to influence the jurors to render it. That subdivision has to do solely with the verdict as rendered, and not with the causes that produced it; the sole questions thereunder being as to whether it is sustained by the evidence admitted, and as to whether it is opposed to the law applicable to the case. To give to the term "contrary to law" any broader meaning would make it include every improper influence that may have operated upon the minds of the jurors to the prejudice of a defendant, and render any further specification of such things by statute as grounds for a new trial superfluous. Improper evidence erroneously admitted by the court, evidence wrongfully received by a juror out of court, erroneous instructions as to the law, misconduct of jurors, and errors in the decision of any question of law arising on the trial, might all so operate as to make a verdict contrary to law in such a general sense, yet we find all these things carefully specified in section 1181, Pen. Code, as separate grounds for a new trial. Unless we are to hold that nothing was meant by the careful specification in section 1181, Pen. Code, of the "only" cases in which a motion for a new trial may be granted, and that any prejudicial irregularity in the proceedings not specified in any other subdivision will render the verdict one "against law," thus rendering meaningless and superfluous the express provision of the section that a new trial may be granted "in the following cases only," the provision "when the verdict is contrary to law or evidence" must be given the construction already stated. The words "contrary to law," as here used, mean no more than the words "against law," used in subdivision 6 § 657, Code Civ. Proc., in relation to the verdict in a civil case in the specification of grounds for a new trial. That section expressly provides in subdivision 1 that a new trial may be granted in civil cases for "irregularity in the proceedings of the * * * adverse party, * * * by which either party was prevented from having a fair trial," which undoubtedly includes prejudicial misconduct of an attorney of the adverse party, but no such provision was made in the section relative to criminal cases. It was held in Brumagin v. Bradshaw, 39 Cal. 35, that the words "against law," as there used, included no cause falling within any other subdivision of section 657, Code Civ. Proc. This narrowing of the meaning of the term from the broad general sense which would make it include every prejudicial irregularity in the course of the proceedings that may have contributed to the rendition of the verdict necessarily brings us to the construction stated, and this gives to the term the definite and specific meaning well recognized by the authorities.

It appears very clear to us that mere misconduct of the district attorney is not included within any of the statutory grounds upon which a trial court may grant a motion for a new trial. We are brought somewhat reluctantly to this conclusion, in view of the apparently well-settled doctrine in this state that the appellate court will order a new trial on account of such misconduct, where it is prejudicial to the rights of a defendant, and as long as this rule obtains it is obviously preferable that the trial court should have the power to entertain a motion on this ground. But that such a ground can avail in support of the statutory motion for a new trial can by no means be held to be settled by the decisions, and such a conclusion would be so opposed to the plain terms of the statute that we cannot assent to it. The only cases that we have been able to find, which may fairly be said to intimate that misconduct of the district attorney may be considered a sufficient ground for granting a motion for a new trial, are those of People v. Sing Lee, 145 Cal. 190, 78 Pac. 636, and People v. Sansome, 98 Cal. 235, 33 Pac. 202, both department cases. In People v. Sing Lee, supra, an order granting a new trial on this ground was affirmed, but the opinion of the commissioners shows that the point now under consideration was not suggested or considered. In People v. Sansome, supra, it was squarely held that motion for new trial was the proper remedy, but this conclusion appears to have been reached without any consideration of the language of section 1181, Pen. Code. While in very many cases misconduct of a district attorney has been considered, and in several held to be of such a nature as to necessitate a reversal, in no other case that we have found was the matter before the court solely on an appeal from an order made on motion for a new trial. The usual appeal in criminal cases in one from both judgment and order denying a motion for a new trial, and the question as to misconduct has been usually presented on such an appeal, and by a bill of exceptions. In one case (People v. Derbert, 138 Cal. 467, 71 Pac. 564) the only appeal under consideration was one from the judgment, and the judgment was reversed on the ground of misconduct of the district attorney, thus practically disposing of the one point decided to the contrary in People v. Sansome, supra. In the much-cited case of People v. Wells, 100 Cal. 459, 34 Pac. 1078, where the appeal was from both the judgment and the order denying a new trial, this court declared that a judgment would be reversed for prejudicial misconduct on the part of the district attorney. In view of the fact that the misconduct of the district attorney has so often been held to constitute a sufficient ground for reversal of the judgment, it may be that it has become a settled rule that the question of misconduct of the district attorney will be considered upon an appeal from the judgment, when presented by a proper record, and the points saved for review by exception. If, however, as appears clear, such misconduct is not one of the statutory grounds upon which the trial court may grant a motion for a new trial, an order of such court granting a new trial on that ground alone, where no other good legal ground for such action appears, is erroneous, and must be reversed on appeal.

Certain other matters are somewhat briefly urged in support of the order granting a new trial, but we entirely agree with the learned judge of the trial court that none of them was of such a nature as to warrant the granting of the motion. The testimony of the witness Price that the defendant, a few days before the discovery of the shortage in his office, paid him on an interest-bearing indebtedness not due for several months the sum of $75, even if immaterial, was not important, and could not have been prejudicial. The requested instruction numbered 35, calling particular attention to the testimony of a certain witness for the people as opposed to the testimony of a witness for the defense, carried with it the intimation that the witness for the prosecution was to be distrusted, and was properly refused. There was no question as to the truth of the uncontradicted evidence of the officers who made the official count of the money in the county treasury on December 27, 1895, as to the amount and kinds of money and vouchers, etc., then in such treasury, and the refusal to give the requested instruction 36 to the effect that it was the presumption of law that the report then made and signed by them, which corresponded with their evidence, was correct, could not have affected the verdict in any degree. The subject-matter of requested instruction 37 was fully and correctly covered by the charge of the court.

The evidence showed without conflict that at the time of the official counts of the money in the county treasury made during the two months next preceding the disclosure of the shortage there was on hand, as a portion of the balance, in place of coin, certificates of deposit of certain local banks for large amounts, and some checks and money orders for small amounts, which had been received as lawful money by the treasurer from the tax collector. Apparently these certificates, checks, and money orders were all convertible into coin by the treasurer at their face value, and they were carried as money by him, and counted as money by the auditing board. The information charged the embezzlement of $32,521.39, "or thereabouts, lawful money of the United States, the same then and there being public funds of said county of Madera, * * * which said money he * * * had received as such county treasurer for the use and benefit of said county." Under these circumstances complaint is made of an instruction given by the court to the effect that, if the regular sworn statement made by the defendant to the county auditor showed a balance of money on hand, the law presumes in the absence of proof to the contrary that such balance was in lawful money of the United States, and, further, that the county treasurer is not authorized by law to accept any checks or certificates of deposit in payment for state and county taxes, fees, or licenses, collected by any officer of the county, and is only authorized to give his official receipt when lawful money of the United States is actually paid into the treasury by the county officers. The latter portion of the instruction was simply an explanation of the presumption stated in the former portion. As an abstract proposition of law, the instruction was manifestly correct, but in view of the state of the evidence we cannot see any good reason for giving it. At the same time, we cannot conceive that, under the circumstances shown by the record, it could have operated prejudicially to defendant's cause.

The order granting defendant's motion for a new trial is reversed, with directions to the court below to enter an order denying the same.

We concur: SHAW, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

McFARLAND, J. (dissenting). I dissent, and think that the order of the trial court granting a new trial should be affirmed.

The state Constitution provides that no person shall be compelled in any criminal cause to be a witness against himself; and section 1323 of the Penal Code declares that the neglect of a defendant to testify as a witness "cannot, in any manner, prejudice him, nor be used against him on the trial or proceeding." In the case at bar the defendant did not testify, and the district attorney, in his address to the jury, willfully and deliberately called attention to the fact that defendant had not offered himself as a witness, and based an argument against him upon the fact that he had not testified. I do not understand that any one contends that this was not a gross violation of the provision of the Code above mentioned, and of defendant's rights under it, or that it could be held to be not prejudicial, or that it should not warrant a reversal provided there is any way to review it, and that defendant's counsel took proper steps to have it reviewed. But defendant made a motion for a new trial upon all statutory grounds. The motion was granted by the trial court on account of the said misconduct of the district attorney above stated. The people appeal from the order granting the new trial, and, of course, there is no appeal by defendant from the judgment. It is therefore contended that as misconduct of the district attorney is not expressly made one of the grounds of a motion for a new trial, by section 1181 of the Penal Code, therefore, the order granting a new trial was erroneously made in the case at bar, and that, as there is no appeal from the judgment, there is no way for defendant to have the said misconduct of the district attorney reviewed, no matter how flagrant and prejudicial it may have been.

It is intimated that the point sought to be made might be considered upon an appeal from a judgment; but I do not see how that could be if it cannot be a ground for a new trial. The judgment would not show any erroneous rulings or action by the court; and on such appeal the judgment could be reversed only on the general ground that a verdict founded in whole or in part upon the effect of a violation of the law by the district attorney would be a verdict contrary to law. But subdivision 6 of section 1181 expressly enumerates as a ground for a new trial "where the verdict is contrary to law." If a verdict founded upon the misconduct of the district attorney is not a verdict contrary to law, then it cannot be touched either on appeal from the judgment or on motion for a new trial. It seems to me that such a verdict is clearly contrary to law, and therefore was within the sixth subdivision of section 1181. If a point made is that "the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial," then, of course, the motion would be based on subdivision 5 of said section; but in the case at bar the point is not that the court misdirected the jury in a matter of law. Has not the phrase in subdivision 6 "contrary to law" some meaning? Suppose that that section had only enumerated two grounds for a motion for a new trial—first, "that the verdict is contrary to the evidence"; and, second, that the verdict "is contrary to law." In that event could not a motion for a new trial be based on the ground that the verdict is against law? And yet the section, as it stands, limits the grounds "contrary to law" only by the case where the court has misdirected the jury as to some matter of law. Other kinds of verdicts contrary to law are embraced in subdivision 6, and therefore the only question is this: Is a verdict based on such misconduct of the district attorney, as is shown in the case at bar, "contrary to law?" and, in my opinion, as before stated, it is clearly so. It is founded upon and the result of a direct violation of law. And certainly in a criminal case such a construction of a provision of law as would enable a defendant to present the merits of his case should be followed, where it is permissible. The question has not been definitely settled by this court adversely to these views, and they were followed in People v. Sansome, 98 Cal. 225, 33 Pac. 202, and People v. Sing Lee, 145 Cal. 190, 78 Pac. 636. The opposite view would make section 1323 of the Penal Code a mere ineffectual and nugatory declaration which could be violated by the district attorney at his pleasure without any redress whatever on the part of the aggrieved defendant. It would be akin to Dogberry's charge to the watch: "Dog. You shall comprehend all vagrom men. You are to bid any man stand, in the prince's name. Sec. Watch. How if a' will not stand? Dog. Why, then, take no note of him, but let him go; and presently call the rest of the watch together and thank God you are rid of a knave."

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151 Cal. 331

## Ex parte McMANUS. (Cr. 1,376.)

(Supreme Court of California. May 22, 1907.)

1. Constitutional Law — Uniformity — Class Legislation.

St. 1901, p. 641, c. 212, provides for the appointment of a board of architecture to provide regulations for the examination of certified architects, and makes it a misdemeanor, punishable by a fine, for a noncertified person to hold himself out as an architect, except that the act shall not apply to a person making plans for his own buildings or furnishing plans, etc., to others whom he has fully informed that he is not a certified architect. *Held*, that such act is not in violation of Const. art. 1, §§ 11, 21, requiring all acts to operate uniformly on all belonging to the class on which it is intended to operate, and prohibiting the granting of special privileges and immunities to some of the class not granted to all.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 651.]

2. Same—Legislative Power—Delegation.

Such act was not objectionable as a delegation of legislative power to a board of architecture, because the Legislature did not itself provide a system of reasonable rules for the examination and certification of architects, but authorized the same to be provided by the board.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 99.]

3. Same—Unreasonable Rules—Adoption—Effect.

The adopting of discriminating or unreasonable rules by the board would not affect the validity of the act, but would merely constitute a violation of its provisions; such rules being subject to vacation by a person affected by a proper proceeding for relief.

4. Habeas Corpus—Proceedings—Scope.

The adoption of discriminating or unreasonable rules for the examination and certification of architects by the state board of architecture, under the authority conferred by St. 1901, p. 641, c. 212, did not justify an attack on the validity of the act in habeas corpus proceedings by a person arrested for practicing architecture without a certificate, in violation thereof.

5. Constitutional Law — Officers — State Board of Architecture—Appointment—Delegation of Power.

St. 1901, p. 641, c. 212, providing for a state board of architecture to consist of 10 persons, to be appointed by the Governor from two specified chapters of the American Institute of Architects, or some similar institution or association of architects, is not invalid as providing an improper method for the appointment of such board.

In Bank. Application by E. C. McManus for habeas corpus. Writ denied.

Galpin, Elkins & Frost, for petitioner. Jordan, Rowe & Brann, for respondent.

LORIGAN, J. The petitioner was arrested, charged with practicing the profession of architecture without a certificate from the state board of architecture, and brings this proceeding on habeas corpus.

The state board of architecture was created by an act of the Legislature approved March 23, 1901 (St. 1901, p. 641, c. 212). The act was amended in 1903 (St. 1903, p. 522, c. 376); but, as this amendment does not affect the question here involved, no further reference shall be made to it. The act of 1901 provides that the state board of architecture shall consist of 10 persons, appointed by the Governor, 5 from the San Francisco chapter, and 5 from the Southern California chapter, of the American Institute of Architects, or some similar institution or association of architects, and empowers such board to grant certificates to practice the profession of architecture upon an examination of applicants therefor. As to such examination, the act provides that the board shall "formulate and adopt a code of rules and regulations for its government in the examination of applicants for certificates to practice architecture in this state; and such other rules and regulations as may be necessary and proper, not inconsistent with this act," and "should the applicant pass a satisfactory examination" grant him a certificate. It is further provided that any architect in good standing, engaged in the practice of the profession of architecture on the date of the passage of the act, and applying to the board therefor within six months from the passage of the act, shall be granted a certificate without passing an examination. The act then proceeds to declare that: "After the expiration of six months from the passage of this act, it shall be unlawful, and it shall be a misdemeanor punishable by fine of not less than $50 nor more than $500 for any person to practice architecture without a certificate in this state, or to advertise or put out any sign or card or other device, which might indicate to the public that he was an architect; provided that nothing in this act shall prevent any person from making plans for his own buildings, or furnishing plans or other data for buildings for other persons, provided the person so furnishing such plans or data shall fully inform the person for whom such plans or data are furnished that he, the person furnishing such plans, is not a certificated architect. * * *" These are the only provisions of the act necessary to refer to, as they are the only ones involved in the consideration of this application.

The claim of the petitioner is that the act in question is unconstitutional and void. It is not contended but that the Legislature has the power, for the protection of the public, to regulate the practice of any particular profession which requires the possession of special knowledge, skill, and training in its exercise, nor that the profession of architecture is not within that class. In fact, this right and its exercise with reference to architects is conceded; but it is claimed that, in attempting to exercise it under the act in question, certain provisions of our state Constitution were violated, and the act is therefore void. In this regard it is insisted that the act is violative of sections 11 and 21, art. 1, of the Constitution of this state, in this: That, while the law is one of a general nature, it does not operate uniformly upon all who belong to the class upon which it is intended to operate; but that it grants special privileges and immunities to some of the class which are not granted to all. In other words, it is contended that there is a distinct and arbitrary discrimination in favor of architects who inform their patrons they are not certificated architects, and a grant to such class of immunity from punishment which may be inflicted upon other architects who do not inform their patrons they are certificated architects. We do not perceive any force in this contention of petitioner. There is no class discrimination as to uncertificated architects, but, on the contrary, the act operates uniformly upon all that class. Any one of the class of uncertificated architects can practice his profession under the terms of the act—that is, prepare plans and other data for buildings—without rendering himself amenable to punishment, by informing his client or patron that he is not a certificated architect. This is open to all uncertificated architects. The purpose of the law in providing for certificated architects was, as we have incidentally remarked, in the interest of and for the protection of the public. The possession by an architect of a certificate of the state board of architects was in the judgment of the Legislature a sufficient guaranty to the public of the skill and fitness of its holder to pursue his profession. The further provision of the statute that an uncertificated architect might practice architecture to the extent stated therein, provided he informs his employer that he has no certificate, was equally in the public interest, because the employer is thereby placed on his guard as to whether he will employ an architect who had not obtained the certificate, which, if his skill and knowledge warranted, he could have obtained from the state board. As this provision of the law applies to all architects who have not a certificate, we cannot discover any support for the objection that any arbitrary or other discrimination as to members of that class exists. Neither do we perceive how under the act any special privileges or immunities are granted to any of the class of uncertificated architects, which are not possessed by, or extended to, all. That entire class are accorded the privilege and right to practice architecture, provided they inform their patrons that they do not hold certificates, and they are granted immunity from punishment provided they do so. Hence the same privileges and the same immunities apply to all of the class.

It is next asserted that the act is void because, in attempting to regulate a lawful occupation, the Legislature has provided no standard of proficiency, nor prescribed any rules under which the qualifications of an applicant for a certificate can be determined. It is insisted, in this connection, that it was the duty of the Legislature to have itself fixed in the act some standard or rules for determining the qualifications of applicants; that this was a legislative duty to be discharged by the Legislature itself, and a function which it could not delegate to the board of architecture, nor invest it with arbitrary power to provide a standard or rules upon the subject. It is undoubtedly a well-recognized maxim of constitutional law that authority conferred on the Legislature to make laws cannot be delegated by it to any other department or body; but here there is no delegation by the Legislature to the state board of architecture of the power to declare what the law shall be. That is declared by the act. It is an equally well-recognized principle that the Legislature, notwithstanding it may do things itself, may nevertheless authorize them to be done by ministerial officers or boards when it believes that they can do them more conveniently and effectually than it can itself. Especially may this be done when it is deemed proper by the Legislature to regulate in the interests of the public, through public commissions or boards constituted for that purpose, the pursuit of particular professions or occupations, as, for example, that of physicians, dentists, druggists, engineers, architects, and others, which involve the exercise of skill and the possession of special knowledge and experience. Such commissions or boards are composed, as under this act the board of architects necessarily must be, of persons technically skilled and trained in their profession or occupation, and who are usually better able to determine whether an applicant for a license or certificate to practice a given profession or occupation is competent to do so, under reasonable rules and standards adopted by them, than under those which might be prescribed by the Legislature; and if in its wisdom the Legislature authorizes such a technically trained commission or board to prescribe reasonable rules, or fix a fair standard for determining the proficiency of applicants for a license or certificate, it cannot be said that a delegation, within the constitutional inhibition, of authority to make laws is conferred, or any other authority given, than the power necessary to be exercised by them to the end that the law as completely enacted by the Legislature may properly be carried into effect. Nor is the objection of petitioner that, by the provision authorizing the board to adopt rules and regulations for the examination of applicants, discretionary and arbitrary power is conferred upon the board under which discriminating, unreasonable and unfair rules and regulations may be established. No arbitrary power is conferred on the board in this respect. The authority conferred by the terms of the statute is to pass necessary and proper rules on the subject; rules which must be reasonably adapted for the purpose of determining the qualifications of all applicants to practice the profession of architecture from an examination of the applicant on subjects pertaining to that profession. It was not necessary in the act to declare in terms that the rules and regulations which the board might adopt should be reasonable ones, although the requirement that they be necessary and proper ones amounts to the same thing. There is always implied in a grant of authority, such as here conferred, that it shall be exercised reasonably and fairly so as to effectuate the end contemplated. It may not be presumed that the authority conferred will be abused by the formulation of unreasonable or unjust rules, and from such presumption declare the act to be unconstitutional. On the contrary, the presumption is that the board will not act unreasonably or unfairly. As under the terms of the statute, as well as in contemplation of law, the authority conferred upon the board is to make necessary and proper, and hence reasonable, rules relative to the subject of the examination of applicants, it can be of no moment to consider the possibility of their formulating unreasonable or unfair ones, and hence violative of the terms of the statute. We are not advised in this proceeding whether the board has adopted any rules at all. If they should adopt rules which are not uniform, or which are discriminating or unreasonable, that could not affect the validity of the act; it would simply be a violation of its provisions. The remedy of the petitioner, if the board violates its duty in this respect, is to apply to the court under some proper and appropriate proceeding for relief. It does not justify an attack upon the validity of the act in habeas corpus proceedings.

It is concluded upon this proposition that the Legislature has the power to delegate to a commission or board, trained in a given profession or skilled in a given art, the right to fix the qualification of applicants desiring to practice such professions or art. The Legislature itself is not obliged in the law regulating such profession to fix the standard of excellence or knowledge in the given profession which an applicant for admission thereto shall be required to possess. Such requirements may be left to the sound discretion of the commission or board, which will be accountable in the courts for any abuse or unjust exercise of the discretion with which it is vested. A familiar instance of this is found in the law touching the admission of attorneys to practice before the courts of this state. Sections 275 and 276 of the Code of Civil Procedure, as they formerly read, declared that every applicant for admission as an attorney and counselor must have the qualifications of learning, ability, and character, and must produce satisfactory testimonials of good moral character, and undergo a strict examination in open court as to his qualifications by the justices of the Supreme Court. As the law now reads, the only change is in conferring this power of examination upon the District Courts of Appeal. A vast majority of the practicing lawyers of this state have been admitted after such examination by virtue of these sections. It would come with some shock of surprise to these members of this learned profession to be told that their licenses were void because the Legislature had failed to define the qualifications which they must possess. Other tribunals have been called upon to consider laws of similar import, and it will be found that their determinations are all in harmony, and in favor of the views above expressed. State v. Knowles, 90 Md. 646, 45 Atl. 877, 49 L. R. A. 695; Kettles v. People, 77 N. E. 472, 221 Ill. 221; In re Thompson, 78 Pac. 899, 36 Wash. 377; Ex parte Gerino, 143 Cal. 412–417, 77 Pac. 166; Ex parte Whitley, 144 Cal. 167–179, 77 Pac. 879.

The last point made by petitioner, as to the constitutionality of the manner of appointment of the state board provided for in the act, is fully disposed of in Ex parte Gerino, 143 Cal. 413, 77 Pac. 166, 66 L. R. A. 249. While some objections are leveled against the manner of appointment provided for in the act under consideration now, in addition to those urged against the act considered in Ex parte Gerino, the reasoning and discussion in the opinion of the court in the Gerino Case embraces them all, and disposes of them adversely to the contention of petitioner.

In our opinion the act in question is not open to the claims of petitioner against its constitutionality.

The petition is denied, and the petitioner remanded to the custody of the chief of police of the city and county of San Francisco.

We concur: HENSHAW, J.; McFARLAND, J.; ANGELLOTTI, J.; SLOSS, J.

SHAW, J. I concur in the opinion of Justice LORIGAN. I think, however, that it does not sufficiently state the reasons for the proposition that the law does not delegate legislative power to the state board of architecture. If the statute gave power to the board to determine the qualifications necessary to entitle a person to become a certificated architect, it would be a delegation of legislative power. It does not do this, however. The statute does not expressly prescribe any standard of qualification in the applicant. It must be construed as, at least, an implied declaration that no person shall be entitled to a certificate as a licensed architect, unless he has such ordinary knowledge of the principles and science of that art or profession, and such ordinary skill in the practical application of those principles and that science as are usually possessed by those engaged therein. It is the usual standard implied in law, where no different standard is expressed by the statute. Doubtless, the statute might require a higher standard, or a lower standard; but, inasmuch as it does not expressly require any, it is to be considered as implying a requirement of the standard above stated. The provisions of the statute give the board the power to adopt rules and regulations, but it does not authorize it to require or enforce a different or higher standard than that of ordinary knowledge and skill, nor to require knowledge and skill of some other art or profession as a condition. It could not, for instance, require the applicant to display a knowledge of theology, or medical science, as a condition of receiving a certificate. The power which is conferred upon it is merely to make such examination as it shall deem sufficient to enable it to decide whether or not the applicant has this ordinary knowledge and skill. This is a task which the Legislature could not itself undertake in each individual instance. If it were a legislative act, of a character so that it could not be delegated, it would follow that it would practically be impossible for the Legislature to perform it, and consequently there could be no regulation of this or any other profession. The thing required of the board is the determination of the fact that the applicant does, or does not, have the qualifications which the law implies he must have. This is a ministerial or administrative function. Like many other ministerial acts, it involves to some degree a consideration of the effect of evidence, and is similar in that regard to judicial proceedings, but it is well settled that such acts are not so far judicial that the Legislature may not place the power elsewhere than in the court. The rules and regulations referred to in the act are merely such rules and regulations as relate to the method by which the board are to proceed in determining this fact.

151 Cal. 375

## HUMPHREY v. LEONARD et al. (L. A. 1,882.)

(Supreme Court of California. June 5, 1907. Rehearing Denied June 24, 1907.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—PERSONAL INJURIES—QUESTION OF FACT.

In an action for personal injury caused by plaintiff slipping on the beveled end of a plank in a temporary driveway across a sidewalk, whether defendants were negligent *held*, under the evidence, a question for the court sitting as a jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1745, 1747–1750.]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by E. C. Humphrey against C. Leonard and others. Plaintiff appeals from a judgment for defendants. Affirmed.

Oscar A. Trippet, for appellant. E. W. Freeman, A. D. Laughlin, and Jones & Weller, for respondents.

HENSHAW, J. Plaintiff brought his action to recover damages from the defendants for personal injuries sustained by him in crossing a sidewalk on a street in the city of Los Angeles. The cause was tried without a jury, and the findings of the court exonerated the defendants. The specific charge of negligence is that defendants, in constructing this temporary driveway of three-inch planks, laid down the plank with a beveled end, and loosely covered the whole driveway with sand; that plaintiff, a foot passenger upon the sidewalk, slipped upon this beveled end, which could not be seen by reason of the sand, and was thrown, sustaining the injuries complained of. The defense showed that it constructed and maintained a temporary roadway under license of a building ordinance of the city of Los Angeles, and the court finds "that it was necessary and proper to cover said sidewalk where said driveway passed over the same, and the manner which defendants constructed and maintained said driveway was a proper method of construction and maintaining such a driveway."

Appellant's proposition is that, the facts being undisputed, it was a question of law as to whether or not defendants were negligent, and that the finding and determination of the court is against the law and against the evidence. This, however, may not be said. It was for the court, as it would have been for a jury, considering all of the circumstances and facts as shown by the evidence, to declare whether the defendants were or were not negligent. The case in this respect is the parallel of that of Wile v. Los Angeles Ice & Cold Storage Company (Cal. App.) 83 Pac. 271, where the true rule is laid down. In this case, as in that, the defendants were called upon to exercise the care which the circumstances required in the construction and maintenance of the temporary driveway, and what was ordinary care it was peculiarly the province of the court below, sitting as a trier of the facts, to determine.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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151 Cal. 271

## HEILBRON v. SUPERIOR COURT OF SACRAMENTO COUNTY et al. (Sac. 1,536.)

(Supreme Court of California. May 15, 1907.)

1. EMINENT DOMAIN—PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION—STATUTORY PROVISIONS — CONSTITUTIONALITY—POSSESSION PENDING PROCEEDING.

Code Civ. Proc. § 1254, allowing the court in a condemnation proceeding to issue a writ of possession to plaintiff at any time after trial and judgment entered, or pending an appeal, when he has paid into court for the defendant the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered, as well as all damages that may be sustained by the defendant if the property is not taken for public use, does not violate Const. art. 1, § 14, providing that no right of way shall be appropriated to the use of any corporation until full compensation is first made in money, or ascertained and paid into court for the owner, which compensation shall be ascertained by a jury, unless a jury be waived; and in condemnation proceedings by a railroad corporation the court may issue a writ of possession to plaintiff after trial and judgment and pending an appeal, if it has complied with the statute as to payment of money into court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 630–636.]

2. SAME.

The right to a verdict of a jury fixing the compensation guarantied by such constitutional provision is not violated by the provision of the Code which allows the court to fix the amount of the additional fund to protect the defendant in a condemnation proceeding, in the event the property is not taken for public use, since there can be no exact preascertainment of damage which has not occurred and may never arise, and since upon the trial the jury give an award to cover all loss resulting from the permanent taking, which is sufficient to pay the minor loss caused by the temporary taking.

In Bank. Application by Louise R. Heilbron for a writ of prohibition against the superior court of Sacramento county and Peter F. Shield, judge. Writ denied.

A. L. Shinn and A. M. Seymour, for petitioner. Devlin & Devlin, for respondents.

PER CURIAM. The Sacramento Southern Railroad, a corporation, commenced proceedings against petitioner to condemn a strip of land for railroad purposes. Trial was had, and judgment passed for plaintiff; the damages for the value of the land to be taken and for the injury which would result to the remaining lands of defendant being assessed by a jury. Defendant then gave notice of intention to move for a new trial, and at the same time perfected her appeal from the judgment, which appeal is still pending. Plaintiff deposited in the superior court the amount fixed by the judgment, and gave notice that it would move for an order authorizing it to take possession of the land upon paying into court such further sum as should be fixed by the court "as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use." This motion coming on for hearing, objection was made that the court had no jurisdiction to entertain the same. The court overruled this objection, and petitioner herein (defendant in the condemnation proceeding) made application to this court for a peremptory writ of prohibition, alleging that the superior court will, unless restrained, make its order authorizing plaintiff in the condemnation proceedings to take possession of her lands.

The motion of plaintiff in condemnation is wholly within the letter and spirit of section 1254 of the Code of Civil Procedure, which provides that the superior court may issue a writ of possession to plaintiff "at any time after trial and judgment entered or pending an appeal from the judgment to the Supreme Court, whenever the plaintiff shall have paid into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use." The section further provides for the reception of the money by defendant, and that such reception shall constitute an abandonment of all defenses to the action or proceeding, "except as to the amount of damages that he may be entitled to, in the event that a new trial shall be granted." It is also provided that, "in ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate." Provision is then made that the integrity of the fund shall be maintained, and that any loss or diminution of it shall be immediately made good by plaintiff. Other provisions are added, all to the end of safeguarding the defendant's interest in the moneys so deposited. Petitioner attacks this section as unconstitutional. The line of argument is that article 1, § 14, of the Constitution declares that no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases; that this provision clearly contemplates a preascertainment and award before the property of the owner can be taken; that an entry into possession under section 1254 is a taking, within the meaning of the Constitution; and that, notwithstanding the carefully devised provisions of the section, whereby an amount of money sufficient and adequate shall be paid into court by order of court to cover "all damages that may be sustained by the defendant, if. for any cause, the property shall not be finally taken for public use," this sum of money is not a preascertainment by a jury of the amount of such damage, and consequently in so far as section 1254 authorizes such a writ of possession, without preascertainment in the manner guarantied by the Constitution, for the compensation to the owner therefor, if the land be not finally taken, it is in plain defiance of both the letter and spirit of the constitutional provision.

Many of petitioner's propositions may be at once conceded. The entry by plaintiff into possession of the property, under the indicated circumstances, is unquestionably the taking of private property for a public use, and may result in damage to that property—probably in all cases will result in detriment and damage to the property if the plaintiff should subsequently abandon his possession. There is, first, the detriment caused to the owner by his loss of possession, and, in addition, the abandoned structures and works which plaintiff shall have put upon the property may be of injury to the owner when possession reverts to him. Also, it may be at once conceded that there has been no exact preascertainment of the amount of such damage, and no ascertainment at all by a jury. So, finally, it may be declared that, if the Constitution does require the preascertainment of such merely possible damage, and that that preascertainment shall be made by a jury, unless a jury be waived—that there shall be, in short, a jury finding of the exact amount of injury in terms of money which would result to the defendant, in the event that at some indefinite time the plaintiff should abandon its possession and its works, or for other cause the land be not finally taken—it will be conceded at once that petitioner's argument is unanswerable. She does not, however, carry it far enough. By irresistible and irrefutable logic, if this preascertainment and payment into court of the amount of damage by a jury is necessary in the one instance, it is necessary in every instance. Therefore, if, on trial of the suit in condemnation, judgment fixing the amount of damage be awarded, and plaintiff pay this amount into court, and defendant then appeal, it can never be said that a new trial as to the amount of damage may not be ordered, and that a subsequent trial may not result in increasing defendant's award. There will never then have been an exact preascertainment by a jury of the amount of damage which the defendant sustains for the general taking of the land, until such time as the jury's award shall have been finally confirmed by the court of last resort. And it must necessarily result from petitioner's argument, carried to its logical conclusion, that in no conceivable instance can a plaintiff in condemnation have a right of entry upon the condemned property until the end of the litigation has come, with a final affirmance by the court of last resort of the amount of the jury's award. This, of course, is not the meaning of the Constitution, which, from its very reading, as well as from the construction which has been given to its language by this court, contemplates that such right of entry vests in plaintiff after an award by the jury of the amount of damage which the defendant will sustain by the taking of his property, whether that amount in the ultimate outcome of the litigation shall prove to be the true amount, or whether, as the result of appeals and new trials, the amount shall be finally determined to be more or less. The constitutional provision is framed to accomplish this result, and unquestionably section 1254 of the Code of Civil Procedure has been carefully devised and drawn to further and effectuate the constitutional intent. It was so decided in Spring Valley Water Co. v. Drinkhouse, 95 Cal. 220, 30 Pac. 218, where section 1254 of the Code of Civil Procedure, which was then in all substantial particulars the same as now, was considered and its constitutionality upheld. It is there said, discussing section 1254 of the Code of Civil Procedure: "This section is not violative of any provision of the Constitution, but directly in line with that instrument wherein it treats of such matters. Section 14, art. 1, provides: 'Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner.' It would seem that the framers of both the Constitution and the statute had in view the delays incident to condemnation proceedings, and the necessity in many cases of allowing the property to be taken and used for a public use during the progress of the litigation, provided an adequate fund to fully reimburse the landowner was first paid into court."

But, returning to the specific objection here advanced, namely, that the constitutional right to the verdict of a jury is violated by a provision which allows the court, and not a jury, to estimate the damages that may be sustained by the defendant if, for any cause, the property shall not finally be taken for public use, the first answer is that there can be, from the nature of the thing itself, no exact preascertainment of damage which has not been incurred, and which never may result. The whole matter rests upon contingencies which may never arise, upon the chance of happenings which may never take place. Damage is but the measure in money for a detriment which has occurred in the past, and which may with certainty be said will occur in the future. Civ. Code, § 3283. It would challenge the astuteness of the most learned court to lay down any rule of damage for the preascertainment of an injury which may never happen at all, and the time of whose occurrence, if it does happen, not only can never be foretold, but rests equally in the will of either party to the litigation. Thus, the plaintiff might abandon the day after he took possession, when certainly the injury to the defendant in deprivation for the use of his property would not be as great as though the plaintiff had remained for a long period of time in possession, had disturbed the freehold and erected structures, valuable enough for the intended purpose, but of no value, but rather of positive injury, to the uses of the freehold as designed by the original owner. The measure of damage under such circumstances would be proportioned to the length of time of occupancy and to the character of the disturbance of the freehold. Upon the other hand, the original owner may any day change his mind, dismiss his proceedings, and accept the award which has been paid into court. Whatever may have been the preceding damage because of the entry of the plaintiff, it would end with his acquiescence. Assume, again, that for this preascertainment of damage which may never arise at all, since plaintiff may never abandon, a jury has been impaneled, and, under instructions from the court, the nature of which we admit our inability to outline, the jury makes an award for the prospective damages which it is supposed the defendant will suffer, should the plaintiff at some indefinite and indeterminate time abandon his possession—if this amount of money, so fixed by the jury, be damages, as by petitioner it is contended that it is—then there must rest with the petitioner the right of immediate acceptance, and with what result? That plaintiff would be obliged to pay a sum of money for so-called damages for an injury which he never committed, for a deprivation of the use of property to which he had a right, and which right he had never abandoned. The law does not exact impossibilities, and it must be very apparent that if this sum of money, so to be estimated and deposited with the court, is strictly damages for an injury which has not and may never have been committed, then it is incapable of exact pre-estimation until after the date of the commission of the injury. In truth, it is not damages at all, and cannot be in strictness damages, since no injury has arisen. It is a fund of money secured to the owner of the property, out of which he may make a judgment subsequently to be fixed by a jury, in case injury by abandonment is inflicted upon him. As it is not an injury which has resulted, and as, moreover, it is not an injury which ever may result, there is no constitutional injunction requiring the impossible condition of its preascertainment.

Moreover, upon the trial of the condemnation proceeding, the jury does give an award which covers both the value of the property to be taken, and the injury which will result to the owner's land by reason of its severance and of the public uses to which it may be put. As the whole necessarily includes the parts, and as the detriment caused by the permanent taking of this land must certainly be greater than the detriment caused by its temporary use, we have in the award of the jury in the condemnation proceeding a fund of money which, as it is sufficient to pay all loss to the owner by reason of the permanent taking, is certainly sufficient to pay the minor loss caused by the temporary taking. In this very fund, therefore, we have the award of a jury upon the matter of damage for temporary detention. True, its amount is not specifically segregated; but, as has been said and shown, it is an absolute judicial impossibility to specify any amount in advance of the occurrence of the injury. It will be noted that section 1254 is extremely careful in safeguarding the rights of the landowner. It requires the payment into court not only of the full amount of the judgment, but also of such further damages and costs as may be recovered in the proceeding. The costs, of course, are a minor matter and capable of reasonably exact ascertainment. The damages here contemplated are the enhanced damages which the defendant may recover under reversal and order for new trial. Those damages, however, can never be more than what he pleads his loss will be, so that he may be amply protected in this regard by the deposit of all which he claims is necessary to cover his prospective loss. In that sum is clearly contained the lesser loss which may result to him in case of entry by plaintiff and his subsequent abandonment. The Constitution merely guaranties that there shall be ascertained and paid into court, before plaintiff's right of entry attaches, the amount of the judgment, and this, notwithstanding that that judgment may be reversed, and that the defendant may ultimately obtain a verdict for a much larger amount of money. We can see no constitutional objection, and none has been pointed out to us, which would invalidate a statute which confers upon a defendant in condemnation proceedings even greater rights, and even greater security for his recovery, than that which the Constitution itself awards him. The proposition here presented, it will be seen at a glance, is entirely different from that considered in Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404, 92 Am. St. Rep. 183. The Code section which the court was called upon to consider in the Steinhart Case provided that the plaintiff might take possession of the land sought to be condemned, before the verdict of the jury and the judgment of the court and during the pendency of the action. It was held, as manifestly it must have been held, that this did violence to the constitutional provision that private property should not be taken or damaged for public use without just compensation having been first made to or paid into court. Here this damage has been estimated and has been paid into court, and the damage, for which it is contended there should be a preascertainment, is a damage which has not arisen, which may not arise, which cannot be ascertained in advance, and for which, if it does arise, such estimation, as by any possibility could be made in advance, has been made in the judgment and award of the jury.

Summing up upon the matter: The fund to secure damages caused by temporary use, if the property be not finally taken, having been paid into court as security for such damages, it follows that it cannot be withdrawn until such damages are paid, and that the court having custody of the fund must have jurisdiction and power, after the temporary use has ceased, to ascertain the amount of the damages caused thereby and direct its payment out of the fund. This power is necessarily implied, though not expressly stated, in the Code. The owner is therefore not deprived of his property, nor is he damaged without compensation, in a legal sense. The right to have this damage for such temporary use preassessed by a jury, as we have said, is not secured by the Constitution. It is a damage which the owner has himself occasioned by his refusal to accept the award of the jury, to which he had the constitutional right, and by resorting to an appeal, which the constitutional guaranty contained in section 14, art. 1, does not give him. This right of appeal is given by the statute. The statute annexes to the right of appeal the condition that for the damages arising from the occupancy of plaintiff during its pendency, if the land is not finally taken, the owner must accept the preliminary award of the court. This condition was annexed to the right of appeal at the time when the constitutional amendment of 1904, implying a right of appeal, was adopted, and this constitutional right is to be construed as a mere affirmance or reference to the statutory right of appeal then existing with all its attending conditions.

For these reasons the application for a peremptory writ of prohibition is denied.

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151 Cal. 357

## LASSEN IRR. CO. v. SUPERIOR COURT OF LASSEN COUNTY et al. (S. F. 4,695.)

(Supreme Court of California. May 28, 1907.)

1. Judges — Disqualification to Act — Interest.

A judge has no interest disqualifying him to try an action against an irrigating company for not supplying all the water which plaintiff claims he was entitled to, though defendant alleges plaintiff was not entitled to a fixed amount, but only to a proportion of whatever water the company might have for distribution, and that certain other persons, including the judge, have prior water rights; they not being necessary parties, no showing for making them parties being made, and any judgment which might be rendered in the case being incapable of affecting them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, §§ 190–207.]

2. Same — Bias — Objections — Who May Raise.

A party cannot have another judge called in for bias of the presiding judge where any bias must be in favor of such party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, § 224.]

3. Same—Acting as Counsel.

Under Code Civ. Proc. § 170, disqualifying a judge to sit in an action when in it, or in a previous action involving any of the same issues, he has been attorney for either party, or when he has given advice to either party on any matter involved in the action, he is not disqualified for counselling or advising with persons not parties to the action, though asserting like claims against the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, §§ 214–217.]

In Bank. Proceedings in prohibition by the Lassen Irrigation Company against the superior court of Lassen county and the judge thereof. Writ denied.

W. F. Williamson, for petitioner.

SHAW, J. This is a proceeding in prohibition to prevent the respondent, Hon. Frank A. Kelly, as judge of the superior court of Lassen county, from presiding in the trial of the case of A. E. Torrey v. Lassen Irrigation Company, pending in said court. The basis of the petition is that said Frank A. Kelly is disqualified to act as judge on the trial of said case by reason of interest and bias. We will assume, for the purposes of the decision, that the facts stated in the petition to demonstrate that the remedy by appeal is inadequate, are sufficient for that purpose, and we will consider the case upon its merits.

The complaint of Torrey, in the suit against the Lassen Irrigation Company, states a cause of action for damages only. It alleges, in substance, that the company is engaged in the business of diverting water from Susan river by means of storage reservoirs and diverting dams, and of selling said water to the owners of the lands within the district to which the use of said water is appropriated for the irrigation of their lands; that Torrey was entitled to receive from said company, during the irrigating season of 1905, for the irrigation of his land, consisting of 40 acres, a certain quantity of said water; that there was in Susan river and in the reservoirs of the company, during said season, sufficient water belonging to said company to supply all its customers, including Torrey, with the water to which they were respectively entitled, but that the company failed and refused to deliver any water to Torrey, whereby he was damaged, by the loss of crops, in a large sum of money, for which judgment is asked. The complaint also includes a prayer that the amount of water to which the plaintiff, Torrey, is entitled from the defendant be determined, and that his title thereto be quieted. But no facts are alleged as a foundation for such relief. The complaint shows that the amount of water to be delivered by the company to Torrey was fixed by a written contract by definite measurement, the maximum quantity being 18 acre inches each year, but not exceeding the amount necessary to irrigate the forty acres of land in question. It is not alleged that there is any dispute whatever between the parties concerning the quantity of water due to the plaintiff, Torrey, from the company, nor that the company has ever denied his right to the amount fixed by the contract, or his due proportion of the amount, in case the supply from the river proved insufficient for all those entitled. And as the only breach of duty alleged was the refusal to deliver the water for the year 1905, and it is alleged that during that year there was enough water for all the persons entitled, there appears in the complaint no ground for any dispute over the right of the plaintiff to the water of which he was deprived, and the complaint cannot be considered in any other character than as a statement of a cause of action for damages alone. The company filed an answer to this complaint, denying that Torrey was entitled to the full supply of water alleged, but admitting that he was entitled to share with a large number of other persons in whatever water the company might have for distribution. It also alleged, in defense, that certain persons, including Frank A. Kelly, and judge of said court, were entitled to prior and paramount rights in the waters of Susan river; that the company had the right only to such quantity of water as should be left in the river after the paramount rights were supplied; that, during the year 1905, the owners of these paramount rights claimed that the company was taking more water than it was entitled to take from the river, and that a complete determination of the issues in the case could not be had without bringing all those parties, including said Frank A. Kelly, into court as parties to the action. Thereupon the company filed an application for a change of venue of the case, and that another judge be called to preside at the trial. This application was denied and the respondent, as judge of the superior court, was about to proceed to sit in that capacity in the trial of the case. The object of this proceeding is to prevent him from so doing. In support of the application an affidavit was filed to that effect that the respondent, Kelly, was by reason of his ownership of the paramount right to a portion of the waters of Susan river, interested in the result of the action and in the determination of the controversy between the parties thereto, and that he is also disqualified by reason of his relationship to certain other persons, who are also owners of paramount rights in said water. Said company at the same time presented motions to have the said owners of paramount rights to the water made parties to the action, and this motion was also denied.

The owners of these paramount rights were not necessary parties to the action. The answer did not state any facts which would justify the court in determining the rights of these parties, or which would require an adjudication of their rights. And for similar reasons it did not show that Frank A. Kelly, or any of the other owners of the prior rights, were interested in the determination of the case of Torrey against the Lassen Irrigation Company. The company could defend that action by showing that the plaintiff did not have an absolute right to a certain amount of water, but only a right to a share of such water as the company itself was entitled to take from the river, and that his share of the water the company could obtain was delivered to him, or that, by reason of circumstances beyond its control and for which it was not legally responsible, its supply had failed. It could show in defense that, after the parties having preferred rights had taken their portion of the water, there was none left, or not enough to supply Torrey. This might make it necessary to prove at the trial the amount to which Judge Kelly had the prior right and the amount he actually took in pursuance thereof. It may be conceded that in weighing such evidence the judge might not be entirely unprejudiced. Nevertheless the fact that he would be required to weigh the evidence and determine the fact does not make him legally interested in the action, nor in the result thereof. It was not an action against him, and no judgment which he could render therein would in the least determine, or affect, his own property rights or interests. The only judgment that could properly be given in the action would be a judgment in favor of the plaintiff for such damages as the court should find he had suffered by the deprivation of the water, or a judgment in favor of the defendant that the plaintiff take nothing. No adjudication as to the relative rights of the defendant company and the other persons alleged to have or claim prior rights in the river would have been proper. The interest in an action which disqualifies a judge who possesses it from trying the cause is a property or personal interest, an interest in the event of the suit, in the judgment which may be rendered therein. It must affect him, either in person or property, directly or indirectly. A mere sentimental interest, or an interest in the facts which the issues make it necessary for him to determine, which may tend to induce him to give more weight to the evidence for one party than to the evidence for the other, respecting such facts, is not the interest which will disqualify him. It may tend to show his bias or prejudice, and he may be disqualified on that ground, but it will not be sufficient to disqualify him on the ground that he is interested in the action, or in the result thereof, or on the ground that he is of kin to other persons in a similar situation, or that he had been the attorney for such persons. The adjudication he might make in the case, respecting the amount of water required to supply his prior right, and the consequent amount to which the Lassen Irrigating Company was entitled, would be of no benefit whatever to him in any subsequent action or controversy. The case is therefore unlike North Bloomfield M. Co. v. Keyser, 58 Cal. 315.

With respect to the effect of these circumstances as evidence of bias and prejudice of the judge sufficient to disqualify him on that ground, we may say that whatever bias or prejudice they would create in the mind of the judge concerning the action would be in favor of the Lassen Irrigation Company, not against it, and that a party cannot insist, as a matter of right, on the calling in of another jugde, solely on the ground that the judge presiding is prejudiced in his favor. He cannot obtain a writ of prohibition to prevent judicial action favorable to himself. The effort of the company, on the trial of the case, would be to prove that by reason of the water taken by Judge Kelly and the other holders of prior rights, there was not enough left to give Torrey more than he actually received, and, for that purpose, to show the prior rights to be as large as possible. The bias of the judge from his ownership of these prior rights and his relationship to the other owners, if it affected him at all, would lead him to enlarge the prior rights, and thereby to favor the company in this action rather than Torrey. This would cause no injury to the company.

Another ground of the motion was that other persons had claims against the company for the delivery of water from the company, or for damages, identical with those of the plaintiff, Torrey, and that Judge Kelly "has counselled with parties holding and making such claims, * * * and advised them of the legality and effect of their claims." It does not appear from this averment that he counselled or advised them in a professional capacity, or otherwise than as a friend, but, in any event, the statute does not disqualify a judge for counselling or advising with persons who are not parties to the action. Code Civ. Proc. § 170. It does not appear whether the advice he gave was for or against the company, and therefore the averment is not sufficient to show actual bias.

We do not think the affidavit and pleadings are sufficient to show that the judge is disqualified, or that any cause is shown for prohibition.

The writ is denied.

We concur: BEATTY, C. J.; McFARLAND, J.; SLOSS, J.; ANGELLOTTI, J.

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151 Cal. 318

## In re DAVIS' ESTATE et al. (S. F. 4,316.)

(Supreme Court of California. May 21, 1907.
Rehearing Denied June 17, 1907.)

APPEAL—RECORD — CERTIFIED TRANSCRIPT—DESTRUCTION.

Where the Supreme Court acquired jurisdiction of an appeal by the service of notice, such jurisdiction was neither affected nor lost by the destruction of the certified transcript after argument and submission of the appeal without any proceeding for the restoration thereof.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Judicial accounting by the administrator of the estate of Jacob Z. Davis, deceased. A judgment striking the answer and petition of Laura E. Tracy and others filed in response to a petition for distribution accompanying the administrator's final act was affirmed on appeal (86 Pac. 183), after which appellants moved to vacate the decision and judgment on the appeal and to recall the remittitur. Denied.

Wm. T. Baggett and Horace W. Philbrook (W. J. Bartnett, of counsel), for appellants. Campbell, Metson & Campbell and Thomas H. Breeze, for respondent.

LORIGAN, J. This is a motion to vacate the decision and judgment of this court rendered on appeal in the above cause, and to recall the remittitur.

It appears from the showing made in support of the motion that a duly certified and printed transcript of the record on appeal in the cause was filed in this court on June 1, 1905; that thereafter briefs were filed, and on February 27, 1906, the cause, being regularly set down on the calendar for hearing on that day, was argued orally by the attorneys for the respective parties and submitted in department one of this court for decision; that during the earthquake and consequent conflagration in the city of San Francisco in April, 1906, the office of the clerk of this court, with its contents, including the certified transcript on appeal in this case, was destroyed; that no order has ever been made by this court restoring such transcript, nor has such record in fact been restored; that on May 21, 1906, a month after such record was destroyed, the justices of department one of this court, before whom the cause had been argued and submitted on February 27, 1906, signed and filed with the clerk of this court a decision in the cause, affirming the decree of the trial court, and on June 23, 1906, the clerk issued a remittitur in the case.

It is the claim of appellants on this motion that the decision and judgment of this court, having been made against them after the transcript on appeal had been destroyed by fire and without any restoration of it, is void. We cannot agree with this view. The jurisdiction of this court on appeal is not determined by the presence or absence of a copy of the record from the trial court—the transcript on appeal. It acquires that jurisdiction immediately upon the filing of the notice of appeal in the lower court, acquires it for all purposes, and it is not divested of its jurisdiction, nor is such jurisdiction suspended, either on account of the failure to file a transcript on appeal, or the loss or destruction of it after it is filed. It is true the statute provides for a certification to this court of the record made in the trial court and upon which the appeal to this court is to be heard, but that has nothing to do with conferring jurisdiction upon this court over the appeal. That is acquired as soon as the notice of appeal is filed, and this court may exercise such appellate jurisdiction long before any transcript is filed, and independent of it. It may dismiss the appeal, stay execution in the court below, or stay further proceedings therein, and make all necessary orders in aid of the appeal. The transcript on appeal is but the statutory method of bringing to the attention of the court the particular proceedings and matters which took place in the trial court and which this court is asked to review, and this is the sole purpose and function of the transcript. As supplemental to the statute requiring such certification of the original record of the trial court to this court, our rules require that a certain number of copies, in addition to the original, shall be filed with the clerk of this court. These are vouched for by the appellant in each case as true copies, and, in this particular case, were in the possession of the court when its decision was made. We simply mention this as indicating that, while the original transcript in this case was destroyed, still duplicate copies, which had been filed with the original, were in the possession of the court when the case was under consideration and decided. Independent of this, however, we do not see how the fact of the destruction of the original transcript in any manner affected the jurisdiction of the court to dispose of the appeal. Our jurisdiction was not acquired by the filing of the transcript, and was not suspended by its destruction. That transcript was on file when the cause was argued and submitted for decision. As the only scope and purpose of the transcript is to present to the court the points involved in the appeal, it had served its purpose with the submission of the cause. In the subsequent preparation of its opinion the court could rely upon its memory of the points involved as presented in the original transcript, or refer to any copy of such transcript on file under the rules. As the filing of the transcript was not necessary to confer jurisdiction upon this court, neither was its continued existence necessary in order to authorize this court to render its decision on submission of the cause.

The motion is denied.

We concur: BEATTY, C. J.; SHAW, J.; HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.

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5 Cal. App. 433

## PRINE v. DUNCAN. (Civ. 322.)

(Court of Appeal, Third District, California. April 23, 1907.)

APPEAL — MOTION TO DISMISS — FAILURE TO FILE TRANSCRIPT.

Under the rule of the appellate court requiring the transcript in a civil action to be filed within 40 days after the appeal is perfected, if there be no proceeding pending for the settlement of a bill of exceptions or a statement which may be urged in support of the appeal and the rule providing that, if the transcript be not filed within the time prescribed, the appeal may be dismissed, where appellant did not file a transcript within the time prescribed, or at all, and, after the trial court entered an order dismissing all proceedings for the settlement of the statement to be used on motion for new trial and all proceedings for a new trial, did not take an appeal therefrom within the time allowed by law, the appeal from the judgment will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2744.]

Appeal from Superior Court, Colusa County; W. M. Finch, Judge.

Action by David Prine against Margaret A. Duncan. From a judgment for plaintiff, defendant appeals. Motion to dismiss the appeal. Dismissed.

C. F. Purkitt and C. L. Donohoe, for appellant. Thos. Rutledge, for respondent.

CHIPMAN, P. J. It appears that final judgment was entered in this case on January 15, 1906. On July 13, 1906, the defendant served notice of appeal and on July 14, 1906, filed herein an undertaking on appeal. No bill of exceptions, or statement, or statement on appeal has been settled or filed. On November 17, 1906, the trial court made and entered its order dismissing all proceedings by defendant for the purpose of settling her statement on motion for a new trial. Notice of appeal from said last-named order was not filed herein until January 17, 1907. Appellant has not requested the clerk of the court to certify to a correct transcript of the record in said cause. The papers on the motion to dismiss the appeal were filed in this court February 8, 1907, prior to which time service of notice was duly made upon appellant.

The ground of the motion is "that appellant has not filed in this court a transcript of the record in said cause or any transcript, and that on the 17th day of November, 1906, the said superior court of the county of Colusa in said cause entered its order dismissing all proceedings then pending for the settlement of the statement on said motion for a new trial, and all proceedings for a new trial of said cause instituted by said appellant, and that no appeal has been taken by said appellant from said last-mentioned order within the time allowed by law." Appellant makes no answer to said motion and has failed to appear. Rule 2 of this court (78 Pac. vii) requires that the transcript in a civil action be filed within 40 days after the appeal is perfected, provided that there be then pending no proceeding for the settlement of a bill of exceptions or a statement which may be urged in support of such appeal. Here, whatever of such proceedings as had been pending were dismissed November 17, 1906, and were no longer pending. Rule 5 (78 Pac. viii) provides that, if the transcript or the record be not filed within the time prescribed, the appeal may be dismissed on motion, upon notice given. If, however, the transcript though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion.

There being no answer to the motion in any form and the facts above set forth being uncontroverted, the appeal from the judgment must be dismissed; and it is so ordered.

We concur: BURNETT, J.; HART, J.

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7 Cal. Unrep. 330

## PRINE v. DUNCAN. (Civ. 323.)

(Court of Appeal, Third District, California. April 23, 1907.)

Appeal — Time for — Order Denying New Trial.

Under the direct provisions of Code Civ. Proc. § 939, subd. 3, an appeal from an order dismissing proceedings for the settlement of a statement to be used on motion for new trial and all proceedings for a new trial may only be taken within 60 days after the order is entered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1887.]

Appeal from Superior Court, Colusa County; W. M. Finch, Judge.

Action by David Prine against Margaret A. Duncan. Judgment for plaintiff, and from an order denying a new trial, defendant appeals. Motion to dismiss the appeal. Dismissed.

C. F. Purkitt and C. L. Donohoe, for appellant. Thos. Rutledge, for respondent.

CHIPMAN, P. J. Motion to dismiss the appeal from the order denying motion for a new trial. This is the same case as No. 322, 90 Pac. 712.

It appeared that on November 17, 1906, the trial court made an order denying defendant's motion to be relieved from her default in the matter of presenting her statement on motion for a new trial and the proposed amendments of plaintiff thereto within the time required by law; and the court further ordered, on the motion of plaintiff, that all proceedings for the settlement of the defendant on motion for a new trial be dismissed. On January 17, 1907, defendant filed her notice of appeal from said order of November 17, 1906, and on the same day filed her undertaking on said appeal. No bill of exceptions or statement on appeal from said order has been settled or filed, and defendant has not requested the clerk to certify a correct transcript in said cause.

The ground of the motion is that the appeal was not taken, and the notice of the appeal was not filed with the clerk, within the time allowed by law. Appellant makes no answer to the motion and has failed to appear. The appeal was taken on the sixty-first day after the day on which the order was entered, and was not taken in time. Code Civ. Proc. § 939, subd. 3.

The appeal is dismissed.

We concur: BURNETT, J.; HART, J.

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5 Cal. App. 455

## ADAMS v. THORNTON. (Civ. 274.)

(Court of Appeal, Third District, California. April 29, 1907. On Rehearing, May 28, 1907. Rehearing Denied by Supreme Court June 24, 1907.)

1. Appeal — Previous Decision of Same Court—Law of the Case.

The construction placed upon a written contract by the appellate court on a former appeal is the law of the case, and decisive of the question of its construction on a subsequent appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4373.]

2. Same.

The rule that the decision of the appellate court on a former appeal is the law of the case and decisive on a subsequent appeal is inapplicable where the facts presented on the subsequent appeal are materially different from those on which the decision was rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4361.]

3. Replevin—By Co-Tenant of Crop.

Where, after a crop of apricots owned by two tenants in common and to which they had an equal right of possession was divided by the tenant in whose possession it was in proportion to their rights therein, and placed in separate piles, his co-tenant took the entire crop, and refused to make a division thereof, he was entitled to maintain replevin to recover his portion.

On Rehearing.

4. Appeal—Reply Brief—Consideration of Point First Made Therein.

A point will be considered on appeal, though not raised in the opening brief of appellant and only made in answer to respondent's argument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3097.]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by W. H. Adams against Arthur Thornton. From a judgment for defendant, plaintiff appeals. Reversed.

See 82 Pac. 215.

Nicol & Orr and J. M. C. Murphy, for appellant. Louttit & Middlecoff, for respondent.

BURNETT, J. This action was brought in replevin to recover 186¾ sacks of dried apricots, or their value, in case a delivery could not be had, together with damages for their detention. When plaintiff rested, a motion for nonsuit was made, and the court granted the motion "solely for the reason that the court feels bound by the decision of the appellate court for the Third district rendered on the prior appeal in this cause to hold that plaintiff and defendant are tenants in common of the property described in the complaint, and that this court should grant a nonsuit on such grounds."

In the decision by this court on the former appeal it was held that, "while the agreement set out and under which the parties were operating is called therein a lease, yet under the authority of Bernal v. Hovious, 17 Cal. 542, 79 Am. Dec. 147, it must be deemed only a cropping contract, and the parties are co-tenants in the fruits raised during the time of the contract, and each has an equal right with the other to the possession of the whole of said fruit, and, under the general rule, neither can maintain a suit against the other for the possession of the fruit," and the judgment was reversed on the ground that the motion for a nonsuit should have been granted. It is claimed by respondent that the aforesaid decision of this court is the law of the case, and that we must affirm the action of the trial court in granting the nonsuit in consonance with the mandate of the appellate court.

Among the decisions declaring the effect and scope of such a judgment as bearing upon the subsequent history of the litigation, the cases of More v. Calkins, 95 Cal. 436, 30 Pac. 583, 29 Am. St. Rep. 128, and McGraw v. Friend & Terry Co., 133 Cal. 589, 65 Pac. 1051, are directly in point. In the former, as we find in the syllabus, it is held that "the construction placed upon a deed of trust by the Supreme Court in its decision reversing the judgment and remanding the case for a new trial * * * is the law of the case, and the question of its correctness will not be considered upon a second appeal." And so here we cannot call in question the construction placed by this court in the former appeal upon the written contract between the parties. We are bound to hold that it constituted a cropping contract, and that by virtue of its provisions the parties became tenants in common in and to all the fruit produced, which was the subject-matter of said contract.

The only remaining question is whether the determination by the appellate court that claim and delivery would not lie in view of the evidence disclosed by the record, and that the nonsuit should have been granted at the former trial, precludes us from any inquiry into the evidence taken at the last trial to find the absence of support for the action of the court in granting the motion for a nonsuit. The proper solution of this question depends upon the consideration whether the evidence was the same or substantially the same at both trials. In the McGraw Case, supra, it is said that "in an action for negligence a motion for a nonsuit on the ground that the evidence for the plaintiff establishes his contributory negligence, so as to preclude a recovery, raises a question of law; and the decision upon a former appeal, that a nonsuit should have been granted upon that ground, is the law of the case upon a second appeal when the evidence for the plaintiff does not warrant a different conclusion." And in Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131, it is said that "the rule has no application when the facts presented on the second appeal are materially different from those on which the decision was rendered"; citing Nieto v. Carpenter, 21 Cal. 455; Meeks v. Southern Pacific R. R. Co., 56 Cal. 513, 38 Am. Rep. 67; Cross v. Zellerbach, 63 Cal. 623, and Dodge v. Gaylord, 53 Ind. 365.

Turning to the record before us, we find the evidence at the latter trial materially different from that at the former. One important circumstance is disclosed which was not presented before. This constitutes a significant feature which cannot be ignored in the determination of the question whether the action can be maintained between tenants in common. It is this: After the fruit was cured and packed, it was divided into two equal parts of the same grade and value, and placed in separate piles in the house occupied by plaintiff. In view of this distinction between the two trials, was the court below justified in granting the motion for a nonsuit? The plaintiff testified: "I was in the occupation and possession of those lands during the year 1902, and had been for two years prior thereto. I had been farming them and caring for orchards thereon. I know the fruit that is mentioned in the complaint. It was grown on that orchard during the year 1902. I picked, cut, dried, and cured it. When it was cured, I sacked it in fruit sacks secured and paid for by me. After it was cut, cured, and sacked, I divided it into two equal parts, and piled it in a house on the premises occupied by me. There was a division of the dried fruit into separate piles, each pile having a separate letter. The sacks were all of the same weight and the same value. They were piled so that each pile was distinguishable from the other. After the fruit had been divided and piled as I have stated, I offered to deliver Mr. Thornton the one-half thereof. He refused to accept it. After I had offered to deliver it to him, and while I was away, he came and took all the fruit and hauled it away. I never got possession of any of it again. * * * I demanded the return of it, a

Thornton refused to return it. From the time it was picked it remained in my possession until it was taken away by Thornton."

In Balch v. Jones, 61 Cal. 237, it is said: "An action of replevin or of claim and delivery of the common property is not maintainable by one tenant in common against another, nor is trover, unless there has been such a loss, destruction, or disposal of the property as amounts to a conversion, or the property is divisible in its nature and ascertainable by measurement, weight or count. In such a case a tenant in common may demand of his co-tenants, having possession of the whole, his share, and, on refusal or conversion, he may sue in trover." In Wattles v. Dubois, 67 Mich. 313, 34 N. W. 672, it is held that "the refusal by a tenant to deliver to his landlord his half of the unthreshed grain grown on the leased premises is a waiver of the tenant's right to possession for the purposes of such delivery, and the landlord has a right to the immediate possession of his half, and may maintain replevin therefor." Here, it will be observed, the defendant refused to accept his one-half which plaintiff offered to deliver. In Sutherland v. Carter, 52 Mich. 473, 18 N. W. 224, the court said: "The plaintiff was tenant in common of the grain, and after it was threshed she was entitled to her one-half thereof, and it was Carter's duty to deliver it to her when she demanded it upon the farm. It was her property, and the action will lie in such a case under the facts found in this record"; citing a large number of cases. In Morgan v. Hedges, 4 Colo. 531, this language is used: "The stipulations in the articles of agreement that appellant, Morgan, should sell the products of the ranch and keep a full account of all receipts and disbursements, involves an agreement for their possession to that end. Where tenants in common of chattels agree that one shall have exclusive possession of the chattels, the tenant so entitled may maintain replevin against his cotenant."

In the case at bar the agreement provided for the possession of the fruit by plaintiff and his delivery of one-half of the dried fruit to defendant. See, also, Newton v. Gardner, 24 Wis. 232. In Hurff v. Hires, 40 N. J. Law, 588, 29 Am. Rep. 282, it is declared: "There is a clear and well-settled distinction between the individual rights of several parties in goods of uniform kind and quality, and in those in which there is no uniformity in these respects. It is recognized in cases of a co-tenancy of personal property, readily divisible by weight or measurement into portions absolutely alike in quality and value. In such cases, either tenant may take his proper proportion, and it will be regarded as a proper severance so long as he does not take more than his share; but the rule is otherwise in case of property not severable. In that event the partition must be by agreement, or proceeding in equity." In Cobbey on Replevin, § 238, the rule is stated as follows: "An action will not lie for an undivided interest in a chattel, nor can such tenant in common sue alone as against a stranger in possession. The plaintiff must have a right to a whole and entire interest. A different rule prevails where the property can be separated into aliquot parts, and the interest is easily separable, as one-third of 60 bushels of wheat. Where corn in a single pile or crib, owned by two tenants in common, is in the exclusive possession of one of such tenants, but both being equally entitled to the possession thereof, the other joint owner, if his co-tenant refuses a division when properly demanded, may recover his portion of the grain by replevin." "Replevin will lie for separate and distinct articles capable of identification and not undivided portions of separate lots." Phipps v. Taylor, 15 Or. 484, 16 Pac. 171.

It would seem that in the present instance the evidence brings the plaintiff clearly within the exception to the general rule that one tenant cannot maintain an action for replevin against his co-tenant. All the property under the agreement was rightfully in the possession of plaintiff. He had divided it equally, and one part belonged to him. He offered to deliver to defendant the portion to which he was entitled, and defendant refused to accept it. During the absence of plaintiff defendant comes and takes all the property, and refuses to surrender the one-half when it is demanded of him. If these facts do not show cause to institute the action, it is difficult to conceive what would be sufficient. It is well settled that a motion for a nonsuit is in the nature of a demurrer to the evidence, that the evidence must be viewed most favorably for the plaintiff, and, if it tends to prove all the material allegations of the complaint, the motion should be denied. It may be admitted that the testimony of plaintiff at the former trial is not altogether consistent with his testimony at the latter, but the question of the credibility of the witness is not involved here, and it is to be remembered that the want of harmony in the testimony of a witness at two separate trials may of itself render inapplicable the doctrine of "the law of the case."

No doubt the learned trial judge would have denied the motion if he had not felt constrained by the former decision in the case, but we think the evidence is materially different, and hence that the motion should have been denied.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

### On Rehearing.

BURNETT, J. Respondent's petition for a rehearing seems to proceed upon the theory that the affirmative defense set up in the answer was establishd at the trial. The truth is that plaintiff was the only witness examined and his evidence tended to prove the allegations of the complaint, and not any allegation of the answer inconsistent therewith. Upon the trial of all the issues in the case it may be that defendant will be entitled to judgment, but we still think that the motion for a nonsuit was improperly granted. We are not inclined to the view that we should not consider the contention that the law of the case is not applicable because the point was not raised in the opening brief. We see no reason why we should not consider it, though it was made, not in anticipation of defendant's argument, but in answer thereto.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

5 Cal. App. 415

HARRISON v. HORTON, Auditor. (Civ. 349.)

(Court of Appeal, First District, California. April 18, 1907.)

1. MUNICIPAL CORPORATIONS—ASSISTANT CORPORATION COUNSEL—COMPENSATION.

San Francisco Charter, art. 5, c. 3, § 3, authorizes the district attorney to appoint seven assistants, to receive specified annual salaries. Plaintiff was appointed assistant under article 16, § 35, empowering the supervisors to authorize the appointment of additional deputies to any officer. Article 3, c. 1, §§ 6, 7, prohibit, except as otherwise provided by the charter, the drawing of money from the treasury unless on appropriations by the supervisors, and provides that no warrant shall be drawn except upon an unexhausted specific appropriation. The supervisors set apart a fixed sum for a fiscal year for the salaries of "the district attorney, his assistants," etc. *Held* that, after plaintiff's appointment, his demand for salary for his services passed beyond the supervisors' control, that he was included in the appropriation, and that it cannot be said, because it was enough for the officers named, with the exception of one assistant, the intention was to exclude him, since he was as much an assistant as either of the seven appointed under article 5, c. 3, § 3.

2. SAME—ASSISTANT IN OFFICE.

San Francisco charter creates the position of assistant district attorney, and article 5, c. 3, § 3, requires certain qualifications of him. Pol. Code, § 865, provides that assistants and deputies shall perform the duties of their principals. The assistant attorney's duties are fixed by charter and statute, and are continuing. *Held*, that an assistant attorney, whose salary had been fixed by the supervisors, was an officer entitled to compensation.

Appeal from Superior Court of City and County of San Francisco; J. M. Seawell, Judge.

Mandamus proceeding by Robert W. Harrison against S. W. Horton, as auditor of the city and county of San Francisco. Judgment for defendant, and plaintiff appeals. Reversed.

Richard C. Harrison, for appellant. Maurice L. Asher, for respondent.

COOPER, P. J. This appeal is from a judgment denying appellant's application for a writ of mandamus, to compel the respondent to audit a demand upon the treasury of the city and county of San Francisco for the salary of appellant, as assistant district attorney, for the month of July, 1906. It is conceded that there is money in the general fund in the treasury of the city and county of San Francisco sufficient to pay the claim, that such money has not been appropriated to the payment of any claim or demand upon the said treasury, and that proper demand has been made upon the respondent.

The respondent contends that the board of supervisors had made no specific appropriation of money for the payment of appellant's salary for the fiscal year beginning July 1, 1906, and upon this ground claims that his refusal was justified, and this was the view taken by the judge of the superior court. It will therefore be necessary to consider the nature of the demand, and the law relative thereto. Under the charter of the city and county of San Francisco (section 3, c. 3, art. 5) the district attorney is authorized to appoint seven assistant district attorneys, who shall each receive an annual salary of $3,600. The district attorney appointed seven assistant district attorneys under the authority above cited, and appellant was not one of the seven so appointed. The charter further provides (section 35, art. 16) that, when any officer shall require additional deputies, application shall be made to the mayor, who shall make investigation as to the necessity for such additional deputies, and, if he find the same necessary he may recommend to the supervisors to authorize the appointment of such additional deputy, and thereupon the supervisors, by an affirmative vote of not less than fourteen members, may authorize such appointment and provide for the compensation of such deputy. It will thus be seen that it was the intention of the framers of the charter to prevent the appointment of deputies unless deemed necessary by the principal officer, the mayor, and 14 of the supervisors. Application having been made by the district attorney to the mayor, and the mayor, finding it to be necessary, recommended to the supervisors the appointment of an additional assistant district attorney. Upon such recommendation the board of supervisors, on the 29th day of May, 1905, duly adopted an ordinance authorizing the district attorney to appoint an additional assistant district attorney at a salary of $250 per month, which ordinance was duly approved by the mayor. On January 8, 1906, the district attorney, in pursuance of the charter, and the ordinance so adopted by the board of supervisors, duly appointed the appellant such additional assistant district attorney. Appellant duly qualified, took the oath of office, and entered upon the discharge of his duties, and his appointment has not been revoked or annulled. He performed the duties required of him as such assistant district attorney for the month of July, 1906, and has never been paid therefor. Having performed the services for the city, by the express appointment of the district attorney under the authority of the charter, he should be paid, unless the charter plainly prohibits such payment. The contention is that the payment is prohibited by reason of the charter (sections 6, 7, c. 1, art. 3), which provides: "Except as otherwise provided in this charter, no money shall be drawn from the treasury unless in consequence of appropriations made by the supervisors, and on warrants duly drawn thereon by the auditor. No warrant shall be drawn except upon an unexhausted specific appropriation." Does this provision apply to the salary of an assistant district attorney?

The appellant, after his appointment and qualification, held the office by the same title and from the same source as the seven other assistant district attorneys. His compensation was different, and perhaps the duration of his term less certain; but he was one of the assistant district attorneys, and may be said to be the eighth one. Seven were appointed under the direct authority of the charter. Appellant was appointed under the authority of the ordinance, which, in turn, was authorized by the charter. After the ordinance was passed, it must be read into and as a part of the charter for the purposes of this case, and when so read the district attorney had the authority to appoint eight assistant district attorneys. The charter is itself a law of the state. People v. Williamson, 135 Cal. 418, 67 Pac. 504. The ordinance was a statute of the city and county of San Francisco, consistent with and authorized by the charter, and when the ordinance was passed and the appellant appointed he received his appointment under a law of the state, to wit, the charter. The appointment is of the same weight and dignity as if the ordinance had been embodied in the charter at the time of its adoption. Murphy v. City of San Luis Obispo, 119 Cal. 625, 51 Pac. 1085, 39 L. R. A. 444; City of San Luis Obispo v. Fitzgerald, 126 Cal. 279, 58 Pac. 699. An assistant district attorney is in fact a deputy district attorney. People v. Turner, 85 Cal. 432, 24 Pac. 857; Garnett v. Brooks, 136 Cal. 585, 69 Pac. 298. The charter contains the provision (section 15, c. 1, art. 3) that "the board of supervisors shall authorize the disbursement of all public moneys except as otherwise specifically provided in this charter." The charter specifically provides for the salary of the district attorney and his seven assistants. When the ordinance was passed, it specifically provided for the salary of the eighth assistant, and this with the direct authorization of the supervisors. We cannot persuade ourselves that the salaries of the district attorney and of his assistants shall go unpaid because the board of supervisors did not specifically set apart a fund sufficient for their payment in full. The charter does not contemplate that the machinery of the district attorney's office shall be stopped by reason of the errors or willful neglect of the board of supervisors—an independent branch of the city government. The object of the charter is to provide safeguards against the willful and careless expenditure of the public moneys by the board of supervisors, but the board of supervisors has nothing to do with the payment of the salaries of the officers of the city. Such salaries are fixed by law and must be paid.

In Cashin v. Dunn, 58 Cal. 581, the auditor refused to audit the salary of plaintiff, who had been appointed a deputy in the office of the superintendent of streets, on the ground that the board of supervisors in fixing the tax levy for the current fiscal year had not appropriated a sufficient amount to pay the salaries of the deputies appointed under the law, and that the allowance was prohibited by the act of February 25, 1878, known as the "one-twelfth act." The court held that the "one-twelfth act" had no application "to the auditing and payment of demands for salaries of officers whose appointment is provided for and salaries fixed by law." St. 1877–78, p. 111, c. 101. The writ was ordered to issue. In Welch v. Strother, 74 Cal. 413, 16 Pac. 22, the defendant refused to audit the demand of the plaintiff for his salary as deputy clerk for the month of July, 1887. The appropriation made by the board of supervisors was insufficient, and the "one-twelfth act" was relied upon. The court said: "Salaries are not liabilities against the treasury which rest upon any authorization or contract by the board of supervisors, or any other officer. They are fixed by law, and not subject to the control of such officers. They are payable out of the general fund, and are not limited to any particular part of that fund which the board may choose to set apart for their payment." The writ was issued. In Lewis v. Widber, 99 Cal. 412, 33 Pac. 1128, which was an application for a writ of mandate against the treasurer of the city and county of San Francisco to compel the payment of the plaintiff's salary as chief clerk of the register of voters, it was held that such salary was payable out of the general fund without regard to the revenues of the previous years. The opinion states: "Our conclusion is that the payment of the salary of a public officer whose office has been created and salary fixed by law, either statutory or constitutional, is not within the provision of said section 18 of article 9 of the Constitution; that his salary is to be paid out of said general fund when there is sufficient money therein without regard to revenues of separate years; and that it was a duty specifically enjoined by law upon respondent to pay the said audited demand of petitioner when it was presented on said 3d day of July." To the same effect, see City and County of San Francisco v. Broderick, 111 Cal. 302, 43 Pac. 960; People v. Black, 120 Cal. 553, 52 Pac. 840; Stevens v. Truman, 127 Cal. 155, 59 Pac. 397. The principle upon which all the above cases were decided is that the restrictions which the organic act imposes upon the setting aside of funds and payment of money out of the treasury do not apply to the payment of demands arising out of liabilities which are placed by law beyond the control of the board of supervisors. The board of supervisors had control in the first place of the question as to whether or not they would authorize the appointment of appellant as assistant district attorney. After having authorized his appointment, and after his receiving the appointment and performing the services, the demand for the salary in payment of such services is beyond the control of the supervisors. The cases cited were all relative to the restrictions of the Constitution or the one-twelfth act, but they apply in their reasoning with equal force to the charter of the city and county of San Francisco. The provisions discussed in the cases cited were as stringent as the provisions of the charter.

The late case of Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167, arose after the adoption of the present charter. It was there held that the fact that the board of supervisors of the city and county of San Francisco had set apart a special fund for the fees of the trial jurors in criminal cases, and that this fund was exhausted, is no defense to a mandamus to compel the auditor to draw his warrant upon the county treasurer for fees of jurors for each day's attendance upon the court. It is there said: "It is claimed by the defendant that the board of supervisors has set apart $16,000 for trial jurors in criminal cases, and that this fund is exhausted. That he is expressly forbidden by the charter of the city and county to draw any warrant except upon an unexhausted specific appropriation. It is sufficient in answer to this to say that the superior courts are state courts, and criminal cases concern the state and are state affairs. The charter provides that the income and revenue of the city shall be apportioned and kept in separate funds. Among the various funds mentioned is the general fund, which shall consist of moneys received into the treasury and not specifically appropriated to any other fund." It was certainly not intended by the charter to prohibit the payment of any claim out of the general fund, and yet this would be the result of respondent's contention that "no warrant can be drawn except upon an unexhausted specific appropriation." It has been held that the controller cannot refuse to draw a warrant for a salary fixed by law merely because the Legislature had failed to make a specific appropriation. That the fixing of the salary payable monthly out of any money not otherwise appropriated was sufficient. Humbert v. Dunn, 84 Cal. 57, 24 Pac. 111.

We have discussed the case thus far without reference to the question that an appropriation was in fact made. The bill of exceptions shows that prior to July 1, 1906, the board of supervisors made a budget, and appropriated for the fiscal year commencing July 1, 1906, "$36,200 for the salaries of district attorney, his assistants, clerks, stenographer, and bond and warrant clerks." Appellant was one of the assistant district attorneys, and included in the appropriation. It cannot be said that, because the appropriation was enough for the officers named with the exception of one assistant district attorney, the intention was to exclude this appellant. He was as much an assistant as either of the seven first appointed. The appropriation may become exhausted before the end of the fiscal year, but it certainly was not short for the very first month of the year.

Respondent claims that the appellant was not an officer, that his employment was only temporary, and that no annual salary was fixed. There is no merit in such contention. The charter (section 3, c. 3, art. 5) provides that the assistant district attorneys shall each, at the time of his appointment, be qualified to practice law, and to practice in all the courts of the state, and must have been so qualified for at least two years next preceding his appointment. Under the Political Code (section 865) the assistant or deputy possesses the powers and may perform the duties of his principal. The position was created under the charter, and by its express authority. The compensation was fixed by the body authorized in the charter to fix it. The duties are fixed by the charter and by statute and are continuing duties. Such duties will continue while the place continues, although the person might be changed. This in our opinion made the appellant an officer within the rule prescribed by the authorities. Mechem on Public Officers, § 38; U. S. v. Maurice, 2 Brock. (U. S.) 96, Fed. Cas. No. 15,747; Patton v. Board of Public Health, 127 Cal. 397, 59 Pac. 702, 78 Am. St. Rep. 66.

The judgment is reversed.

We concur: KERRIGAN, J.; HALL, J.

5 Cal. App. 451

## MINER v. RICKEY. (Civ. 284.)

(Court of Appeal, Third District, California. April 25, 1907.)

1. Appeal—Discretion of Trial Court—Review.

Where no abuse of discretion is shown, the denial of a motion to amend a pleading will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3825.]

2. Same—Amendment of Pleadings—Prejudicial Error.

The denial of a motion to amend a pleading is not prejudicial where the case is tried on the theory that the issue sought to be set up in the amendment is in issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4106–4108.]

3. Trial—Instructions—Certainty.

Where, in an action for legal services, the defendant relied on a settlement of the claims for services, instructions containing the expression "all accounts prior to said settlement" was not uncertain; it referring to all services performed prior to the settlement.

4. SAME—ISSUES—PLEADINGS—EVIDENCE.

Where, in an action for legal services, the complaint was framed on the theory that plaintiff rendered services for defendant individually, and defendant relied on denials in his answer of the allegations of the complaint, without setting up the defense that any services were rendered for a firm of which he was a partner, but evidence showing a partnership liability was received without objection, defendant was entitled to an instruction that if the services were rendered at the request of defendant for the firm, and plaintiff knew that the request was made for the firm, the verdict should be for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587-595.]

5. ATTORNEY AND CLIENT—ACTION FOR SERVICES.

The value of legal services in an action for compensation therefor cannot be shown by declarations of third persons not under oath.

6. EVIDENCE—HEARSAY EVIDENCE.

In an action for legal services pursuant to an employment by defendant, the testimony of a witness that he was authorized by a third person to employ an attorney to assist in the prosecution of cases, that he consulted plaintiff, and employed him, was hearsay.

7. ATTORNEY AND CLIENT—ACTION FOR SERVICES—EVIDENCE—ADMISSIBILITY.

In an action for legal services in suits involving state lands, the testimony of a witness to a conversation with the land register, in which he stated that the interest on school lands sometimes was not demanded for a number of years, was inadmissible to rebut an unfavorable inference drawn against plaintiff from the fact that the cases in which he claimed to have performed services were allowed to remain on the calendar undisposed of for years, when, on motion, they could have been dismissed.

Appeal from Superior Court, Mono County; Clark Howard, Judge.

Action by R. S. Miner against T. B. Rickey. From a judgment for plaintiff, defendant appeals. Reversed.

Parker & Parker and Jas. F. Peck, for appellant. Richard S. Miner, for respondent.

BURNETT, J. The action was brought for legal services and was tried before a jury. The verdict was in favor of the plaintiff for the sum of $480. The appeal is from the judgment on a bill of exceptions.

The first point urged in the brief of appellant for reversal is based upon the ruling of the court in denying the motion to suspend the trial until the determination of another action pending in the Circuit Court of the United States. We understand, however, from the oral argument that appellant has abandoned this position, and therefore we shall not discuss it.

Complaint is made of the refusal of the court to allow the defendant to amend his answer. The motion to amend, it is claimed, was promptly made at the close of plaintiff's case, and was based upon the testimony of plaintiff himself. By the amendment it was proposed to set up a "settlement of all the claims and demands existing between the plaintiff and Richard Kirman and T. B. Rickey as copartners, in which settlement a balance of account was struck between the plaintiff and defendant, and in which settlement there was found to be due and owing from the said Richard Kirman and T. B. Rickey as copartners to the plaintiff the sum of $168.50, which said last-mentioned sum was then and there paid by defendant to the plaintiff and received by plaintiff in payment and discharge of the said balance so then found to be due by said settlement." The pertinency of defendant's application to amend is pointed by his contention that, if he incurred any liability at all to plaintiff, it was solely as a member of the firm of Kirman & Rickey, a copartnership. As often held, the power of the court should be liberally exercised in allowing amendments so as to present causes upon their merits, and yet, where no abuse of discretion is shown, the action of the lower court in denying a motion to amend should not be disturbed by the appellate tribunal. While the motion in the present instance might well have been granted, yet it is manifest that the ruling did not prejudice the substantial rights of the defendant, as the cause was tried upon the theory that the settlement was in issue.

The criticism by appellant of the instructions given by the court, and found at folios 933 and 936 of the transcript, we deem inapt and unjustifiable. We think there is no uncertainty in the expression, "all accounts prior to said settlement." It obviously refers to all services for said firm performed by plaintiff prior to said settlement. It would not be contended that the settlement would affect any services rendered thereafter or performed at any time for the defendant individually.

Again, it is urged that the instruction defining a partnership liability and also the following should have been given to the jury: "This is an action against T. B. Rickey individually, and, if the jury find from the evidence that the items sued upon in this action were rendered by plaintiff, and that such services were rendered by plaintiff at the request of the defendant, who at the time of making the request was acting as one of the copartners of a copartnership composed of Richard Kirman and T. B. Rickey, and that the plaintiff knew at the time of such request that the defendant's request was made as such copartner for the copartnership, then your verdict should be for the defendant." To appreciate the force of this contention, it should be remembered that the complaint was framed upon the theory that plaintiff was employed by and rendered services for the defendant individually. The defendant relied simply upon the denials in his answer of the material allegations of the complaint. No affirmative defense was set up, except one in relation to the motion to postpone the action, which at the trial was withdrawn. The evidence introduced by plaintiff was sufficient to support his claim. Defendant's evidence, received without objection, tended to prove that whatever liability existed in favor of plaintiff was against a partnership of which the defendant and the said Richard Kirman were the members. In this state it has been held that, when "several persons contract together with the same party for one and the same act, they shall be regarded as jointly and not individually or separately liable in the absence of any words to show that a distinct as well as entire liability was intended to fasten upon the promissors. Especially is this the rule as to the legal liability of partners upon their partnership obligations." Harrison v. McCormick, 69 Cal. 620, 11 Pac. 456, and cases cited. It might be contended that, where defendant claims as a defense that the obligation is joint and not separate, he should plead it affirmatively, but the obvious answer here is that it was treated as though an issue in the case. The evidence of the partnership liability was received without objection, and hence defendant was entitled to the instruction to which we have referred, as it was addressed to the question of a material variance between the complaint and the evidence.

Again, hearsay testimony of a prejudicial nature was admitted over the objection of defendant. The most serious error in this respect is in relation to the testimony of one David Hays. Nearly all of his testimony was improperly admitted, but we shall refer to only a few of the questions and answers disclosed by the record. He was asked: "Were you authorized by Turner and Dobin, the plaintiffs in these actions, to employ an attorney to help in the prosecution of these cases?" He answered substantially that he was. Again: "Now state what you did do, if anything." The witness answered: "Well, I went to different persons that were practicing law to engage them to act in cases for the association. Mr. Miner: To whom did you go? A. Well, I went to Judge Goodall * * * and Mr. Miner, the plaintiff. Q. Now, how often did you come to me and consult me in that matter? A. I think I may have gone to you, one time or another, five or six times, and you stated, 'I don't know as I have the right——' Mr. Miner: State what I said generally. A. Employed on the other side in some of those instances of which I speak by Kirman & Rickey. Mr. Miner: Was any amount, was any sum mentioned, that I could get, if you recollect, providing I would prosecute the land cases? A. Well, I suggested that you might make a few thousand dollars by serving the sheep men association, that we needed you. You said you could not take any case."

It is idle to argue the incompetency of the foregoing testimony. It is hearsay pure and simple. The effect it might have upon the jury it is easy to surmise. The plaintiff understood its significance, because he made three futile efforts to induce the trial judge to admit it, but at the fourth attempt his pertinacity and importunity were finally rewarded—but upon what ground it does not appear. Plaintiff, in the oral argument, admitted that the ruling is somewhat questionable, but suggested that the evidence might be admissible to prove the value of his services. But it is clear that it was not addressed to the issue as to the reasonable value of his services. But, if it related to that matter, it would still be hearsay and inadmissible. The value of services cannot be shown by declarations of third persons not under oath. The evidence was undoubtedly offered to corroborate plaintiff's testimony as tending to increase the probability that he was employed by defendant. We cannot say, of course, what weight was attached to this testimony by the jury, but by its admission, in the somewhat turgid phraseology of appellant, "every rule of evidence was violated and the defendant's rights ruthlessly disregarded."

Mr. Joe A. Brown, another witness, was allowed also over objection to testify to a conversation with the register of the state land office, in which he stated that the "interest on school lands sometimes was not demanded for a number of years, and there couldn't only be two reasons for that—one would be that the land had not been listed to the state, and the other that there might be suits pending." This evidence was offered for the purpose of rebutting any unfavorable inference that might be drawn against plaintiff from the fact that the cases against defendant, and in which plaintiff claims to have performed the services that are the basis for the present suit, were allowed to remain on the calendar undisposed of for years when upon motion they could have been dismissed. The objection to this evidence likewise should have been sustained.

For the reasons stated, the judgment is reversed.

We concur: CHIPMAN, P. J., HART, J.

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5 Cal. App. 421

## PEOPLE v. SWAIN. (Cr. 38.)

(Court of Appeal, Third District, California. April 22, 1907.)

1. Criminal Law—Preliminary Examination—Magistrates—Jurisdiction.

Pen. Code, § 807, defines a magistrate as an officer having power to issue a warrant for the arrest of one charged with an offense; section 808 authorizes justices of the peace to act as magistrates; section 811 provides that when an information is laid before a magistrate of the commission of a public offense, he must examine on oath the prosecutor and witnesses; section 872 provides that, where it appears from the examination that a public offense has been committed and there is sufficient cause to believe accused guilty thereof, the magistrate must make an order holding him for trial; and section 1426 provides that proceedings before a justice for a public offense of which he has jurisdiction must be commenced by complaint, etc. *Held*, that proceedings before a magistrate and those before a justice of the peace are different, and a justice of the peace exercising the powers of a magistrate has equal authority as such with other officers designated as magistrates, and on examination of one charged with grand larceny on determining that the crime has not been committed he must discharge the accused, and cannot bring him to trial on the charge of petit larceny under the complaint on which the preliminary examination was held.

2. SAME — FORMER JEOPARDY — PRELIMINARY EXAMINATION—DISMISSAL—EFFECT.

A justice acting as an examining magistrate of one charged with grand larceny, on finding the evidence insufficient, entered an order for the trial of accused on the charge of petit larceny on the complaint, on which the preliminary examination was held. On the day fixed for trial the prosecution on motion of the district attorney was dismissed for the reason that accused had been indicted by the grand jury for grand larceny which included the offense charged in the complaint. On the trial of the indictment, the defense, under the plea of former acquittal, offered the proceedings before the justice. *Held*, that the court properly excluded the same, notwithstanding Pen. Code, § 1387, providing that an order of dismissal shall be a bar in other prosecutions for the same offense, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 316–328.]

Appeal from Superior Court, Tehama County; Wm. M. Finch, Judge.

W. E. Swain was convicted of larceny, and he appeals. Affirmed.

McCoy & Gans, for appellant. U. S. Webb, Atty. Gen., for the People.

HART, J. The defendant was prosecuted by indictment for the larceny of four head of hogs, alleged to be of the value of more than $50, and the property of one E. J. Blossom, and was found guilty by the jury of the crime of petit larceny. He appeals from the judgment and an order denying his motion for a new trial.

Upon his arraignment upon the charge alleged against him in the indictment, the defendant interposed a plea of "not guilty," and also a plea "that he has already been acquitted of the offense charged in said indictment, and particularly of the offense of petit larceny included therein by the judgment of dismissal of the justice court of Red Bluff township, in the county of Tehama, state of California, rendered at Red Bluff, in said county and state, on the 22d day of March, 1906."

The only point urged here, and upon which a reversal of the case is asked, is founded upon the ruling of the trial court excluding certain testimony bearing upon the plea of "former acquittal." It appears from the record that on the 21st day of February, 1906, and about one month prior to the finding and filing of the indictment upon which the defendant was tried, as before explained, a deposition or complaint was filed by one E. J. Blossom before and with the justice of the peace of Red Bluff township as a magistrate, charging the defendant with the crime of grand larceny, said complaint or deposition alleging the asportation of eight head of hogs "of the value of $70, the same being the personal property of said E. J. Blossom." An examination of the defendant was had before the magistrate upon this charge, and, after hearing all the evidence offered and taking the matter under advisement, the magistrate finally made the following order in the case: "It does not appear to the court from the evidence adduced at the hearing of this case that the crime of grand larceny has been committed by the defendants (the appellant was jointly charged with one Peter McNett), but there is sufficient reason to believe that the crime of petit larceny has been committed by said defendants. Wherefore it is ordered that said defendants be brought to trial before this court under the complaint filed herein on the 21st day of February, 1906, on the charge of petit larceny." An order was then made setting the case for trial for March 22, 1906. Upon the last-mentioned day the defendants, with their counsel, appeared and announced themselves ready for trial, whereupon the district attorney made a motion to dismiss the case pending before the magistrate, who granted said motion "for the reason that it is made to appear that the defendants have been indicted by the grand jury of Tehama county, for grand larceny, which includes the offense charged in the complaint in this action, which said indictment is now pending in the superior court of the county of Tehama, state of California, a certified copy of which last-mentioned indictment has been produced and filed in this court." It was the refusal of the court to allow proof of the proceedings thus briefly narrated before the magistrate which constitutes the alleged error of which complaint is here made.

The claim is that the dismissal of the proceeding against the defendant by the magistrate after the latter had made an order that the accused be put upon his trial for a misdemeanor under the deposition upon which he had been examined amounted to his acquittal of the lesser offense, and that, therefore, the prosecution, under the indictment, based upon the same transaction, was barred. This position is the equivalent of the contention that the magistrate, having once legally acquired as such authority to preliminarily examine a felony charge, is also in the same proceeding and by the same means invested with jurisdiction to exercise his powers as a justice of the peace and as such to try the accused upon any lesser offense included within that charged in the deposition, without the interposition of the formal complaint required by section 1426 of the Penal Code. This contention is obviously without merit. The act of the magistrate, after discharging the accused upon the felony charge, in ordering the defendant to appear before him as a justice of the peace for trial upon a misdemeanor upon the complaint or deposition charging the felony, was in excess of that officer's jurisdiction, and therefore wholly nugatory and void. Under our law the following persons are magistrates: (1) The justices of the Supreme Court. (2) The judges of the superior courts. (3) Justices of the peace. (4) Police magistrates in towns or cities. Section 808, Pen. Code. A magistrate is defined to be "an officer having power to issue a warrant for the arrest of a person charged with a public offense." Section 807, Pen. Code. Section 811 of the Penal Code provides that "when an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them." Section 1426 of said Code reads: "All proceedings and actions before a justice's or police court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place person, and property, as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint." It is readily to be observed from the foregoing provisions of our Penal Code that proceedings in criminal cases before a magistrate and those before a justice of the peace are entirely different and distinct, and are designed to accomplish widely different purposes. The proceeding before a justice of the peace acting in his ex officio capacity of magistrate is one of the two methods authorized under our system for the inauguration of a prosecution upon ordinary felony charges. The proceeding authorized by section 1426 of the Code involves a trial, of which the justice of the peace as such has jurisdiction under the law, and is, of course, analogous to a trial for a felony in the superior court. Under the law a justice of the peace, when exercising the powers of a magistrate, has equal authority as such with the justices of the Supreme Court and judges of the superior courts when acting in a similar capacity. The jurisdiction of all those officers, when acting in the ex officio capacity in question, extends only to taking and hearing evidence upon the felony charge, and after hearing the proofs making an order either discharging the accused, or holding him to trial for the offense shown by the depositions to have been committed by him. Section 872, Pen. Code. Surely it would not for a moment be contended that a judge of the superior court, acting as a magistrate, could, after discharging the defendant upon the felony charge, make a valid order requiring him to appear for trial before a justice of the peace, under the complaint upon which he had been preliminarily examined, for some misdemeanor of which the evidence might show him to be guilty.

The cases cited in the briefs of appellant do not in any aspect of the question presented sustain his position. On the contrary, we are of the opinion that the case of People v. Smith, 143 Cal. 598, 77 Pac. 449, relied upon by him, harmonizes with the view of respondent. In that case the defendant had been charged by a formal complaint in a justice court with the crime of petit larceny. Over an objection by the defendant's counsel, the court, on motion of the district attorney, dismissed the complaint in order to enable the prosecuting officer to file a felony charge against the accused; said felony charge consisting of the crime of petit larceny alleged against him in said complaint, and a prior conviction of burglary. The authority for this proceeding is found in section 1385 of the Penal Code, which provides: "The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes." Upon the trial in the superior court upon the felony charge, the defendant, having entered a plea of former acquittal, offered the proceedings of dismissal in the justice court in evidence to sustain that plea; it being admitted that the information upon which he was being tried upon the felony charge "embraced the same charge contained in the complaint charging the defendant with petit larceny, filed in the justice court" and dismissed, etc. Under an objection by the district attorney the evidence was disallowed. It was contended that the ruling was error because of the following provision of section 1387 of the Penal Code: "An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor; but it is not a bar if the offense is a felony." The court held that the circumstances of that case did not bring it within the provisions of section 1387; that the defendant, having been previously convicted of the crime of burglary, his subsequent perpetration of the crime of petit larceny was an act constituting a felony, under the terms of section 666 of the Penal Code. Here, as seen, the appellant was never charged by a complaint, as required by section 1426 of the Penal Code, with the crime of petit larceny. The mere declaration by the magistrate that the evidence taken at the preliminary hearing of the felony charge disclosed a case of petit larceny against the accused, and the order that he be required to appear for trial under the complaint or deposition charging the felony amounted to no more than such a declaration and order by a private citizen. It was, as we have declared, an attempt upon the part of the magistrate to exercise authority not within his jurisdiction as such officer—a mere attempted usurpation of power. It will, of course, be conceded that a magistrate's order discharging a defendant does not operate as a bar to a second hearing of the charge either by the magistrate himself or by a grand jury. Pen. Code, § 999; Patterson v. Conlan, 123 Cal. 454, 56 Pac. 105.

From the foregoing reasons, it follows that the court's ruling disallowing the testimony was clearly within the law.

This being the only point urged upon this appeal, the judgment and order appealed from will therefore be affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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5 Cal. App. 441

## ARCHIBALD ESTATE v. MATTESON.

(Civ. 306.)

(Court of Appeal, Third District, California. April 24, 1907.)

1. TRIAL—NONSUIT—DETERMINATION OF MOTION.

A motion for a nonsuit operates as a demurrer to the evidence, and the court in considering it must assume that all the facts given in evidence to support the material allegations of the complaint are true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 359, 373, 374.]

2. SAME — QUESTIONS OF LAW OR FACT — WEIGHT OF EVIDENCE.

Where the evidence and presumptions arising therefrom are legally sufficient to prove the material allegations of the complaint, instead of merely raising a conjecture that the facts alleged are true, a motion for nonsuit should be denied, though the evidence is conflicting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 332.]

3. APPEAL—INVITED ERROR—RIGHT TO REVIEW.

A party bringing out on cross-examination objectionable testimony cannot complain thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3599.]

4. TRIAL—MOTION FOR NONSUIT—DETERMINATION.

On a motion for a nonsuit, the relevant testimony, though inadmissible, but admitted either without or against objection, must be given the effect of its probative force.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 373, 374.]

5. SAME—MONEY RECEIVED—ACTION — QUESTIONS FOR JURY—NONSUIT—EVIDENCE.

In an action by a corporation for money had and received, the evidence *held* to establish a prima facie case, rendering a nonsuit erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Received, § 72.]

6. TRIAL — HEARING ON MOTION FOR NONSUIT.

The question of the credibility of witnesses cannot arise on a motion for a nonsuit, except in so far as the rule requires for the purpose of the motion that the testimony shall be given the benefit of its probative power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 373, 374.]

7. SAME.

Where plaintiff's proof in support of his complaint establishes a prima facie case, and defendant elects to offer no proof, it is for the jury or court sitting as a jury, to determine whether or not plaintiff on the merits is entitled to a recovery, and in such case there is no presumption as to the truth or falsity of the testimony, and the court or jury may accord to the evidence such weight as, in subordination to the rules of law, it may decide that it is entitled to.

8. SAME.

Where a motion for a nonsuit is submitted to the court sitting as a jury, it is not for the court to base its determination of the motion on what it might do in dealing with the facts as a jury, but solely on the proposition of whether the facts as proved are such as to make out a prima facie case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 373, 374.]

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by the Archibald Estate, a corporation, against A. H. Matteson. From a judgment of nonsuit, plaintiff appeals. Reversed. See 84 Pac. 840.

R. L. Hargrove, for appellant. Raleigh E. Rhodes, for respondent.

HART, J. The plaintiff corporation brought this action to obtain judgment from the defendant for the sum of $1,050, alleged to have been loaned by the former to the latter. When plaintiff rested its case, the court, upon the application of defendant, granted a nonsuit, and it is from this judgment of nonsuit, upon a bill of exceptions, that this appeal is taken.

This cause has previously been before this court on an appeal from a judgment of nonsuit, and the judgment reversed. Archibald Estate v. Matteson, 84 Pac. 840. The reversal was based upon the proposition, according to the opinion filed in the case that there was evidence disclosed by the record tending to establish the material averments of the complaint, and that therefore the court erred in ordering a nonsuit. The learned judge of the court below, in granting a nonsuit in the case now before us, filed findings of fact and conclusions of law. He also filed a written opinion (which is incorporated in the opening brief of counsel for appellant) setting forth the reasons upon which he reached his conclusion upon the motion for a nonsuit. There was but one witness, W. J. Archibald, secretary of corporation plaintiff, produced upon behalf of plaintiff, and his testimony, together with certain documentary evidence, introduced into the record all the facts upon which plaintiff seemed to have relied and from the character of which the court felt justified in making its ruling, resulting in the granting of the nonsuit. From the evidence thus adduced, we learn that the Archibald Estate was organized as a corporation on the 11th day of May, 1904; that on the 4th day of June, 1904, there was held by the directors of the corporation a meeting, at which, with the transaction of other business, J. F. Archibald was elected president of the corporation or of the said board of directors thereof, and W. J. Archibald, the witness (and a nephew of J. F. Archibald), was made secretary; that on June 4, 1904, J. F. Archibald, the president, etc., executed a deed transferring to said corporation all the real and personal property of which he was seised and possessed;

and that on July 5, 1904, he turned over to the corporation by check all the money he had on deposit in the Commercial Bank of Madera, amounting to the sum of $3,082.55. This check and the deed conveying the real and personal property to the corporation were offered and received in evidence. On the 4th day of June, 1904, the board of directors of said corporation passed and adopted the following resolution, which was admitted in evidence as a part of the minutes of the proceedings of the board of that day: "Resolved, that the president of this corporation be and he is authorized, empowered and directed to draw from any bank or person or corporation in which may be deposited any of the money or funds of this corporation, upon his own signature and request, and the signature of the secretary shall not be necessary to draw said money or funds." The sum claimed to have been loaned by plaintiff to defendant was received by the latter in two different amounts or installments in the form of checks. These checks were received in evidence, and were as follows:

"Madera, Cal., September 1, 1904.

"Commercial Bank of Madera. Pay to the order of A. H. Matteson the amount eight hundred dollars.
"$800.00 [Signed] J. F. Archibald, Pres."

Indorsed: "A. H. Matteson." Across the face is stamped: "Paid, 9—2—04."
"No. ———.

"Madera, Cal., October 22nd, 1904.

"Commercial Bank of Madera. Pay to the order of A. H. Matteson amount two hundred fifty dollars.
"$250.00 [Signed] J. F. Archibald, Pres."

Indorsed: "A. H. Matteson." Across the face is stamped: "Paid, 10—2—04."

The evidence shows that J. F. Archibald died on the 13th day of November, 1904. The witness W. J. Archibald stated that said checks were drawn on the funds of the corporation. The pass book of the Archibald Estate issued by the Commercial Bank of Madera, showing that the corporation had sufficient money on deposit in that institution to cash said checks, was admitted in evidence. Witness Archibald testified that the bank in which the money of plaintiff was deposited was instructed to pay money on checks issued by J. F. Archibald and signed by him as president, in accordance with the resolution to that effect adopted by the board of directors on the 4th day of June, 1904. He further testified that the deceased, J. F. Archibald, had no money in his individual name on deposit in said bank; that he had held conversations with deceased prior to his death, in which the latter had declared that he had loaned the money to the defendant; that on the 21st day of November, 1904, the board of directors of the plaintiff held a meeting at which a resolution was adopted directing that a demand be made upon the defendant for the payment to the corporation of the sum of money in dispute; that previous to the institution of this suit he held a conversation with the defendant, who then admitted having received the money on the checks heretofore referred to; that there was no written evidence, either by note or mortgage or other written contract, of the alleged transaction between the plaintiff and defendant; that during the lifetime of the deceased, and after the organization of the corporation, all moneys withdrawn from the Commercial Bank of Madera by the corporation were so drawn by checks signed "J. F. Archibald, Pres." On cross-examination this witness admitted that there was no record either in the minutes of the proceedings of the corporation, or in any other book kept by it for the purpose of preserving the history of its business dealings, of the alleged transaction between plaintiff and defendant. He admitted that J. F. Archibald paid personal bills and accounts against himself through checks upon the Commercial Bank signed by him as "Pres." He further admitted that he knew nothing of the transaction to which this controversy relates, except such knowledge with reference thereto as he had obtained from an inspection of the checks after they had been cashed and turned over to plaintiff by the bank, and such information as he had gathered from the deceased in conversations with him upon the subject before his death, and that learned from the defendant himself in a conversation a short time preceding the commencement of this action. In other words, the witness admitted having no personal knowledge of the transaction.

The facts thus detailed are substantially all that were presented by plaintiff and upon which it rested its case. The complaint is in the ordinary and usual form in actions for money had and received, and is verified. The answer denies the averments of the complaint, and sets up a special defense to the effect that said cause of action "is barred by the provisions of section 1973 of the Code of Civil Procedure," and "particularly subdivision 1 of said section," and by way of a plea in abatement alleges that if the defendant is indebted to plaintiff in the sum sued for, or in any other sum, the action is prematurely brought for the reason that cause therefor has not accrued to plaintiff, etc. But it does not appear definitely from the answer how or why the action is barred or was prematurely commenced, nor does the evidence furnish any light upon the subject. The only question, therefore, demanding inquiry and discussion, is whether or not, from the standpoint of the evidence, received upon the merits of the transaction, the court erred in its order granting the nonsuit. We know of no rule of law more firmly rooted in the procedure of our system of jurisprudence than that which forecloses a court from ordering a nonsuit where the evidence presented by the plaintiff tends to establish the material averments of the complaint. A motion for a nonsuit in purpose and effect practically operates as a demurrer to the evidence, and must therefore assume that all the facts given in evidence to support the material allegations of the complaint speak the truth. The consequence of the rule as thus stated is that a motion for a nonsuit presents for the decision of the court a pure question of law. Cravens v. Dewey, 13 Cal. 41; Donahue v. Gallavan, 43 Cal. 576; Schroeder v. Schmidt, 74 Cal. 460, 16 Pac. 243; Warner v. Darrow, 91 Cal. 311, 27 Pac. 737; Goldstone v. Merchants', etc., Co., 123 Cal. 631, 56 Pac. 776; Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336. The sole question therefore is: Does the evidence tend to prove the material averments of the complaint? If it does, then the judgment of nonsuit cannot stand. The evidence must, of course, establish a prima facie case. The proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. Janin v. London, etc., Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82. But where the evidence and the presumptions reasonably arising therefrom are legally sufficient to prove the material allegations of the complaint, a nonsuit should be denied. Felton v. Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750. Or, even where there is a conflict in the evidence, and some evidence tends to sustain the plaintiff's case, a motion for a nonsuit should not be allowed. Pac. Mut. L. I. Co. v. Fisher, 109 Cal. 567, 42 Pac. 154; Wassermann v. Sloss, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209. The record here shows that certain testimony given by the witness Archibald was purely secondary or hearsay, and should have been excluded, and it may be stated that where objection was interposed against such evidence the court promptly and properly sustained the objection. But most of the objectionable testimony referred to was brought out by the defendant himself upon the cross-examination of Archibald. But it is nevertheless argued by counsel for respondent that such testimony is not competent in any view of the proposition to be considered in the determination of the question of whether or not a nonsuit should have been granted. If it were within the province of this court, upon an appeal from a judgment of nonsuit, to review errors involved in admitting incompetent testimony, the respondent would hardly find himself in a position to complain. A party cannot take advantage of his own fault or wrong. This is, however, a proposition which cannot enter into the consideration of the question of whether a nonsuit should or should not have been granted, for even if evidence be erroneously admitted against objection, but tends to prove the averments of the complaint, full effect must be given to it upon motion for a nonsuit. Wright v. Roseberry, supra. The rule, in other words, is that where, upon a motion for a nonsuit, the testimony is relevant, but may be inadmissible under some rule of evidence, and is admitted either without or against objection, it must be given the effect of its full probative force. "Error in admitting evidence for the plaintiff cannot be reviewed on a motion for a nonsuit." O'Connor v. Hopper, 102 Cal. 528, 36 Pac. 939. And in the consideration of a motion for a nonsuit it is the duty of the court to view the testimony in the strongest and most favorable light for the plaintiff.

Do the facts as developed by the evidence, and of which we have presented an epitome, sufficiently meet the criterion established by the rules thus declared, or, in other words, do they make out a prima facie case for plaintiff? A résumé of the record as briefly given here will show that there is proof that all the property, real and personal, including the money he had on deposit in the Commercial Bank, was transferred by J. F. Archibald to the Archibald Estate corporation; that the corporation authorized said Archibald to draw any moneys belonging to it and on deposit in any bank or with any corporation or person on his check, signed by his name as president of the corporation; that he had no money credited to his individual account in the Commercial Bank of Madera; that the defendant admitted having received the sums of money involved in the amount in dispute; that the checks through and by which said sums were paid to defendant by the deceased were issued on said Commercial Bank and signed by said J. F. Archibald as "Pres."; that said money has not been returned or repaid to either plaintiff or to the deceased; that the deceased in his lifetime stated to the secretary of the corporation that said loan had been made to said defendant. We think the evidence, and "the presumptions reasonably arising therefrom," strongly tend to establish the material averments of the complaint, or at least sufficiently so tend as to compel, under the principles as declared by the courts, a denial of a motion for a nonsuit. These facts must, as seen, be assumed upon the motion to be true, and, so assuming them to import verity, and giving them full effect, is there any ground for doubting that they are of sufficient probative force to persuade the conclusion that the defendant was indebted to the plaintiff? The fund drawn upon to secure the money received by the defendant is shown without question to have been that of plaintiff. The authority of Archibald to draw the money as indicated is under the proof equally without question or doubt. The receipt of the money by the defendant is an uncontroverted fact in the record, and that the deceased was acting for the corporation, and not for himself individually, in the transaction with the defendant, is an inference or presumption of fact reasonably arising from the manner in which the checks were signed and from the fact that the fund upon which they were drawn was that of the plaintiff. It must certainly be admitted that the last-mentioned fact warrants a much stronger inference that the transaction, so far as J. F. Archibald's participation in it was concerned, was by and for the plaintiff, than it would afford in the establishment of respondent's contention that Archibald acted in his individual capacity in loaning the money to defendant. It is true that there is no evidence of the history of the transaction to be found in the records or books of the Archibald Estate, but this circumstance, in our opinion, does not materially detract from the strength of the other testimony, for such omission may or might be accounted for upon reasons perfectly consistent with contractual relations involving the transaction between the plaintiff and defendant. Whatever significance might be attached to the circumstance, either for or against the contention of plaintiff, by the jury or the judge acting as such in the determination of the facts upon the merits of the case, is a matter which cannot concern the decision upon the motion. If the other admitted evidence tends to prove the material allegations of the complaint, the circumstance to which we refer is, as to its effect upon the ruling upon the motion, of no importance in any point of view. The same observations are equally applicable to the point established by the evidence that the president of the corporation was accustomed to liquidating personal or private accounts against himself through checks upon the bank, signed by him as "Pres." There is nothing in this fact necessarily incompatible with the contention that Archibald, in loaning the money to defendant, was acting for the corporation. The findings of fact and conclusions of law filed by the court below were, of course, unnecessary and inappropriate. In fact, the learned judge of the court below, in his written opinion, declares that, "while undoubtedly this is an unusual and an apparently unnecessary proceeding, still I feel that under the decision heretofore rendered by the Court of Appeal in Archibald Estate v. Matteson, nothing else remains to be done."

The question raised by the motion, as observed, is one purely of law, and we cannot see how the court's findings of facts from the evidence before it can in any degree aid or strengthen the conclusion reached, for, as we have seen, the motion must admit the truth of the facts shown by the evidence, and by consequence it is the evidence alone upon which we must rely for light to guide us to a conclusion. The question of the credibility of witnesses cannot arise on the motion, except in so far as the rule requires for the purposes of the motion that the testimony shall be given the full benefit of its probative power. In his written opinion giving his reasons for granting the motion, the learned judge of the trial court says: "* * * It certainly seems to me that it would be an anomalous proceeding, after the trial judge, in any case, tried without a jury, had determined that the evidence was insufficient to support a judgment, to refuse a motion for a nonsuit, and, if the defendant then chose to rest upon the evidence offered on behalf of plaintiff, to order a judgment in favor of defendant. If this course were pursued, it would be in effect a confession of error in refusing a nonsuit. The case would be entirely different if the trial were had before a jury, whose province it is to decide the facts, for it is unquestionably the settled law of this state that a nonsuit will not be granted when there is any evidence whatever tending to sustain plaintiff's cause of action." We think the fallacy involved in the reasoning of the learned trial judge lies in the fact of overlooking the extent of the responsibility in the proof of the ultimate fact resting upon the plaintiff. As we have undertaken to demonstrate, the plaintiff must, in support of his averments, offer sufficient proof to make out at least a prima facie case. When he has done this, he has presented a case which he is entitled to have submitted to the jury, which is only putting in another form the declaration of the rule that in such a state of the record, when plaintiff has closed his case, the granting of a nonsuit is not justified. When he has thus rested his case, he is entitled to know what excuse, justification, or defense, if any he has, the defendant may offer against the claims of his complaint. If the defendant elects to offer no proof, it is then for the jury to determine whether or not the plaintiff, upon the merits of the case, as presented, is entitled to a recovery. And in such case there is, of course, abstractly speaking, no presumption to be indulged as to the truth or falsity of the testimony as given, for, the case being then submitted upon its merits, the judge or jury trying the facts may accord to the evidence such weight as it, not arbitrarily, but in subordination to rules of law governing that determination, may decide that it is entitled to, or may give it no weight whatever.

The trial judge is also in error as to the intimation in his opinion that there is any difference in the power and duty of a court, upon a motion for a nonsuit, merely for the reason that a jury has been waived by the parties, and the questions of fact are to be submitted to the arbitrament of the court. The motion is not, of course, addressed to the court, sitting as a jury, when the latter has been waived, but is a question of law alone submitted to the judgment and decision of the court, as such, and the jury or the court acting in that capacity has no more concern with it than it could have with the decision of a question upon demurrer to a complaint or other pleading. In the case of

Goldstone v. Merchants', etc., Co., 123 Cal. 631, 56 Pac. 778, the court says that "the rules as to a nonsuit are the same, whether the trial is by the court or by the jury." When, therefore, a motion for a nonsuit is submitted to the court, acting also as a jury, it is not for the court to base its determination of the motion upon what it might do in dealing with the facts as a jury, but solely upon the proposition of whether the facts as proved are such as to make out a prima facie case. If the facts upon their face, when plaintiff rests, are sufficient to justify the submission of the case to a jury, then they are, of course, enough to submit to the court when acting as a jury, notwithstanding the court's opinion that, upon the merits, they are not sufficient to entitle plaintiff to a recovery, and under such circumstances the motion should be denied.

For the foregoing reasons, the judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

151 Cal. 126

## McELLIGOTT et al. v. KROGH et al.

(Sac. 1,466.)

(Supreme Court of California. May 7, 1907. Rehearing Denied June 6, 1907.)

1. Mines and Minerals—Validity of Location—Corners on Land Not Vacant.

Where the discovery of mineral-bearing vein is made on land subject to location, that the corners were not placed on unappropriated land subject to location does not render the location entirely void; but it is valid to the extent that such location is within the marked boundaries and on unappropriated land.

2. Same.

Where a mining location made in good faith includes within its boundaries more than Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424], permits, being 300 feet on each side of the middle of the vein at the surface, it is void only to the extent of the excess.

3. Same.

Under Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424], declaring that no mining claim shall exceed more than 300 feet on each side of the middle of the vein at the surface, though locators did not place a monument at an intervening point on the line between the end monuments, as under their mistaken belief as to the accuracy of the location of the end monuments there could be no necessity for it, yet they were entitled to have a line established on the correction of the location of one of the end monuments, which would include the corrected corner, that point, and the original corner not corrected, where no part of such line was more than 300 feet from the middle of the vein.

4. Same.

On the correction of this corner, the court was not required to fix the boundary line as a straight line between the corner corrected and the original corner not corrected.

5. Same—Extralateral Rights.

Where the apex of a vein between two points is outside a mining claim and entirely within another, no extralateral rights in favor of the owners of the former claim can apply as to the segment of the vein between such points.

Department 2. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

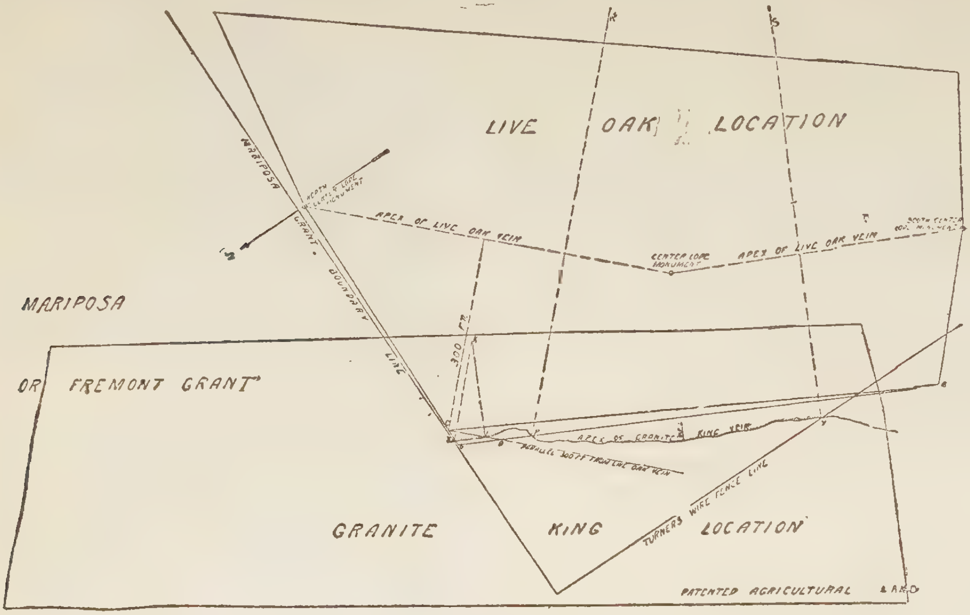
Ejectment by P. McElligott and others against F. W. Krogh and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Wm. E. Colby (Chickering & Gregory, of counsel), for appellants. Geo. E. Goucher, Newman Jones, and J. S. Larew, for respondents.

LORIGAN, J. This is an action in ejectment brought by plaintiffs, the owners of a mining claim known as the "Granite King," against the defendants, the owners of another mining claim called the "Live Oak." These claims join each other; the Live Oak lying to the east of the Granite King as originally staked on the grounds, and the latter overlapping the former to a considerable extent. The Live Oak was located October 28, 1898;

the Granite King on August 28, 1899, nearly a year later. Neither claim has been patented.

We incorporate herein a copy of the map used in evidence in the case and made part of the findings of the court, in order to illustrate the points made on this appeal:


LIVE OAK LOCATION
MARIPOSA
OR FREMONT GRANT"
MARIPOSA GRANT BOUNDARY LINE
NORTH CENTER LODE MONUMENT
APEX OF LIVE OAK VEIN
CENTER LODE MONUMENT
APEX OF LIVE OAK VEIN
SOUTH CENTER LODE MONUMENT
300 FT.
X
O
A
C
Y
APEX OF GRANITE KING VEIN
PARALLEL 300 FT FROM LIVE OAK VEIN
TURNERS WIRE FENCE LINE
GRANITE KING LOCATION
PATENTED AGRICULTURAL LAND

The principal controversy, though not the only point in the case, is as to the correct boundary line betweeen the two locations. As the Live Oak location was the senior one, it became necessary for the trial court, in order to determine the easterly boundary of the Granite King location, to determine first the proper legal position of the westerly side line of the Live Oak location. This the court (referring now to lines, points, and letters indicated upon the above copy of the map) did, as follows: It first determined and fixed the apex of the Live Oak vein trending as indicated on the map. It then found the original northwest corner, as established by the locators of the claim, to have been set at a point indicated on the map by the letter O, being 320 feet from the Live Oak vein, measured at right angles therefrom to said point O. The southwest corner, letter A, it found to be well within the 300-foot limit. It found the westerly line of the Live Oak location as originally staked by the locators to be a straight line connecting these original corners O and A. The court, having so found these original corners as staked and the line connecting them, proceeded then to move the northwest corner in, fixed it at a point exactly 300 feet from the apex of the Live Oak vein—letter C—and thus established a new legal northwest corner. The court then, having established this new legal corner, found the legal westerly line of the Live Oak location, and hence the common line dividing the two locations, to be a straight line projected from this newly established 300-foot corner, C, to the original southwest corner, A. Having thus established the common boundary between the two claims, the court further found that the apex of a well-defined vein or ledge existed in the Granite King territory, which apex extended southerly, as indicated on the map, in a course from the "Mariposa grant line" at the letter X, and very close to the established common boundary between the two claims, until it crossed "Turner's wire fence line" at a point Y; that this ledge dipped to the east at an angle of 35 or 40 degrees; and that within a few feet of its apex it passed underneath the surface of the Live Oak location. In addition, it was found that respondents were entitled to exercise extralateral rights on said vein on its dip underneath the Live Oak surface territory, and the court awarded them such rights in the judgment. The court further found that all of the Granite King location lying to the west of the line designated on the map as "Turner's wire fence line" was not owned by respondents, but had been patented as agricultural land long prior to the date of the Granite King location; and that all of the Granite King location lying to the north of the line designated on the map as "Mariposa grant boundary line" was not owned by respondents, but was part of said grant long prior to the date of making such Granite King location. It was then found by the court that respondents were entitled to a triangular-shaped piece of territory bounded westerly by "Turner's wire fence line," northerly by the "Mariposa grant boundary line," and easterly and southerly by the westerly side line of the Live Oak location, as established by the court.

These are the principal facts as found by the court, and all that are necessary to be stated in order to consider the points presented on this appeal. As we have said, the main question on this appeal is as to the correctness of the action of the court in fixing the position of the common boundary between these two locations; but, before approaching a consideration of that point, it is proper first to briefly consider another point urged by appellants—that the location of respondents (the location of the Granite King) was entirely void. This contention of appellants is based on the fact that not one of the corners of the Granite King location was on ground that was vacant and open to appropriation; that every corner but one was placed on patented ground (on the Mariposa grant or Turner's patented agricultural land), and that one (the southeast corner) was placed within the limits of the Live Oak location. It is true that the corners were placed as appellants contend they were, but we do not perceive how this could affect the rights of respondents as to land which was within such boundaries and subject to location. The court found that the location of respondents was made in good faith, and in substantial compliance with the provisions of section 2324 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1426]. The discovery was made by respondents upon lands subject to location, and their location notice posted thereon in a monument on the lode, and the boundaries were traced upon the ground so that they could be readily found. We are referred to no authority which holds that the corner monuments of a location must be placed upon vacant or unappropriated lands subject to location, in order to constitute a valid location. The basis of the title or right to a mining claim is the discovery of the mineral-bearing vein. The posting of the location notice and marking of the boundaries is simply to give notice that a mining location by virtue of the discovery is claimed. Of course, if the discovery and location are made on lands belonging to another—either patented land or land taken under a previous valid location—the location is void; but that is not this case. Here the discovery and location were on lands subject to location within the boundaries laid out, and such location was valid to the extent that the lands upon which the discovery was made and the location notice posted were within the marked boundaries, and were public and unappropriated lands. This was the view the lower court took. In as far as the location conflicted with the Mariposa grant, the patented agricultural land of Turner, and the prior Live Oak location, the court rejected it and limited it in area to the triangular piece as represented on the map. Thereby the court, rejecting the excess of land upon which the Granite King location could have no valid claim, held the location good as to the lands within the limits of the claim upon which a valid location was entitled to be made, and we make no question but what this was proper. Doe v. Tyler, 73 Cal. 21, 14 Pac. 375; West Granite Co. v. Granite Co., 7 Mont. 356, 17 Pac. 547; Perigo v. Irwin (C. C.) 85 Fed. 904.

Having disposed of this preliminary matter, we now approach the principal point in the case—the correctness of the location by the court of the common boundary line between the two locations. As we have said, the Live Oak location being the senior one, it was necessary to establish its westerly boundary line in order to fix the easterly limits of the junior Granite King location, and this the court proceeded to do, as we have already shown, by first fixing the apex of the Live Oak lode, extended from its center lode monument along a straight line connecting such monument with its north center lode monument. Having done this, the court then found that while the southwest corner of the location A was inside the 300-foot limits, measured from such lode, the original northwest corner, O, as placed by the locators, was 320 feet from said lode, an excess of 20 feet over the authorized legal side line limits. It then drew in this original corner, established it at C, 300 feet at right angles from the lode, and determined the westerly side line of the Live Oak location to be a straight line measured from said new northwest corner, C, as fixed by the court to the original southwest corner (the line C, A).

Counsel for appellants claim that the court erred in so establishing the said westerly line of the Live Oak location, and that it should have established the westerly line of said location along the line C, B, A, so as to include within the Live Oak location the triangular area embraced within those lines, and which was within 300 feet of the lode, and we think this contention of appellant is correct. The Revised Statutes of the United States (section 2320 [U. S. Comp. St. 1901, p. 1424]), which declare the width of lode locations, provide that "no claim shall exceed more than 300 feet on each side of the middle of the vein at the surface." This provision of the statute defining the lateral rights of a claim is equally a declaration that as to all the surface of a lode claim which is within 300 feet of either side of the apex of the vein at its surface, and which is included within the boundaries as staked by the locator, he is entitled to have his right of title confirmed. A locator is not bound to absolute accuracy in laying out the boundaries of his claim, nor, as a penalty for having included within his side boundaries more than the statute allows as lateral rights, is he to lose any portion of the surface of the claim located, which is properly within these statutory limits. When he includes within its boundaries more than the law permits, he is entitled nevertheless to hold to the limit which the law authorizes within the limits laid out, and only the territory embraced within his boundaries which is in excess of these limits is to be rejected. As said in Lindley on Mines, § 362: "It frequently happens that the locator marking his surface without the aid of chain or compass includes within his boundaries an area in excess of the statutory limit. The courts uniformly hold that such a location, where it injures no one at the time it is made, and where it has been made in good faith, is void only to the extent of the excess." This is the general rule and is declared as the rule obtaining in this state, in Thompson v. Spray, 72 Cal. 528, 533, 14 Pac. 182, 185, where it is said: "The location is good for as much as the party is entitled to hold, and void for the excess only." And in Howeth v. Sullenger, 113 Cal. 547, 552, 45 Pac. 841, 842, where the declaration is made that "it often happens that claims are located covering more than * * * 600 feet in width; * * * the location being void only as to the excess." Counsel for respondents cite nothing to the contrary. Now, while the westerly boundary line of the Live Oak location, as originally laid out, included more surface territory than its locators were entitled to as lateral limits under the statute, still, within the rule announced, the lower court should have established the western boundary line of this location so as to include all territory within the limits staked which was within 300 feet of the ledge, and only have rejected the excess. When the court established the westerly line of the Live Oak as a straight line between the points C and A, and rejected the triangular area between it and the line C, B, A, it rejected territory which was not only within the original boundaries as staked, but was within the statutory lateral limits authorized by law. There is no pretense that this triangular area was not within such limits. Measuring from any point along the middle of the vein, the line C, B, A was within 300 feet of the vein, and hence defined the statutory lateral limits to which the Live Oak location had a right to extend, and the lower court should have established it as the westerly boundary line of such location.

Respondents contend that, because the locators of the Live Oak established their westerly line as a straight line between their improperly located northwest monument, O, and their properly located southwest monument, A, when the court established C as the proper northwest corner, the court was also required to establish the westerly boundary line as a straight line between C and A; that, in order to have had the court establish the western boundary line as C, B, A, the locator should have placed a monument at B. But the locators were only required in law to establish monuments at both ends of their westerly side line. They were not required to place intervening monuments, and as they believed the northwest corner to be properly located by them 300 feet from the lode, as the southwest corner was, there could be no occasion to place a monument at B, because that point was within their westerly side line, as they thought they had correctly monumented it. Because they did not place a monument at an intervening point, when, under their mistaken belief as to the accuracy of the location of the end monuments, there could be no necessity for it, did not make them any less entitled to have a line established which would include territory along that line which was within 300 feet of the lode and within the side line as originally marked out. The right of the locators to have such territory included within a line established for that purpose between the northeast and southwest corners did not depend upon the fact whether intervening monuments had been established by them, but because it was within 300 feet of the lode and within the boundary line as originally monumented at both ends.

Nor was the court required to fix the boundary line as a straight line between the northwest corner as established by the court, and the southwest corner, along the line C, A. There is no law which requires the side lines as originally located to be straight lines. As is said by Lindley, in his work on Mines (section 366): "As long as they keep within the statutory width, they may have angles and elbows. * * *"

Nor is there in this case any question relative to establishing a boundary line between two original corners where ordinarily a straight line would be drawn from one to the other. Here the court properly discarded one of the original corners (the northwest), "drew it in," as the mining phrase has it, and established it at a true distance of 300 feet from the lode. This corner had no existence till established by the court, and had nothing to do with fixing the original western boundary as the locators staked it. As they fixed this corner, the line therefrom embraced this triangular piece. If, as the law says, the locators are entitled to a surface area of a width extending 300 feet from the center of the vein, and their boundary line as originally extended between their monuments included this strip, we are at a loss to understand why the court could not have fixed corners so that lines drawn therefrom would include the territory within the statutory limits and which was embraced in the original location. The power of the court to fix corners was not limited to fixing the proper northwest corner at C (300 feet from the vein), and authority only left to draw a straight line from there to the original southwest corner. The court had a right to fix as many corners as were necessary to give the locators of the Live Oak the territory which was within their original location and within the lateral rights defined by the statute. It had no right to fix a line which would exclude any territory within 300 feet of the vein and within the lines of the original location. When, therefore, the court drew in towards the lode the original northwest corner from where the locators had erroneously fixed it at O, and established that corner at C, it was the duty of the court to then also ascertain, with that corner so established, how much of the original Live Oak location was within the statutory limits, and to have fixed the westerly boundary accordingly. As point B was within those limits and within the original boundary, it was the duty of the court to have established another corner at that point, and to make the line C, B, A the westerly side line of the Live Oak location, instead of the straight line C, A. And such a rule of adjustment as to a boundary line originally established by a senior locator in good faith is not only just and proper, but it cannot be said, with any substantial merit, that it works an injury to a subsequent locator who establishes his boundary line within that of the senior location. Such junior locator, when he intrudes upon the monumented side line of a prior locator, knows where the original side line of the senior location is, and where the vein of that location is, and he intrudes with his location at his peril. He knows, even if one of the corners is outside the 300-foot lode limit from the vein, that the surface territory within the side line measured from its end monuments is all at least within 300 feet of the vein. He knows that the law entitles the locator to a side line measured from the vein to not exceeding 300 feet from it, and has no valid ground of complaint when the court gives a senior locator only the ground which he originally located and then extending no further from the lode than the statute said it might.

Now, as to the only remaining point—the question of extralateral rights: It is insisted that respondents are entitled to none at all as to the segment of the vein P, I, which, it will be observed, under the view we take of the proper location of the westerly line of the Live Oak location, lies entirely within that location. This is no doubt true. As the apex of the vein between those points is outside the Granite King location, and entirely within that of the Live Oak, no extralateral rights in favor of respondents can apply to it. Lindley on Mines, § 591.

It is further insisted, however, that, as to the other segments of the vein within the Granite King location, the respondents are entitled to no extralateral rights, because the end lines of their claim are not parallel; that, according to the map incorporated in the findings, the end lines of the Granite King, instead of being parallel, converge in the direction of the dip of the vein. And it is also insisted that if they are entitled to such rights, notwithstanding the end lines of the claim are not parallel, but converging, each segment of the vein from X to I and from P to Y must be treated as if it were a distinct and separate vein and apply to the northerly and southerly points of termination of each segment a perpendicular plane parallel to the respective northerly and southerly end lines of the claim, giving extralateral rights to the respondents between such perpendicular planes, extended easterly in the direction of the dip of the vein until they converge. Interesting as these questions may be, we do not think, under the findings as made, we can dispose of them, and it is possible that in this case we may never be called on to do so. It cannot be determined from the finding of the court as to these end lines whether they are parallel or converging. The court makes the map, a copy of which we have inserted herein, a part of its findings in the case, and then, as to the end lines of the Granite King location, finds "that the end lines of said Granite King location are substantially parallel to each other as they were originally laid out and located, as will appear from said map." Now, if the court had simply found that these end lines were substantially parallel to each other, we would encounter no difficulty, because, with the end lines established as parallel, no question could arise but the respondents were entitled to extralateral rights. But the court goes further and finds that they are substantially parallel as appears from said map. As the map is part of the findings, it must be taken into consideration in examining that finding. When we do so, we find that not only are the end lines not substantially parallel as drawn on the map, but to a large degree are converging lines. The finding is therefore inconsistent and conflicting in its own terms, forming no basis for a solution of the question of extralateral rights, and makes it unnecessary to discuss them until it is definitely determined how the end lines are located—whether parallel or converging. These lines will doubtless be accurately fixed on a new trial, and the finding of the court as to extralateral rights relative to them may be subject to no contention between the parties.

For the reasons given the judgment is reversed.

We concur: HENSHAW, J.; McFARLAND, J.

151 Cal. 340

## Ex parte COLLINS. (Cr. 1,374.)

(Supreme Court of California. May 22, 1907.)

1. HABEAS CORPUS—PETITION FOR WRIT.

The function of a petition for a writ of habeas corpus is to secure the issuance of the writ, and when that is issued the petition has accomplished its purpose.

2. SAME—RETURN—NECESSITY.

A writ of habeas corpus requires a return by the officer or other person having jurisdiction of the prisoner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 65.]

3. SAME—EXCEPTIONS AND TRAVERSE.

The petitioner for a writ of habeas corpus may present to the return exceptions raising questions of law or a traverse raising issues of fact, or both.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 75.]

4. SAME—BURDEN OF PROOF.

Where the return to a writ of habeas corpus is not subject to exception—that is, where it sets forth process which on its face shows good ground for holding the prisoner, such process being produced at the hearing, and the traverse alleges matter tending to invalidate the apparent effect of such process—the burden of proving such new matter is on the petitioner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 78.]

5. EXTRADITION—INTERNATIONAL—RIGHT TO TRY FOR SUBSEQUENT OFFENSE.

United States-Great Britain Treaty July 12, 1889, art. 3, 26 Stat. 1509, provides that no person surrendered by or to either country shall be tried for any offense committed prior to his extradition other than the offense for which he was surrendered. Article 6 provides that the extradition of fugitives under the treaty and the treaty of 1842 shall be carried out in conformity to the laws regulating extradition in force in the surrendering state. The Canadian extradition act is said to provide that it does not authorize the issue of an extradition warrant to any state or country in which the person may be tried after extradition for any other offense than that for which he was extradicted, unless assurance is first given that he shall not be so tried. Rev. St. U. S. § 5275 [U. S. Comp. St. 1901, p. 3596], provides for the security against lawless violence of persons extradited into this country until they have been tried for the offenses for which they have been extradited, etc., and for a reasonable time thereafter. *Held*, that one extradited from Canada is not immune from trial for another offense committed after his extradition, and before given opportunity to return to Canada, and that though the Canadian officials might have refused to surrender him without receiving the assurance referred to in the Canadian act as, by surrendering him without such assurance, the rights of the United States and the state were limited only by the treaty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Extradition, § 23.]

6. HABEAS CORPUS — SCOPE OF INQUIRY — MATTERS OF DEFENSE.

That defendant in a perjury prosecution is charged with matters forming the basis of another prosecution is not a ground for discharge on habeas corpus, acquittal, or conviction in one trial, being a matter of defense to be relied on in the other.

In Bank. Application of George D. Collins for a writ of habeas corpus. Petitioner remanded.

George D. Collins, in pro. per. Wm. Hoff Cook and Hiram T. Johnson, for respondent.

SLOSS, J. A writ of habeas corpus was issued on the application of George D. Collins, who claimed to be unlawfully restrained of his liberty by the sheriff of the city and county of San Francisco. A return was made and a hearing had.

Before proceeding to a consideration of the merits of the application, it may be well to here repeat what was orally stated at the hearing regarding the practice of this court on habeas corpus. The function of the petition is to secure the issuance of the writ, and, when the writ is issued, the petition has accomplished its purpose. The writ requires a return by the officer or other person having the custody of the prisoner. To such return the petitioner may present exceptions, raising questions of law, or a traverse, raising issues of fact, or both. Where the return is not subject to exception—that is, where it sets forth process which on its face shows good ground for holding the prisoner, such process being produced at the hearing (Pen. Code, § 1480), and the traverse alleges matter tending to invalidate the apparent effect of such process—the burden of proving such new matter is on the petitioner. The remarks in Re Smith, 143 Cal. 368, 77 Pac. 180, are to be taken as referring only to the case where, by agreement of the parties and the consent of the court, the petition is treated as a traverse to the return, and its averments are not disputed. This course has frequently been followed in this court; but, where it is followed, it does not require the respondent to file, in addition to the return, a pleading specifically denying the affirmative allegations of the petition (treated as a traverse), nor does it shift the burden of proof as to such allegations from the petitioner to the respondent. To adopt the analogy of pleadings in civil actions, the return is the complaint, and the traverse is the answer; new matter set up in the traverse is deemed denied, and must be proved by the party alleging it.

In this case the petitioner filed exceptions to the return, which were overruled. He then filed a traverse. Evidence was taken, and the substantial facts disclosed are the following: On the 13th day of July, 1905, an indictment charging the petitioner with the crime of perjury alleged to have been committed in the city and county of San Francisco on the 30th day of June, 1905, was found by the grand jury and filed in the superior court of the city and county of San Francisco. Said indictment was designated in said superior court by No. 16,130. After the alleged commission of said crime, and prior to the finding of the indictment, Collins had departed from the jurisdiction of said court and gone to the city of Victoria, in the province of British Columbia, Dominion of Canada. Steps were duly taken to demand his surrender pursuant to the extradition treaty between the United States of America and Great Britain, and on the 27th day of October, 1905, Collins was surrendered and extradited, and removed from the city of Victoria to the city and county of San Francisco. Being there arraigned upon said indictment, he pleaded not guilty, and the case went to trial. Such trial resulted in a disagreement of the jury in the month of December, 1905, and a second trial has not since been had. In the course of said trial, the defendant became a witness, and testified in his own behalf, making certain statements under oath which were, after the disagreement of said trial jury, made the basis of a second indictment for perjury found on the 29th day of December, 1905. This second indictment filed in the superior court, and numbered 16,415, charged Collins with having committed perjury in giving his testimony in his own defense on the 12th day of December, 1905. The district attorney proceeded to trial upon the second indictment against the objection of Collins, and such trial resulted in a verdict of conviction, whereupon judgment was pronounced. An appeal from the judgment was taken and is now pending in the District Court of Appeal.

The principal contention of the petitioner is that, inasmuch as he was extradited from the Dominion of Canada upon a specific indictment (No. 16,130), the state of California could not try him upon any other charge until his trial upon the original charge had first been brought to a final conclusion, and he had been given a reasonable time within which to return to the country from which he had been extradited. So far as relates to international, as distinguished from interstate, extradition, this is undoubtedly the general rule. Commonwealth v. Hawes, 13 Bush (Ky.) 697, 26 Am. Rep. 242; State v. Vanderpool, 39 Ohio St. 273, 48 Am. Rep. 431. The subject was very fully considered by the Supreme Court of the United States in the leading case of United States v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425, where the court, after considering all of the authorities then existing, reached the conclusion that under a treaty of extradition providing for the surrender of persons accused of specific crimes, taken together with sections 5272 and 5275 of the Revised Statutes [U. S. Comp. St. 1901, pp. 3595, 3596], "a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."

In the Rauscher Case, as well as in every other case that has been called to our attention, the crime for which it was sought to try the extradited prisoner was one alleged to have been committed prior to his extradition. In the present case, on the contrary, the crime with which Collins was charged, and of which he was convicted, was committed after his surrender by the authorities of the country in which he had sought a refuge, and after his return to the state of California. The question is whether the immunity against prosecution for another offense, declared in United States v. Rauscher and similar cases, extends to an offense committed subsequent to the extradition. No doubt there is language in United States v. Rauscher, general in its terms, which, taken without regard to the facts before the court, would lend countenance to the view that the prisoner is, until the conclusion of his trial for the offense on which he was extradited, and for a reasonable time thereafter, absolutely immune from prosecution on any other charge. It is an elementary doctrine, however, that expressions in judicial opinions are to be read in the light of the facts before the court, and it is necessary, therefore, to consider the grounds upon which the decision in this class of cases went in order to determine whether those grounds are applicable to the case of a crime committed after the extradition. The reasoning of United States v. Rauscher is substantially this: That in the absence of treaty there is no obligation upon any country to surrender to another persons who are charged with crime in the latter country. That as a matter of comity such surrender might be made, but that, if made in pursuance of a demand or request for the surrender of a person accused of a specific crime, there is an implied undertaking on the part of the country receiving the surrender that such surrender is asked and received for the purpose of putting the accused on trial for that crime, and for no other purpose. When a treaty is adopted, providing for the surrender of persons accused of specific crimes, the same implied obligation exists, more particularly in view of the provision generally found in treaties of extradition that, before any surrender shall be made, there must be some proof of the commission of the offense. To permit a country to seek the extradition of a person found in another country upon the ground that he is charged with the commission of a specific offense covered by an extradition treaty, and then, when his surrender has been granted upon that ground, to try him for some other offense, would make it possible to evade the provisions of the treaty, and to use it as a pretense for securing possession of the person of a prisoner whom it was not designed to try for the charge upon which his extradition was nominally sought, but for some other offense which might or might not be in itself extraditable. In the language of the court in the case under consideration, "it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition."

The doctrine, then, seems to rest ultimately upon the view that the treaty of extradition is intended to provide for the surrender of persons who may have fled from one country to another after committing one of a number of designated crimes, and that it would be a breach of international faith to use the provisions of this treaty for any other purpose than the one which is stated in the demand for the surrender, namely, that the prisoner may be put upon his trial for the specific offense designated in the proceedings. In the absence of this limitation, it would be possible to make up a fictitious case coming nominally within the terms of the treaty, and, having secured possession of the prisoner, to then disregard the charge upon which he was extradited, and proceed to try him upon some other offense which could not have been made the basis of extradition, because not covered by the treaty, or a charge on which extradition, even if the crime charged was named in the treaty, might have been refused. But no such considerations apply to the case of an offense committed after the surrender and return of the accused. While it may be the policy of a country in which a person has taken refuge to grant him the right of asylum except as against a specific charge of a crime covered by a treaty of extradition, such country, after it has once extradited him, cannot be concerned in securing for him immunity for new crimes committed after his return to the demanding country. The obligation assumed by the country demanding the surrender is that such surrender will not be used for the purpose of putting the prisoner on trial for any other offense which he may be claimed to have committed before he sought the asylum of the foreign country; but we cannot see that there would be any breach of international faith in compelling him, in common with other persons within the jurisdiction, to assume responsibility for any offense which he may commit after his return. In such case there is no possibility of the extradition proceedings being used as a subterfuge to pursue the accused for an offense other than the one for which he was extradited. In the absence of any authority compelling such conclusion, we are not prepared to hold that a person extradited under a treaty may, after his return, and pending his trial upon the extradition charge, commit any crime, however atrocious, with absolute security against prosecution until he shall have had an opportunity to return to the country from which he was taken.

The immunity of an extradited prisoner from prosecution for any offense other than the one for which he was extradited rests, not upon any absolute right in him to have an asylum in the land in which he has taken refuge, but primarily upon the rights of the sovereignty which has surrendered him, and has done so pursuant to a treaty. This is illustrated by the many cases holding that where an accused is forcibly seized in another country, and transferred by violence, force, or fraud to this country, without resort to any extradition treaty, he cannot rely on the circumstances of his removal to defeat his prosecution and trial when here. Ex parte Scott, 9 Barn. & C. 446; Lopez & Sattler's Cases, 1 Dearsley & B. C. C. 525; State v. Smith, 1 Bailey, Law (S. C.) 283, 19 Am. Dec. 679; State v. Brewster, 7 Vt. 118; Dow's Case, 18 Pa. 37; State v. Ross, 21 Iowa, 467; The Richmond v. U. S., 9 Cranch (U. S.) 102, 3 L. Ed. 670. See, also, Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421; In re Mahon (D. C.) 34 Fed. 525. "The fundamental principle upon which the doctrine of these cases rests is this: The criminal himself never acquires a personal right of asylum or refuge from the consequences of his crime anywhere. The government of the state or country to which he flees may insist that he shall not be extradited from there unless by its consent and under such conditions as it shall assent to." Hawley on International Extradition, 15. In the Rauscher Case itself, there are one or two expressions indicating that the court intended to limit the doctrine declared to cases of offenses committed prior to the extradition. In speaking of the right of the accused, the court says: "That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up; and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime *committed previous to his extradition.*" And at another place the opinion refers to the immunity from arrest, trial, and conviction for a crime "not enumerated in the extradition treaty *and committed before his removal.*" (The italics are ours.)

Much force is added to the view that the accused is not protected from prosecution for crimes committed subsequent to his extradition by a consideration of the terms of the treaty under which Collins was surrendered. The treaty involved in the Rauscher Case was that of 1842 with Great Britain. That treaty merely provided for the surrender by the respective contracting governments of persons charged with certain enumerated crimes; the surrender to be made upon such evidence of criminality as would justify arrest and commitment for trial in the country which was asked to surrender the accused. There was no express limitation as to the crimes for which the accused might be tried after surrender. Such limitation was held by the court to be implied in the nature of the treaty itself, and there was no occasion to define its precise extent. In 1889 the United States of America and Great Britain concluded an extradition convention, which, after referring to the treaty of 1842, made certain further provisions. Article 3 of the treaty of July 12, 1889, 26 Stat. 1509, reads as follows: "No person surrendered by or to either of the high contracting parties shall be triable or tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered." By this provision the contracting governments reduced to an express and definite agreement the exemption which had been before implied. It seems clear that, in limiting the exemption to crimes committed prior to extradition, the contracting parties indicated their intent that persons surrendered should not be exempt from prosecution for crimes subsequently committed. If under the former treaty there was any exemption for such subsequent crimes (which as we have said was not in our opinion the case), such exemption was removed by the new treaty.

It is urged that the effect of article 3 of the treaty with Great Britain is modified by the provisions of article 6 of the same treaty, providing that: "The extradition of fugitives under the provisions of this convention and of the said tenth article (of the Treaty of 1842 [8 Fed. Stat. Ann. p. 576]) shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering state." 26 Stat. 1510. We are not furnished with any copies of the laws of the Dominion of Canada, and none are at the present time accessible to us. On the hearing the petitioner, after qualifying as a witness regarding the laws of Canada, testified that the extradition act of Canada provided that: "This act shall not authorize the issue of a warrant for the extradition of any person under the provisions of this statute, to any state or country in which, by the law in force in such state or country, such person may be tried after such extradition for any other offense than that for which he was extradicted, unless an assurance shall first have been given by the executive authority of such state or country that the person whose extradition has been claimed shall not be tried for any other offense than that on account of which such extradition has been claimed." For the reasons already stated, we do not think that this statute was intended to protect persons surrendered from trial for subsequent offenses; but, if it was, its only effect was to lay down a rule for the government of officials of the Dominion of Canada. They may, under this act, have had the right to refuse to surrender the accused without receiving the assurance referred to in the act. If they did surrender him without such assurance, the rights of the United States and of the state of California after receiving the prisoner were limited only by the provisions of the treaty, and that treaty, as we have seen, did not prevent trial for a subsequent offense.

In this connection it may be observed that the petition for the writ of habeas corpus alleged as a fact that the warrant of extradition issued by the Canadian government, and upon which the prisoner was returned to this country, contained an express provision that the petitioner "should not be tried or triable for or on account of any other offense than the one upon which such extradition shall be granted * * * until after the final conclusion of his trial for said offense and until his final discharge from custody or imprisonment for or on account of such offense, and thereafter, until he has had a reasonable opportunity of returning to the country from which he was taken on said extradition." The original warrant was destroyed in the conflagration of April 18, 1906. Without deciding that the language quoted, if inserted in the warrant, would affect the right of the state to try the accused on the second indictment, it is sufficient to say that the evidence taken on the hearing absolutely negatives the claim of the petitioner, and shows conclusively that no such language was inserted in the warrant. There is, in our opinion, nothing in the provisions of section 5275 of the Revised Statutes of the United States which conflicts with the views herein expressed.

It is further contended by petitioner that the perjury with which he was charged in the second indictment consisted in swearing to some of the same matters which formed the basis of the charge of perjury in the first indictment. From this it is argued that a verdict of acquittal on the first charge would be conclusive in favor of the defendant on any subsequent trial. U. S. v. Butler (D. C.) 38 Fed. 498; Coffey v. U. S., 116 U. S. 436, 6 Sup. Ct. 432, 29 L. Ed. 681; Cooper v. Com., 51 S. W. 789, 106 Ky. 909, 45 L. R. A. 216, 90 Am. St. Rep. 275. Similarly, it is claimed, a verdict of conviction on the first charge would preclude a conviction on the other. We need not decide whether the principle invoked has any application to the facts here presented. In any event, such acquittal or conviction in one trial is matter of defense to be relied on in the other. It does not go to the jurisdiction, and affords no ground for release on habeas corpus. For these reasons we are satisfied that the state of California did not violate any treaty obligation of the United States, or any right of the accused, in putting him to trial upon the second indictment, and that he is properly held in custody by the sheriff pursuant to the judgment of conviction.

The sheriff also claims to hold the petitioner by virtue of a bench warrant issued upon the first indictment, namely, the one which was the basis of the extradition proceedings. As to this the petitioner claims to have been released on bail. The destruction of the public records of the city and county of San Francisco in the conflagration of April, 1906, makes it difficult to determine the truth of this claim. The evidence upon it is conflicting. We have reached the conclusion that the weight of evidence is to the effect that the prisoner, after having given bail upon this charge, voluntarily surrendered himself into custody, and that he has not since given bail. Nor has he offered any evidence in support of his allegation that his trial on this charge has been unreasonably postponed against his objection, and that the prosecution has no bona fide intention of putting him to trial on this indictment. He is therefore properly in custody of the sheriff on the bench warrant issued under the indictment in case 16,430, and the extradition proceedings thereon, as well as the judgment of conviction in case 16,415.

Petitioner is remanded to the custody of the sheriff to be held in pursuance of process in both cases.

We concur: BEATTY, C. J.; HENSHAW, J.; McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

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## TRACY v. MUIR et al. (S. F. 3,720.)

(Supreme Court of California. June 3, 1907.)

1. WILLS—PROBATE—DISTRIBUTION—COLLATERAL ATTACK.

Fraud in obtaining decrees of distribution which were in strict accord with the terms of a will, and which necessarily followed the decree admitting the will to probate, cannot avail, if the probate itself cannot be attacked.

2. WILLS — REVIEW — FRAUD — PREJUDICIAL ERROR.

An heir not a party to a will contest is not injured by frauds perpetrated on the trial of the contest with a view to secure a verdict sustaining the will, for the only effect of a decree admitting the will to probate is to fix the time within which he must under the statute himself contest the will.

3. TRUSTS—CONSTRUCTIVE TRUSTS—SUIT TO ESTABLISH—COMPLAINT.

A complaint in a suit to declare that distributees under a will hold property as trustees for plaintiff alleged that plaintiff resided in a foreign country, and for several years after the probate of the will she had no knowledge of the forgery of the will, nor of any conspiracy between the distributees and others to obtain for them by means of a forged will the property of decedent. There was no allegation of want of actual knowledge within a year after the probate of the will of such court proceedings as were evidenced by the records of the court. *Held*, that it must be presumed that plaintiff had knowledge of the order admitting the will to probate, either at the time it was made or very shortly thereafter and in time to contest the will, so that the complaint did not state a cause of action.

4. WILLS — PROBATE — JUDGMENT — CONCLUSIVENESS.

The determination of the question of the genuineness of an instrument purporting to be a will is exclusively for the court to which the proof of wills is confided, and its decision is final and conclusive, and, in the absence of statute providing otherwise, not subject, except on an appeal to a higher court, to be questioned in any other court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 904–910.]

5. SAME—PARTY AGGRIEVED—REMEDY.

One having actual notice of proceedings admitting a will to probate in time to make his contest, and failing to take advantage thereof by appearing and contesting within the time allowed by law, cannot obtain relief, unless he was prevented from appearing and contesting by fraud of those procuring the probate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 911–916.]

6. TRUSTS—CONSTRUCTIVE TRUSTS—SUIT TO ESTABLISH—COMPLAINT.

A complaint in a suit to declare that distributees under a will hold property received thereunder as trustees for plaintiff alleged that plaintiff had been deprived of property to which she would have succeeded as heir by means of a false and forged will, established in a court having jurisdiction to determine its validity, by perjured testimony. It also alleged a conspiracy between the distributees and others to obtain for the distributees by means of a forged will the property of the decedent. The action was brought after the expiration of the time within which to bring a suit to contest the will. *Held*, that the complaint did not state a cause of action; for whether the forgery and perjury complained of were the result of a conspiracy was immaterial to a determination of plaintiff's rights to pursue the property in the hands of the distributees.

7. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—NOTICE OF JUDICIAL PROCEEDINGS—SUFFICIENCY.

Code Civ. Proc. § 1303, providing that a will may be probated on 10 days' notice by publication or by posting the same in public places, is not unconstitutional as depriving an heir of a decedent of his property without due process of law when applied to a nonresident heir who could not receive a notice in time to permit her to appear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 930.]

8. SAME—EQUAL PROTECTION OF THE LAWS.

Code Civ. Proc. § 1304, providing that copies of the notice of the time appointed for the probate of a will must be served on the heirs of the testator resident in the state, if known to the petitioner, is not violative of the fourteenth amendment of the federal Constitution, as discriminating against nonresidents because of a failure to make any provision for personal notice to nonresidents; the fact of nonresidence being a sufficient reason for a difference in the manner of notice.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Laura E. Tracy against Elizabeth M. Muir and another. From a judgment for defendants, plaintiff appeals. Affirmed.

William T. Baggett and George W. Monteith, for appellant. Campbell, Metson & Campbell (Thomas H. Breeze, of counsel), for respondents.

PER CURIAM. This is an appeal from a judgment in favor of defendants, given upon sustaining a demurrer to plaintiff's amended complaint. The action was one in equity to obtain a decree adjudging defendants, Elizabeth Muir and Isabella Curtis, to hold certain property distributed to them by decrees of partial distribution in the matter of the estate of one Jacob Z. Davis, deceased, as trustees for plaintiff, a daughter of a deceased brother of said Davis and one of his heirs at law, and the other heirs at law. The distribution to defendants was in accord with the terms of a document purporting to be the olographic will of said deceased, which was filed for probate in the superior court of the city and county of San Francisco upon November 16, 1896, and which, after contest instituted and maintained by certain heirs not including plaintiff, was upon August 15, 1897, admitted to probate as the last will of deceased. Within the year after probate allowed for contest, a contest was instituted by heirs other than plaintiff, which was on stipulation of the parties thereto dismissed, and the probate of the will was never revoked.

The main basis of plaintiff's claim that defendants should be held to be trustees as to the property so distributed to them is that the will so admitted to probate was in fact a forgery, made by defendants and divers other persons pursuant to a conspiracy to obtain for defendants, by means of a forged will, the property of Davis, and that such persons, in the carrying into effect of such conspiracy, offered such forged will for probate, and procured the probate thereof by means of false and perjured testimony, the fraudulent concealment from the court of genuine writings of the deceased which would have shown the forgery, and the fraudulent procurement by the conspirators of three of their secret agents and co-conspirators upon the jury which tried the contest before probate and rendered the verdict sustaining the will. Plaintiff was not a party to such contest, and never appeared in the probate proceeding until August 18, 1900, when she filed her petition contesting the validity of said will and asking that the probate thereof be revoked upon the same ground now urged in behalf of the pending proceeding. A demurrer to her petition was sustained and relief denied by the probate court, and upon appeal to this court the ruling of the lower court was affirmed; it being held that, notwithstanding the residence of plaintiff outside of the country, her failure to contest within a year after the decree of probate was made barred her from the relief sought in the probate proceeding. Estate of Davis, 136 Cal. 590, 594, 69 Pac. 412. At the time of the death of Davis, the offering of the will for probate and the probate thereof, "and for a long time thereafter," plaintiff was an actual resident and inhabitant of the city of Honolulu, in the then republic of Hawaii. She did not learn of the conspiracy or discover any of the frauds until May 1, 1900. She subsequently filed a petition to revoke the probate heretofore mentioned. The defendants were not heirs at law of Davis, being merely nieces of his deceased wife. The notices given of the original application for probate were given in full accord with the statutes of this state relative to such notices, but plaintiff also alleges that these statutes, as to nonresidents of the state, are unconstitutional and void, in that they are repugnant to the constitutional guaranty of due process of law, and deny persons subject to the jurisdiction of the state the equal protection of its laws. This is substantially, so far as is material, the case made by the amended complaint. Fraud in obtaining the decrees of partial distribution is also alleged, but we do not regard these allegations important if the probate of the will cannot be successfully attacked in some way. As already stated, such decrees of distribution were in strict accord with the terms of the will, and necessarily followed the decree admitting the will to probate. Unless plaintiff can succeed in charging defendants as trustees because of the fraudulent procurement of probate of a forged will, it is clear that she must fail, for she can have no independent right to complain of a distribution in full accord with the terms of a will, the probate of which has not been revoked, and which is unassailable either by proceedings to revoke the probate, or in an equitable action to have the distributees thereunder decreed to be trustees for her. See In re Davis' Estate (Cal. Sup.) 86 Pac. 183, 186.

Passing for the moment the question as to the validity of our statute relative to the notice to be given of an application for probate of a will, and assuming that the probate court had jurisdiction of the proceedings as against this plaintiff, the question presented is as to whether an action in equity can be maintained for the purpose of having the beneficiaries under a forged will, the probate of which has been obtained by such frauds as are alleged in the amended complaint, declared trustees for those who would but for such will have succeeded to the estate.

It is to be stated at the outset that, in view of the provisions of our statutes relative to probate of wills, it is manifest that plaintiff could not have been injured by the frauds alleged to have been perpetrated on the trial of the contest before probate for the purpose of securing a verdict sustaining the will, and is in no position to complain thereof. This includes, of course, the alleged fraudulent introduction of certain agents of the conspirators upon the jury which tried that contest. Plaintiff was not a party to that contest, and was in no degree estopped or concluded by the result thereof. Estate of Cunningham, 54 Cal. 556. The only effect as to her of the decree entered upon that contest was to fix the limit of time within which she might herself contest the will. Under the express terms of the statute, she could at any time within one year after the probate have contested the will upon any of the grounds that could have been urged against it before probate, and upon such contest no different measure of evidence or manner of procedure from that required before probate was essential to a successful attack. See Estate of Latour, 140 Cal. 414, 421, 437, 73 Pac. 1070, 74 Pac. 441. If on such a contest after probate the genuineness of the will is not sufficiently proved, the probate must be annulled and revoked. Code Civ. Proc. §§ 1327, 1329, 1330.

It must also be borne in mind that, under the allegations of the amended complaint, neither of the defendants nor any of their alleged co-conspirators sustained any fiduciary relations to the plaintiff or the other heirs at law. They were absolute strangers, asserting as against the world the genuineness of an instrument which would give the beneficiaries under the will the property of the deceased as against the heirs, and they occupied no position of trust or confidence which imposed upon them any special duty as to plaintiff.

It is further to be observed that the amended complaint is destitute of allegation of any act on the part of any of the alleged conspirators, the effect of which could have been to prevent the plaintiff from appearing in the probate court at any time within one year after the probate, and contesting the will upon all or any of the grounds specified in the statute, including the very ground upon which she here bases her claim, viz., that the will had never been executed by the deceased, but was a forgery.

It is also to be noted that there is no allegation that plaintiff had not learned, prior to the offer of the alleged will for probate, of the death of deceased, or that she did not then know that he was, at the time of his death, a resident of the city and county of San Francisco, and it was not alleged that she did not have actual knowledge of the admission of the will to probate in ample time to have enabled her to contest it within the year after probate. Her complaint appears to have been carefully drawn, with a view to excluding anything like an allegation of want of actual knowledge within such year of such proceedings in the matter of said estate as were matters of public record, except in regard to the petition for revocation filed within the year by Anna Wilson and others, which it is alleged she did not know of until August 14, 1900. Her general allegations in regard to want of knowledge are that at the time of the death of deceased and up to the time of the admissions of the alleged will to probate, August 17, 1897, "and for a long time thereafter," she was actually living in Honolulu, and that prior to May 1, 1900, "she did not know of the conspiracy hereinbefore mentioned, nor of any fact or circumstance connecter therewith, nor did she know of the forgery of said will, nor that the same was not genuine, nor did she have any knowledge whatever prior to that date of any fraud, conspiracy, deception, or concealment specified and referred to in paragraph V of this complaint." There is in this no allegation of want of actual knowledge within the year after probate of such court proceedings in the matter of the estate as were evidenced by the records of the court; the allegations being confined to actual knowledge as to the conspiracy, and the forgery and the falsity of the alleged will, and the fraud, deception, and concealment practiced in obtaining its admission to probate. In the absence of positive averment to the contrary, it must be presumed that plaintiff had actual knowledge of the order admitting the will to probate made nearly a year after its offer for probate, either at the time it was made or very shortly thereafter and within time for contest. See Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88; Tynan v. Kerns, 119 Cal. 451, 51 Pac. 693. Whatever might be the effect of the presence of some such feature in the case, we are satisfied that, under the circumstances above stated, the unrevoked probate decree must now be accepted as conclusive upon the question of the genuineness of the will. If plaintiff cannot be allowed in this action to show that the will was not the genuine will of deceased, it is needless to say that no cause of action cognizable by a court of equity is stated by her amended complaint.

It appears to be firmly settled by the overwhelming weight of authority that, under such a system as exists in this state for the admission of wills to probate, the determination of the question of the genuineness of an instrument purporting to be a will is solely and exclusively for the court to which the proof of wills is confided, and that its decision therein is final and conclusive, and in the absence of "state law, statutory or customary," providing otherwise (O'Callaghan v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101), not subject, except on an appeal to a higher court, to be questioned in any other court, or to be set aside or vacated by the court of chancery on any ground (State v. McGlynn, 20 Cal. 233, 266, 81 Am. Dec. 118; Broderick Will Case, 21 Wall. [U. S.] 503, 22 L. Ed. 599, and authorities there cited; Langdon v. Blackburn, 109 Cal. 19, 41 Pac. 814). Under this rule, as long as the probate stands, the will must be recognized and admitted in all courts to be valid, the unrevoked decree of probate standing as absolute and conclusive proof of its genuineness. This rule is stated to be an exception to the general doctrine that a court of equity may set aside judgments obtained by fraud or mistake, and it has been suggested by some of the courts and writers that no satisfactory ground can be discovered for such an exception. However this may be, it is a rule that is firmly established by the authorities, and one that has been declared and applied by this court. In the leading case of State v. McGlynn, supra, the matter was exhaustively discussed and the authorities reviewed. It is unnecessary to here restate the reasoning of the court in that case, or to attempt to add thereto. In the Broderick Will Case, supra, upon a full discussion of the question, it was held by the United States Supreme Court, as stated by this court in Langdon v. Blackburn, supra, that "a court of equity has no jurisdiction to avoid a will or to set aside the probate thereof on the ground of fraud, mistake or forgery, this being within the exclusive jurisdiction of the courts of probate, and also that a court of equity will not give relief by charging the executor of a will or a legatee with a trust in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief by refusing probate of the will in whole or in part." This rule we take to be absolute, at least in every case where there has been no breach of duty arising from a fiduciary relation on the part of those securing the probate of the will, no such extraneous fraud as operates to prevent the heir from appearing in the probate court and there contesting the will and exhibiting fully his case against the same, and no lack of actual knowledge of the pendency of the probate proceeding operating to deprive the heir of an opportunity to so appear in the probate court and make his contest. The case of such lack of actual knowledge is stated as a possible exception, in view of the doctrine declared in Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143, and in Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007, to the effect that when a judgment has been obtained upon a false and fraudulent claim upon constructive service of summons, and the party against whom it is obtained had no actual notice of the pendency of the action in time to appear therein and set up his defense, a court of equity will relieve such party from the judgment, and because it has been suggested here that this doctrine may be applicable in the matter of a decree admitting a will to probate. In some or perhaps all of the cases just suggested equity might grant some appropriate relief as between the parties, if the complaining party has not been guilty of laches, but as to this we do not decide. This is not such a case. A proceeding for the probate of a will is a proceeding in rem.

By the offer of the will for probate the proponents tender to the world the issue as to its genuineness. Any person interested may appear and contest the instrument so offered upon various grounds, including all grounds substantially affecting its validity or the question of its due execution. Failing to appear and contest before probate, the right exists for a full year after probate. One who must be held to have had actual notice of the proceedings in time to make his contest, and who fails to take advantage of the opportunity afforded of opposing the will by appearing and contesting within the time allowed by law, must, at least unless he can be held to have been prevented from so appearing and contesting by some fraud of those procuring the probate, be held concluded by the decree as to any matter concerning which he could have obtained relief by a contest. It can be no excuse for his failure to appear and contest that he did not know that the alleged will was not genuine. That it was genuine was one of the very issues tendered him by his adversary, which he was called upon to meet within the time allowed by law or forever thereafter admit.

The three California cases relied on by plaintiff—Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98, Aldrich v. Barton, 138 Cal. 220, 71 Pac. 169, 94 Am. St. Rep. 43, and Silva v. Santos, 138 Cal. 536, 71 Pac. 703—are not in point here. None of them involved any question as to the effect of a decree admitting a will to probate. In addition to this, there was present in the first two cases fraud operating to prevent the injured party from presenting his case in the original proceeding, while in all of the cases the persons whose misconduct was held sufficient to impose an involuntary trust upon the beneficiaries of their acts sustained a fiduciary relation to the persons defrauded. This is disputed by counsel for plaintiff as to the case of Sohler v. Sohler; but an examination of the opinion will show that the statement in the opinion of the learned judge of the trial court to that effect is correct. The statement of Mr. Pomeroy in his Equity Jurisprudence (section 919) that, where "a probate is obtained by fraud, equity may declare the executor or other person deriving title under it a trustee for the party defrauded," must be taken as referring only to such cases as those we have already referred to as possible exceptions to the rule. Such was the case of Barnsley v. Powell, 1 Ves. Sr. 284, cited by him, where a deed of consent to the probate had been fraudulently procured. It cannot be held to include such frauds as could have been relieved against by the probate court by refusing the probate of the will, where the injured party had actual notice of the probate proceeding in time to make his contest, and was not prevented from so doing by some fraud of the other party.

The allegations as to conspiracy add nothing to the legal effect of plaintiff's complaint. The sum and substance of that complaint is that she has been deprived of property to which she would have succeeded as heir by means of a false and forged will, established in the court having the jurisdiction to determine as to its validity by perjured testimony. Whether or not the forgery and perjury were the result of a conspiracy appears to be entirely immaterial in determining her rights to pursue the property in the hands of the beneficiaries. We are unable to see, as suggested by counsel for plaintiff, that such a conspiracy could operate to change what would otherwise be intrinsic fraud into extrinsic fraud. See Pico v. Cohn, 91 Cal. 129, 134, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159.

The alleged invalidity of our statute relative to the notice to be given of an application for probate of a will (sections 1303, 1304, Code Civ. Proc.) as to nonresidents who have no actual notice, is principally based upon the claim that the notice thereby provided for is wholly inadequate to enable one, situated as was this plaintiff, in any contingency to receive the notice in time to appear and contest the probate of the will on the original hearing. The notice provided by section 1303, Code Civ. Proc., is one of at least 10 days, the same to be given publication. Plaintiff was at that time a resident of Honolulu, in the then republic of Hawaii, and could not have received the notice in time to permit her to so appear. The effect of a provision making such notice sufficient is, it is urged, to deprive one situated as was this plaintiff of her property without due process of law. This particular contention has been before made in this court by this appellant, and overruled. It was held in Estate of Davis, 136 Cal. 590, 597, 69 Pac. 412, that inasmuch as the rights of the nonresident heir are in no way concluded by the decree, he having an entire year thereafter in which to attack the will on the same grounds and for the same reasons that he could attack it before probate, the measure of evidence demanded of him for a successful attack being no different in the two cases, due process of law is in no degree denied to the nonresident heir by the provision as to notice of the original hearing. This ruling was affirmed in the matter of Davis' Estate (Cal. Sup.) 86 Pac. 183, the court saying: "Whether or not this be a proper case for applying the doctrine of res adjudicata or that of the law of the case, we are satisfied with the conclusion reached and adhere to it." In O'Callaghan v. O'Brien, 199 U. S. 89, 117, 25 Sup. Ct. 727, 50 L. Ed. 101, the United States Supreme Court has decided a practically similar question in the same way. That case arose under the laws of Washington, the claim being made that the failure to give notice of an application for the probate of a nuncupative will, as required by the statute, made the admission to probate of such will a violation of the due process clause of the fourteenth amendment to the Constitution of the United States. The laws of Washington as to a contest within one year after probate were substantially similar to ours. It was held that, conceding for the purposes of argument that absence of notice might afford substantial ground to contend that rights protected by the Constitution of the United States had been violated, if by its omission the parties were deprived of or lost their right to deny the will or question its probate, the full right given by the statute was a complete answer to the claim made under the federal Constitution.

The further contention that section 1304, Code Civ. Proc., requiring, in addition to the constructive notice provided for, personal notice to be mailed to or personally served on heirs of the testator residing in the state, but making no provision for such personal notice to nonresident heirs, is violative of the fourteenth amendment of the federal Constitution, as discriminating against nonresidents, we think to be entirely without merit. The very fact that one is a nonresident of the state is, from the necessities of the case, a sufficient reason for a difference in the manner of notice, and has always been recognized as such. If the manner of notice provided for an absent party is reasonable and adequate for that purpose, he cannot complain thereof on the mere ground that it is different from the notice provided for residents. He has not been deprived of due process of law. See, also, Estate of Davis, 136 Cal. 590, 595, 69 Pac. 412. The other federal questions suggested are disposed of by what has already been said upon the merits of the case.

For the reasons given above, the amended complaint failed to state a cause of action. The judgment appealed from is affirmed.

BEATTY, C. J. I concur in the judgment.

5 Cal. App. 505

## TATE v. AITKEN et al. (Civ. 314.)

(Court of Appeal, Third District, California. May 6, 1907. Rehearing Denied by Supreme Court July 5, 1907.)

1. PRINCIPAL AND AGENT—ACTS OF AGENT—RATIFICATION.

Though a contract authorizing real estate brokers to sell plaintiff's land was not signed by plaintiff, it was none the less his act, where his wife signed it with his approval, and he subsequently ratified her act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 662; vol. 26, Husband and Wife, §§ 139-147.]

2. SAME — ACTION BY PRINCIPAL FOR ACCOUNTING—SUFFICIENCY OF EVIDENCE.

Evidence in an action to recover money wrongfully retained by real estate brokers *held* to show that they were plaintiff's agents; that, as such, they agreed to sell the land to another for $1,300, which sum was paid to them; that after such sale they represented to plaintiff that the land could be sold for no greater sum than $800; that plaintiff, relying on the misrepresentation, accepted $800, and conveyed the land to the brokers, and they conveyed it to the third person.

3. SAME—AUTHORIZATION AND RATIFICATION OF AGENT'S ACTS—EVIDENCE—SUFFICIENCY.

Evidence in an action based on a contract made by plaintiff's wife *held* to show that her acts were authorized and ratified by plaintiff.

4. VENDOR AND PURCHASER—OPTION TO PURCHASER — AUTHORITY TO SELL — BROKERS — REAL ESTATE—CONTRACT—CONSTRUCTION.

A writing in express terms empowering and authorizing real estate brokers to sell land for $1,000, or as much less as the owner might take, binding the brokers to accept as remuneration any sum they might obtain in excess of the sum stipulated that the owner should receive was a contract of agency, and not an option to the brokers to purchase the land.

Appeal from Superior Court, Tehama County; Wm. M. Finch, Judge.

Action by C. M. Tate against A. B. Aitken and another. Defendants appeal from a judgment for plaintiff, and an order denying a new trial. Affirmed.

M. J. Cheatham (W. P. Johnson, of counsel), for appellants. John J. Wells, for respondent.

HART, J. Plaintiff commenced this action for the purpose of recovering the sum of $500 alleged to be due him from defendants, said amount representing, it is alleged, the difference between the sum paid to plaintiff by the defendants for a piece of land belonging to the former and the sum received for said land by said defendants on a sale of the same to a third party; the transaction involving such sale having been conducted, it is averred, by defendants as agents of plaintiff. Plaintiff was given judgment for $200, from which and the order denying a new trial, this appeal is taken.

The defendants at and for some time prior to the date of the institution of this action were copartners, engaged in the business of buying and selling real estate at the town of Corning, in Tehama county. The plaintiff at the same time was the owner of "lot numbered 2, in the block numbered 11, in Richfield colony, in the said county of Tehama." In the month of July, 1904, the plaintiff employed said defendants as agents, conferring upon them full authority to sell said lot, agreeing to pay them for their services in effecting the sale thereof so much as they might receive therefor in excess of a certain amount fixed and stated in a certain written agreement to be hereafter noticed. It is charged in the complaint "that on the 1st day of July, 1905, the defendants bargained and agreed with one W. L. Yound to sell and convey to him the said property for and in consideration of the sum of $1,300, which sum the said Yound then and there paid to the defendants." It is further alleged "that thereafter the defendants, while still the agents of plaintiff, for the purpose of making the sale of the said property, represented to plaintiff that they could sell the said property for the sum of $800, but not for any greater sum, and they prevailed upon the plaintiff to accept the said sum of $800, in full as payment for the said property." The plaintiff, it is alleged, thereupon executed a deed, conveying said property to defendants, and that the latter paid to him the sum of $800; that immediately after said transaction, "and as a part thereof," the defendants conveyed said property to said W. L. Yound, the latter paying to the defendants therefor the sum of $1,300. The answer, after denying that the land was sold to defendants under the circumstances alleged in the complaint, and denying that plaintiff employed them as agents to sell said land, admits that the defendants purchased it at the price mentioned, but declares that plaintiff sold the same to them upon his "own volition and without any inducements on the part of defendants other than the ordinary inducements usually made in transactions of this character." The sale of the land to Yound for the sum of $1,300 is also admitted. The answer, as a "further and second defense," sets out the alleged written agreement to which we have previously referred, the same being signed by Mrs. K. M. Tate, the wife of plaintiff, and by the defendants, dated July 14, 1904, and by the provisions of which the defendants were purported to be given power and authority to sell the land described in the complaint "for the sum of $1,000.00, or as much less as he [plaintiff] may take at any time therefor," and it was also stipulated in said agreement that the defendants for the services of negotiating and consummating such sale should retain, as their commission, "all over the above mentioned sum." It is then alleged that in the month of May, 1905, and after the execution of the said written contract, "plaintiff, pursuant to the terms thereof, informed defendants that he would reduce the price of the property named therein from $1,000.00 to $800.00." The defendants further admit that, when they purchased said land from plaintiff, they were negotiating with said Yound for the sale of the same to him, etc.

The evidence offered by plaintiff in support of the allegations of his complaint shows, briefly stated, the following facts: That Mrs. Tate, wife of plaintiff, signed the written contract, set out in the answer, by the request and consent of the plaintiff, authorizing defendants to sell the property mentioned in the pleadings, upon the terms as therein stipulated; that plaintiff himself was also to have signed said contract, but failed to do so; that plaintiff approved the act of his wife in making and signing said contract; that on July 1, 1895, while plaintiff was absent from home, the defendant Case called at his residence, and stated to plaintiff's wife that he (Case) had a purchaser for the property if the price were reduced from $1,000 to $800; that Mrs. Tate asked time in which to consult her husband with regard to the proposition, but that Case advised her to take $800 for the property, as that was as much as could be obtained for it, and that in selling it for that sum they (the defendants) would receive no commission; that finally Mrs. Tate consented to take the responsibility of authorizing the sale of the property for the amount mentioned; that, when plaintiff returned home, his wife related to him the facts of the transaction which had occurred between her and the defendant Case; that he approved and ratified her action in the acceptance of Case's proposition to pay $800 for the land by the execution of a deed conveying the property to defendants, and left the same "at the bank" to be delivered to defendants upon the payment of the sum agreed upon; that defendants paid plaintiff the amount and received the deed, which bore date of July 5, 1905. The foregoing represents in substance and effect the testimony given by Mrs. Tate. There was introduced in evidence a document, signed by the defendants, and dated July 1, 1905, purporting to be an acknowledgment by them of the receipt from W. L. Yound of the sum of $1,300, "payment in full Lot 2, Blk 11, 31 acres more or less, Richfield." The plaintiff testified that his wife had told him of the conversation with Case, and that, believing therefrom that the sum of $800 was all that he could get for the property, conveyed the same to defendants for that sum. He stated, in reply to a question asked on cross-examination, that his wife acted for him in the matter, and that he had ratified her acts. Mr. Yound testified to having paid to defendants the sum of $1,300 for the property on the 1st day of July, 1905. These are in brief the facts as shown by the evidence introduced on behalf of the plaintiff.

The defendants, while admitting having entered into the contract for the sale of the land to which they and Mrs. Tate had subscribed their names, testified that subsequent to the execution thereof the price of $1,000 called for by said contract for said property was verbally changed by plaintiff to $800. The defendant Case testified as follows: "On Friday, the 30th day of June, I told her [Mrs. Tate] we had some parties looking at the place, and that we had hopes to sell. I explained to her and told her the price we were asking for the place was $1,300; that we often had to make trades, and I expected if we sold the place, to have to make a deal and trade it off. I went specifically to ask her if she would take less than $800. It was understood that $800 was the price. It had been talked again and again. I asked her, in case we couldn't make a sale to do any better, if we should turn it down, if we couldn't get the $800 for her, and she said she would rather not take less than $800. I told her then that, if she was satisfied to take the $800, to come down the next morning to make out the deed, and we would take our chances on selling the place. Before I had gone out to Mrs. Tate's, I had taken Mr. Yound out to look at the place, and on Saturday I took him out again. In the afternoon of Saturday Mr. Yound came back to the office, and after some little talk he decided to take the property at $1,300. * * * He then paid us the $1,300. After he had paid us the mnoey for the place, I went out and told Mrs. Tate that she could come in and have the deed fixed up and then we would pay her the money. She understood that Mr. Aitken, and I had bought the place from her on Friday evening. We told her we would take the place and take the chances on selling it. We were taking it under and in pursuance of that contract." Defendant Aitken corroborated the testimony of Case as to an alleged conversation with Mrs. Tate in the former's office in which the latter, it was claimed, said that she would be satisfied to receive $800 for the property, and that she did not care how much defendants made over and above that sum. There was testimony to the same effect by one R. B. Aitken. In rebuttal, the plaintiff and his wife testified that, having heard, after the conveyance of the property to the defendants, the latter had sold the same for $1,300, they called on the defendant Case, repeated to him what they had learned, and he then insisted that they had received but $800, for the property from Mr. Yound, etc. The court found that the defendants were the agents of plaintiff for the sale of the property; that as such agents of plaintiff they "bargained and agreed with one W. L. Yound to sell and convey to him the said property for and in consideration of the sum of $1,300, which said sum the said Yound then and there paid to defendants"; that defendants, after such sale to said Yound, represented to plaintiff that the sum of $800 could be obtained for said property, and that it could be sold for no greater sum; that plaintiff, relying on such representations, and being in ignorance of the negotiations for the sale of the land by defendants to Yound, accepted the sum of $800 therefor, and thereupon conveyed the same to defendants; that thereafter defendants conveyed the land to Yound.

The appellants undertake to avoid the effect of the judgment against them upon the ground that, as they seem with earnestness to contend, as to the transaction responsible for this action, they were not at any time acting as, or were, in fact the agents of plaintiff. This contention is urged mainly upon the proposition that the written contract which purported to authorize them to sell the property was not in fact or in law the act of plaintiff because it was not signed or executed by him. But the evidence as presented by the record justifies no such assumption. While it is true that the agreement empowering the defendants to sell the property for plaintiff does not bear his signature, and on its face appears to carry with it no other or further authority than that which his wife by her own individual act sought to confer, the testimony of the latter, which upon this point not only stands in the record absolutely uncontroverted but without any attempt at contradiction whatever, is to the effect that her husband, who was employed in a store at Vina, and had little opportunity to give personal attention to the matter, authorized her to see the defendant, Case, "and put the property in his hands as our agent"; that she called at the office of Aitken & Case, "and Dr. Case wrote out a contract with me, and I signed it, and the arrangement was that the first time my husband was in town he would call at the office and sign it, too, and it was so understood when I left Dr. Case." She further testified that her husband approved her act in signing the agreement, and had said to her that he would himself sign it at some later time. Her testimony with reference to this agreement was corroborated by her husband, who was made to say by the attorney for the appellants himself, on cross-examination, that his wife had acted for him in the transaction. Moreover, the actions of plaintiff, as disclosed by the evidence, clearly show that he ratified the acts of his wife, both in the execution of the agreement with the defendants and in the sale of the property to them. After the property had been placed in the hands of appellants for the purpose of selling it for the plaintiff, the former advertised it over their firm name for sale for the sum of $1,300 in the Corning Observer, a newspaper published at Corning, and this advertisement came under the observation of and was known to Mrs. Tate, and, while it does not directly so appear from the evidence, it is a most reasonable conclusion that plaintiff also must have known of said advertisement.

That the representation made by Case to Mrs. Tate in the conversation after the defendants had virtually made a sale of the property to Yound, to the effect that the sum of $800 was as much as could be secured for the land, was untrue, and resorted to for no other purpose than to obtain a larger commission from the sale than the defendants could otherwise hope to receive, we think is indubitably established by the testimony of Case himself. According to his evidence, after he was undoubtedly satisfied that he could sell the land for $1,300, he asked Mrs. Tate if she would not take less than $800 for it because that sum could not be obtained for it, and that she refused to accept anything less than that amount, whereupon he told her that he would take it at that figure, and requested her to call at his office with the deed transferring it to defendants. It is true that he says that this conversation occurred on June 30th, the day before the sum of $1,300 was paid to his firm by Yound for the land; but Mrs. Tate says it took place on the evening of July 1st. The court found the fact as testified to by Mrs. Tate, and it is sufficient to say that, from a careful consideration of the whole record, we are fully satisfied and in perfect accord with that finding. It is quite evident that, when Case declared to Mrs. Tate that the sum of $800 could not be obtained for the land, he thus made a statement having no foundation in fact, for, accepting his own word, when he discovered that she was unwilling to part with the property for less than that amount, he told her he would buy the property at that price. This, too, in the face of repeated asseverations that he would be unable to make any profit on the sale of the property, unless he could secure it for less than $800. It is also a circumstance of considerable significance that when Case, according to his own statement as a witness, after receiving the sum of $1,300 for the property—which event occurred, it will be recalled, before his firm acquired title to it—called on Mrs. Tate at her house, and requested her to "come in and have the deed fixed up and then we would pay her the money," said absolutely nothing of having already sold the land to Yound. The whole affair, as it is protrayed by the evidence before us, so far as it concerns the part taken in it by the defendants, appears to bear the marks of the ambidexterity by which transactions involving real estate deals are too often characterized. The evidence fully supports the findings of the trial court, and there is no reason which the record discovers justifying the fostering of any doubt that the judgment is just and that it should be sustained. Counsel have directed our attention to the law and some cases bearing thereon with reference to the elements, the existence of which is essential to the establishment of the relation of principal and agent. We have no fault to find with the principles thus stated and presented; but, under the facts as shown by the record, they have no force here. The evidence sufficiently shows that the acts of Mrs. Tate in the transaction, from its inception to its conclusion, were first authorized and subsequently ratified by the plaintiff. They show, as we have stated, that the defendants were, as to the sale of the property, at all the times mentioned in the complaint, agents of the plaintiff, and that they did not, in the part of the transaction involving the final disposition of the land, act in good faith with their client.

Counsel have made an attempt to maintain that the agreement, by the provisions of which defendants were made the agents of plaintiff for the sale of the property, amounts only to an option to purchase said property by the defendants. This contention is not supportable. The writing, in express and unequivocal terms, empowers and authorizes defendants, as agents of the plaintiff, to sell the property "for the sum of $1,000, or as much less as we may take at any time thereafter," and the defendants in unmistakable language agree as agents to sell the property and to accept as their remuneration therefor any sum which they might succeed in obtaining for it in excess of that which it was stipulated plaintiff should receive for it.

The only errors urged are based upon the insufficiency of the evidence to support the findings, and therefore, having disposed of those against the contention of appellant, it follows that the judgment and order appealed from must be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

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5 Cal. App. 491

## BEAUMONT v. SAMSON et al. (Civ. 325.)

(Court of Appeal, Third District, California. May 2, 1907.)

1. Certiorari—Grounds—Public Officers—Title to Office.

Under Code Civ. Proc. § 803, which provides that an action may be brought by the Attorney General in the name of the people against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, or any franchise, quo warranto, and not certiorari, is the proper remedy to try the rights of persons to exercise the functions of town offices.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 4.]

2. Same—Excess of Jurisdiction.

Certiorari lies under Code Civ. Proc. § 1068, when "an inferior tribunal board or officer, exercising judicial functions, has exceeded" its jurisdiction, "and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy," and its office is not so much to determine the valid existence of the tribunal, etc., while acting in a judicial capacity, as it is to determine whether its jurisdiction has been exceeded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 1, 2.]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Certiorari by J. B. Beaumont against W. H. Samson and others as board of supervisors of Thomas county. From a judgment for defendants, plaintiff appeals. Affirmed.

See 89 Pac. 137.

Frank Freeman, for appellant. W. A. Fish, Dist. Atty., and McCoy & Gans, for respondents.

CHIPMAN, P. J. Certiorari. This is an appeal from the judgment and order of the superior court of Tehama county denying plaintiff's application for a writ of review and dismissing the proceedings therein.

Proceedings were taken before the board of supervisors of said county which resulted in an order of said board declaring the territory in said order described to be "duly incorporated as a municipal corporation of the sixth class, under the name and style of the town of Corning." The purpose of the action is to set aside, vacate, and annul all of said proceedings and to obtain a decree that said incorporation is invalid.

Several questions arising in the case have been discussed, and among others it is contended by respondents that plaintiff had a plain, speedy and adequate remedy by quo warranto, and that this latter, and not certiorari, is the appropriate remedy, and it was so held by the learned trial judge. We think the point well taken, and this makes it unnecessary to notice other questions.

It appeared that, pursuant to the order of the board, the persons named as trustees of said town of Corning entered upon the discharge of their duties, and were so acting at the commencement of this action. Whether or not a de jure corporation, the officers elected to exercise its powers and functions assumed to act under the authority conferred by the proceedings taken by the board of supervisors, and we think the organization constituted a de facto corporation. The good faith of these officers in so acting is not called in question, nor is it disputed that they were acting under the authority supposed by them to be conferred by the proceedings leading up to the formation of an assumed valid and legal corporation. At most, the acts of these trustees constituted a usurpation of or an intrusion into a public office, and their authority so to do, it seems to us, cannot be properly determined otherwise than by the method pointed out in section 803 et seq. of the Code of Civil Procedure, commonly called proceedings by quo warranto. The writ of review, or certiorari, lies when "an inferior tribunal board, or officer, exercising judicial functions, has exceeded" its jurisdiction, "and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." Section 1068, Code Civ. Proc. The office of this writ is not so much to determine the valid existence of the tribunal, board, or officer, while acting in a judicial capacity, as it is to determine whether the jurisdiction of such tribunal, board, or officer has been exceeded. "The character of the act or determination sought to be reviewed, rather than the tribunal or officer by which the act or determination is made, is the test for determining whether the writ should be issued, for it is only a determination which is made 'when exercising judicial functions' that can be reviewed." Quinchard v. Board of Trustees, 113 Cal. 664, 668, 45 Pac. 856.

In 17 Ency. of Pl. & Pr. p. 412, it is said: "Certiorari to ministerial boards or officers is not the proper remedy to try the title to an office or the right to exercise corporate functions. Quo warranto is the only remedy which affords complete relief, and, although questions regarding the legality of an election may be collaterally raised and determined by certiorari in determining the validity of laws or ordinances of municipal bodies, yet, for the purpose of directly testing the right to a public office, quo warranto, and not certiorari, is the proper remedy. Nor is certiorari allowed for the purpose of bringing up a certificate of incorporation or other proceedings for the purpose of enabling the court to determine the legal existence of an alleged corporation. For the purpose of determining such questions, the proper remedy is by scire facias or quo warranto, so that the corporation may be in court." See cases cited in footnotes. In the case of State v. Osburn et al., 51 Pac. 837, 24 Nev. 187, the action was for a writ to review the proceedings of the city council of the city of Reno, Nev. The statute relating to this writ is substantially the same in that state as in California. The question of the constitutionality of the act incorporating the city of Reno was raised, and the court, in passing upon that question, said: "We are not determining whether the city council of that city exceeded its jurisdiction in ordering bonds to be sold for the purposes indicated, * * * but we are passing upon the rights of the respondent to exercise the functions of city council, and upon the validity of the corporate existence of the city of Reno. This we do not believe we have the power or authority to do, under the limitations of the regulative statute above cited." The court then proceeds to show that the question of corporate existence "must and can be determined by another proceeding, plain, speedy and adequate." Reference is then made to the statute regulating proceedings in quo warranto as furnishing the true remedy.

The cases are numerous in our reports where the form of action was quo warranto to determine the right to enjoy a franchise or exercise the powers of a municipal or other corporation. People v. Town of Linden, 107 Cal. 94, 40 Pac. 115, cited by appellant, is an instance. Our attention has been called to but one case where the action by writ of review seems to have been resorted to for the purpose of determining the validity of the proceedings of a board of supervisors resulting in the incorporation of a town. The question now before us was not raised in that case. Furthermore, the opinion is careful to state the limitation of the inquiry solely to the correction of errors or irregularities within the jurisdiction of the board while exercising judicial functions. Many acts connected with the statutory proceeding for the creation of a municipal corporation are shown to be legislative or ministerial, and not within the corrective force of writ of review. It would seem to us that a remedy incapable of determining the validity or invalidity of all the steps taken by the board of supervisors would be inadequate to an inquiry as to the validity of the corporation created by the board. And then, too, every consideration requires that the corporation thus created should be a party to the action and have its day in court.

The judgment discharging the writ and dismissing the proceedings is affirmed.

We concur: BURNETT, J.; HART, J.

151 Cal. 227

## DE LONG v. MILLER & LUX. (Sac. 1,450.)

(Supreme Court of California. May 13, 1907. On Rehearing, June 15, 1907.)

HIGHWAYS—DEFECTS—LIABILITY OF PERSON CAUSING DEFECTS — EVIDENCE—SUFFICIENCY.

In an action for injuries to a traveler on a highway, caused by a defect therein, evidence examined, and *held* not to show that the defect was caused by the negligent act of another.

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by A. De Long against Miller & Lux. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Frohman & Jacobs, Frank H. Short, and J. K. Law, for appellant. F. G. Ostrander and F. W. Henderson, for respondent.

SLOSS, J. This is an action brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. The complaint alleged that on or about the 27th day of June, 1900, plaintiff was riding in a buggy along a certain public highway in Merced county known as the "Wilson Ranch Road"; that the defendant wrongfully and negligently caused water to flow over, along, and across said highway by means of a dam constructed and maintained by the defendant across a slough at a point about one-half mile from the highway, whereby the waters of the slough were turned out and spread over the adjoining land and caused to run over and across the highway; that this water formed a deep hole in the highway, which was covered by said water so it could not be seen; that while the plaintiff was riding along this highway the front wheels of his buggy ran into said hole, and plaintiff was violently thrown from the buggy, striking against one of the wheels of said buggy, whereby he sustained great bodily injury, to wit, a double inguinal hernia; that plaintiff fell into the water and was chilled, thereby contracting rheumatism. The plaintiff sought to recover damages in the sum of $25,000. The answer denied that any water was caused to flow along or across the highway by reason of the dam referred to in the complaint, but, on the contrary, averred that the water on the highway was the natural overflow water from the San Joaquin river and the sloughs running from said river. It denied plaintiff's alleged injuries, and set up an affirmative plea of contributory negligence. At the trial the jury returned a verdict in favor of plaintiff in the sum of $10,000. A motion for new trial was made by defendant, and, upon said motion being argued and submitted to the court, it was ordered that the motion be granted, unless plaintiff should agree to a reduction of $3,000 from the amount of $10,000 found by the verdict of the jury. This reduction was agreed to by the plaintiff, and the court denied the motion for new trial. From the order denying the motion for new trial, this appeal is taken.

The principal point made by the appellant, and the only one which need be considered here, is that there was no evidence to show that any water, which may have been upon the highway at the place where plaintiff claimed to have been thrown from his buggy, was caused to flow there by reason of the dam mentioned in the complaint.

The road in question is the county road running from Merced to Los Banos in the county of Merced, and plaintiff was on his way from Merced to Los Banos when the accident is alleged to have occurred. From the maps showing the surrounding territory and the testimony concerning the topographical conditions, it appears that the road traverses a stretch of low lands running southerly and westerly from the left bank of the San Joaquin river. The river runs, at this part of its course, in a northerly and westerly direction, through flat and low lying lands on either side. The road from Merced crosses the river by means of a bridge at a point known as "Dickenson's Ferry"; and runs thence southerly across these low lying lands to a bridge over a slough designated in the evidence as "Middle Slough"; thence continuing in the same direction for some distance across other low lands to another bridge across Salt Slough. Middle Slough runs out of the San Joaquin river in a westerly direction several miles above Dickenson's Ferry. Some distance to the west of the point where it is crossed by the road, Middle Slough connects with Salt Slough, a slough emerging from the San Joaquin river at a point higher up than Middle Slough. Salt Slough, after its junction with Middle Slough, runs in a northerly and westerly direction until it again rejoins the San Joaquin river. The land inclosed by the San Joaquin river and Salt Slough forms an island known as "San Luis Island," all of which is composed of flat and bottom land intersected by numerous sloughs and swales. These low lands have always been flooded for a considerable portion of each year by water overflowing the banks of the San Joaquin river. A large part of this territory, including the portion of the island inclosed between the road in question, the San Joaquin river, and Middle Slough, is owned by the defendant, which has been conducting farming operations upon it and has erected certain dams and levees for the purpose of irrigating the land and controlling the flow of the flood waters from the river. It appears that the defendant had constructed a dam across Middle Slough at a point about one-half mile upstream from the road, and the contention of the plaintiff at the trial was that this dam had caused water, which would have remained within the banks of the slough or returned to it, to be diverted to the north and west, and thence to run across the road, causing and covering up the hole into which the plaintiff's buggy fell.

The principal witness upon whom plaintiff relied in attempting to establish his theory of the case was one H. H. Henderson, a surveyor. The map introduced by plaintiff was prepared by Henderson, and he testified at length concerning it and regarding the conditions existing in the territory in question. From Henderson's testimony it appeared that the road in question was elevated above the surface of the adjoining ground for a considerable distance after it left Dickenson's Ferry. After it reached the end of this elevated portion (or "grade" as it is called in the testimony), the road ran over the natural surface of the ground for a distance, and then came to a second and shorter piece of grade, after which it continued over the natural surface of the ground (except at a point where there was a culvert) until it reached the bridge over Middle Slough. According to Henderson's testimony, the first continuous grade was 8,653 feet in length. There was then a stretch of 447 feet ungraded; then a second grade of 324 feet, from the end of which the road ran 1,626 feet to a culvert over a low place, and thence 3,746 feet to the bridge across Middle Slough. A point near the end of the second grade of 324 feet is marked "B" on Henderson's map, and Henderson's testimony was to the effect that there was, in June, 1900, a hole in the road at this point, and that this hole was covered to a greater or less extent by water which had been diverted thither by reason of the dam in Middle Slough referred to in the complaint. While the defendant insists that the evidence, taken as a whole, is insufficient to justify the inference that any water was diverted by the dam so as to cross the road at point B, it may be assumed, for the purposes of this discussion, that Henderson's testimony tended to establish this fact. If there were evidence on the part of plaintiff to show that the injuries sustained by him occurred by reason of his buggy falling into a hole at this point, it might well be said that there was enough to justify the jury in finding that the injury complained of was caused by the act of the defendant in maintaining its dam across Middle Slough.

But a careful examination of the testimony demonstrates that the hole into which plaintiff claims to have fallen was not situated at point B on the map, but, on the contrary, was located at least 1,000 feet to the north of this point. There were no witnesses to the accident except the plaintiff and his son, who were riding together in the buggy. The son was driving. According to the son's testimony, they started in the buggy down the grade from Dickenson's Ferry, and had driven for some distance when they struck water. While they were passing through this water, they got into the hole, and the plaintiff was thrown out. The hole was about at the end of the first grade. The water began at a point where the first of a series of stakes was set. (The uncontradicted evidence of the man who set the stakes shows that the first of them was set at or near the end of the first long grade.) The plaintiff himself testified that about a mile and a quarter beyond the bridge "it looked as though water had passed over the road there, and pretty soon we could see the stakes on each side of the road, and as we got down a little further the water was deeper. * * * We were driving along the grade when we first struck the water. After we struck the water, we went along, and all of a sudden our left front wheel dropped right down into a hole up to the axle." He testified further that they had traveled about eight or ten rods between the stakes before they struck the hole. This testimony shows conclusively that the hole into which the buggy fell could not have been the hole found by Henderson at point B at the end of the second grade. If we assume that Henderson's map accurately defined the length of the first grade, the point where the accident occurred was some hundreds of feet north of point B. The second grade itself was 324 feet in length, and between the first grade and the second there was a distance of 447 feet, little, if any, of which had, according to the testimony of the De Longs, been traversed. But, in addition to this, it appears conclusively from the transcript that Henderson was in error in fixing the end of the first grade at the point where it is shown on the map, and that in 1900, at the time of the accident, that grade in fact ended at a point some 600 feet north of the point shown by Henderson as the end of that grade. It appears that, while the accident occurred in 1900, the action was not commenced until 1902, and the trial took place in 1904. Henderson made his survey and map in the latter year, and represented the road as it then appeared. It is true that he testified that he had been over the road repeatedly in 1900, in fact that he had been over it within a day of the accident to De Long, and that the grade as indicated on his map was in the same condition it had been in 1900. But he was not clear and certain in his statement that the first grade had not been lengthened since 1900, and, in view of all the testimony, it is perfectly evident that his memory was at fault in this respect. The defendant called eight witnesses, all of whom testified that the southerly 600 feet of the first grade had been added in the year 1901, and had not existed in 1900. These witnesses included a supervisor of Merced county, who had been in charge of that portion of the road in 1900 and 1901, and had had the last 600 feet graded in the fall of 1901, the roadmaster who had actually extended the grade, and other officials and residents in the neighborhood, who were thoroughly familiar with the circumstances testified to. In view of the fact that Henderson's map was prepared from surveys made four years after the occurrence of the accident, and that his statement that the grade was in the same condition in 1900 that it was at the time of his survey was based merely upon a recollection not positively asserted, there cannot be said to be a substantial conflict on this point, and it must be taken as an established fact that the first grade in 1900 ended at a point 600 feet north of the end of the grade as shown on Henderson's map. If this be so, the accident to the plaintiff must have occurred at a point at least 1,000 feet north of point B, the point at which Henderson found a hole, and the point where, as shown by his testimony, the water diverted by the dam across Middle Slough would cross the road.

We do not find in the record any evidence tending to show that the water which crossed the road at the point where, according to the testimony of plaintiff and his son, the accident occurred, was caused to be there by reason of the dam mentioned in the complaint. The testimony of the witnesses, who established the fact that the last 600 feet of the first grade were added in 1901, shows that this portion of the grade was constructed across a particularly low piece of ground, which was always flooded whenever there was any water in the surrounding country. Henderson's testimony fails to show that water diverted by the dam reached the point at or near the end of the first grade where the accident occurred, and his statement as to the elevations of the ground at various points affords no ground for the inference that such water did reach this point. The only evidence pointed to as sustaining the contention is that of the witness Tucker. He testified that he had seen the water flowing across the grade as the result of the diversion from Middle Slough at the dam, that he had seen it "run up on the grade about a mile and a half; different places ran over the grade." But he subsequently modified this statement by stating, "Just a short piece of the grade will overflow from that water, about sixty feet," and later, on cross-examination, stated that, "It was running 60 feet over the grade on the short piece there," evidently referring to the second grade ending at point B. At a later point he stated that he had found some water on the main grade, running over the main grade about eight or ten feet wide. But as this was stated to be about half a mile from the south end of the main grade, it is apparent it could have had no connection with plaintiff's injuries, even if we are to attach any importance to testimony so vague and uncertain as that given by this witness. Plaintiff's case seems to have been tried upon the theory that the accident occurred at point B, and his main effort was to show that any overflow of the road which existed at that point was caused by the erection of the defendant's dam across Middle Slough. Assuming that this effort was successful, it appeared that the injury to plaintiff occurred at an entirely different point, and as the plaintiff failed to show that any act of the defendant caused the condition of the road at this point, the evidence must be held to be insufficient to justify the verdict.

Many other points are made by the appellant; but, in view of the conclusion reached regarding the evidence, it will be unnecessary to consider any of them.

The order denying a new trial is reversed.

We concur: SHAW, J.; HENSHAW, J.; McFARLAND, J.; ANGELLOTTI, J.; LORIGAN, J.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing, and from the judgment of the court. A careful examination of the evidence convinces me that the testimony of the plaintiff and his son does not necessarily lead to the conclusion that the accident occurred at or in the immediate vicinity of the end of the grade as it existed in 1900, or, in other words, at a point 1,000 feet, or thereabouts, north of point B. They were testifying from recollection, and did not pretend to locate with precision the position of the hole into which they drove, and, while plaintiff places it 8 or 10 rods from the end of the first grade at one time, he puts it at 20 rods in another part of his evidence, and describes it as one-third of the way "across the water." "Across the water," in that connection, meant the overflowed space between the end of the long grade and the beginning of the short grade, which, at the time of the accident, was 1,047 feet wide, so that according to this testimony the hole was located over 300 feet from the end of the first grade, and the most trustworthy evidence in the case—the levels established by actual survey—shows that water diverted by the dam of defendant not only might have reached that point, but in seeking its own level must inevitably have overflowed all the low ungraded part of the road up to the terminus of the long grade as then existing.

151 Cal. 383

## MARLOW et al. v. SOUTHERN PAC. CO.

(L. A. 1,895.)

(Supreme Court of California. June 7, 1907.)

1. CARRIERS—EJECTION OF PASSENGER—TICKETS—IDENTIFICATION OF PURCHASER.

Where a passenger tendered a ticket containing a provision that she would sign her name, and otherwise identify herself as the original purchaser, and was ejected as not sufficiently identified, *held*, that the passenger's identification as the original purchaser of the ticket was sufficient to satisfy a reasonable man, and that her ejection was wrongful.

2. SAME—DAMAGES—EXCESSIVENESS.

Where a married woman, with a nursing child, was wrongfully ejected from defendant's train at an intervening station, where she was left without money, and was there aided in telegraphing her husband and obtaining a night's lodging, a verdict awarding her $500 damages was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1490.]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Edward Marlow and wife against the Southern Pacific Company. From a judgment for plaintiffs, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

J. W. McKinley, for appellant. Byron Waters and Wm. Wylie, for respondents.

HENSHAW, J. Plaintiffs brought their action to recover damages for the unlawful ejectment of Mrs. Marlow from a train of defendant upon which she was a passenger. The cause was tried before the court, which gave judgment for plaintiffs in the sum of $500, from which judgment and from the order denying its motion for a new trial defendant appeals.

Plaintiff Edward Marlow had purchased for his wife a ticket entitling her to travel from Maricopa to Los Angeles and return. She was upon her return trip from Los Angeles to Maricopa when she was ordered from the train by defendant's agent. Her ticket contained following provision: "That I, the original purchaser, will sign my name and otherwise identify myself as such purchaser, whenever called upon so to do by any conductor or agent of the line or lines over which the ticket reads." This agreement was signed by Mrs. Marlow.

Appellant's first point is that there is no evidence showing that plaintiff identified herself by signature or otherwise in accordance with the terms of the ticket, and that she was therefore not entitled to passage thereon. The facts are that Mrs. Marlow was traveling with a nursing baby about a year and a half old, and that her trunk had been checked through to her destination.

The train agent of defendant had asked for her signature while the train was in motion. While admitting a similarity, he expressed himself dissatisfied with a comparison which he made between the signature written for him, and that upon the face of the ticket. Mrs. Marlow protested that the ticket was honestly hers, and asked for an opportunity to sign when the train was not in motion. She did so sign repeatedly, and still the train agent was unsatisfied. He asked her if she knew anybody on the train, or if there were any identifying marks upon her clothing. She knew nobody on the train, and was unable to show the required identification marks. She still protested, however, that it was her ticket, declared that she had not money sufficient to pay her fare, but announced her willingness to pledge a ring, and begged to be allowed to continue her journey to Maricopa, where she assured the agent that friends would identify her. The ticket was signed "Mrs. Edward Marlow," and the identification marks upon the ticket described the owner as "female, stout, middle aged, light eyes, dark hair." That the plaintiff had in charge a nursing baby was at least some evidence that she was a married woman, and it is not contended that in person she did not meet the description above given. Nevertheless, and despite her protest, her ticket was taken by the train agent and was reported to the conductor, and it became the conductor's duty to cause her to leave the train, which unpleasant duty he performed with courtesy. Mrs. Marlow was thus left at Colton with the care of a nursing, frightened, crying child, without her trunk, and without money. She was aided in telegraphing to her husband and in obtaining a night's lodging.

These facts present a different case from that of Southern Ry. Co. v. Barlow, 104 Ga. 213, 30 S. E. 732, 69 Am. St. Rep. 166, cited by appellant. That case holds merely that, under a contract such as this, a validating agent who was not satisfied with the signature alone was justified in requiring other evidence of identity, and that the mere opinion of a hotel clerk as to the genuineness of the signature was no better evidence than the signature itself. Central Georgia Ry. Co. v. Cannon, 32 S. E. 874, 106 Ga. 828, a case also relied upon by appellant, was one where the plaintiff, against the advice of the agent, printed his name on the ticket instead of writing it in the first instance, thereby making it impracticable to identify himself by writing. The court very properly declared that it was incumbent upon such purchaser as a condition precedent to having the ticket signed and stamped to furnish such proof of his identity, and of the fact that he was the original purchaser, as would be sufficient to satisfy a reasonable man, and that under such a contract the validating agent was entitled to call for other proof of identity than that offered merely by the holder writing his name. Certainly the evidence, as above pointed out, presents an entirely different case from those referred to, and furnishes what should have been sufficient assurance of plaintiff's right to travel.

Under this contract the agents of defendant were not made the absolute arbiters, as appellant contends, upon the authority of Church v. Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207. The utmost which the agents could require was reasonably satisfactory evidence of identification. Church v. Shanklin was a case under contract whereby title to real estate was to be perfected "to the satisfaction of Church & Cory, attorneys," and this court held that the expression of their satisfaction with the title was what the parties had stipulated should be had, and that Church & Cory thus became umpires and arbiters whose judgment was final. Such, as we have said, is not the case here presented, nor will it be said that, under the circumstances indicated, the judgment was excessive.

The judgment and order appealed from are therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

151 Cal. 411

HUYCK et al. v. RENNIE et al. (L. A. 1,899.)

(Supreme Court of California. June 19, 1907.)

1. Appeal—Competency of Witnesses—Discretion—Review.

The exercise of a trial court's discretion in determining whether a witness was an "intimate acquaintance" of testator, in order to entitle the witness to give his opinion as to testator's mental condition, as provided by Code Civ. Proc. § 1870, subd. 10, would not be disturbed on appeal, unless a clear abuse of discretion appeared.

2. Evidence — Opinion Evidence — Mental Capacity —Witnesses—Competency—Intimate Acquaintances.

Where one witness had an acquaintance with testator which was of a mere casual character, and another knew him only through having given him massage treatments on three occasions, neither was an "intimate acquaintance" of testator, required, by Code Civ. Proc. § 1870, subd. 10, to qualify him to testify as to testator's mental condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2198.]

3. Wills — Testamentary Capacity — Evidence—Time.

Where, on an issue of testamentary capacity, it did not appear that witness saw testator on the date the will was executed, a question calling for witness' opinion as to whether testator possessed sound and disposing mind and memory on that day was properly disallowed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 116-120.]

4. Same.

While evidence as to testator's mental condition at times more or less remote from the date of the will is admissible, the time to which the witness' testimony relates must be specified, and must have reference to a time when the witness came in contact with testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 120.]

5. Evidence—Opinion Evidence—Witnesses—Examination—Indefiniteness.

A question calling for a witness' opinion as to testator's mental capacity prior to a specified date was objectionable for indefiniteness as to time.

6. Same—Hearsay.

On an issue as to testamentary capacity, a question whether witness knew whether any one conversed with testator, or endeavored to dissuade him from the belief that a marriage would take place between himself and witness' niece, was objectionable as calling for hearsay evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1168–1173.]

7. Same — Knowledge or Belief of Another.

On an issue as to testator's mental capacity, questions calling for testator's belief as to whether he would marry witness' niece, and whether witness knew if her niece had any intention of marrying testator, were properly disallowed.

8. Wills—Mental Capacity—Evidence.

On an issue as to testator's mental capacity, evidence of statements or actions by testator indicating his belief that he would marry a certain lady was competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 133.]

9. Witnesses—Cross-Examination.

Where, in a will contest, one of proponent's attorneys who drew the will was called as a witness for contestants, and testified concerning the directions and instructions given by decedent for drawing the will, fixing the date as subsequent to the making of certain deeds, he was properly allowed to state on cross-examination whether the making of the deeds had any effect as to his desire in the testamentary disposition of the rest of his property.

10. Wills—Mental Capacity—Evidence.

On an issue as to testator's mental capacity, a lease, identified by testator's attorney who drew the will as one executed by testator after negotiations conducted in witness' presence, was admissible to show testator's business capacity; a proper foundation having been laid by the witness' testimony as to the execution of the lease, together with the proof of due execution afforded by the notarial certificate of acknowledgment attached, as provided by Code Civ. Proc. §§ 1948, 1951.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 128, 130.]

11. Evidence—Preliminary Evidence—Identifying Documents.

It is not error to overrule an objection to a question, merely preliminary, for the purpose of identifying a lease intended to be introduced in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1594.]

12. Appeal—Rulings on Evidence—Prejudice.

Where a lease was admitted in evidence without objection, defendant was not prejudiced by the overruling of a preliminary question as to whether witness had prepared it, which question the witness answered in the negative.

13. Evidence — Opinion — Subject of Inquiry.

On an issue of testamentary capacity, a witness testified concerning testator's ability to conduct his business affairs, and, after giving the details of transactions between himself and testator, was asked whether, in a particular transaction, testator received as much, in witness' estimation, as was coming to him; witness having knowledge of all the facts. *Held*, that the question did not relate to a proper subject of expert or opinion evidence, and was objectionable as calling for the conclusion of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149–2160.]

14. Trial—Weight of Evidence.

A request to charge that the jury were not bound in a will contest by the testimony of the witnesses to the will, but if they were not satisfied with the testimony of such witnesses, as against the testimony of others, they might reject the testimony of the subscribing witnesses, was properly refused as calculated to discredit such subscribing witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 490, 531–533, 577–581.]

Department 1. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Suit by Monte Ingall Huyck and others against Eva J. Rennie, as administratrix of the estate of Andrew L. Huyck, deceased, and others, to set aside the probate of testator's will. From a judgment for defendants, plaintiffs appeal. Affirmed.

G. W. Meals (W. H. Johnson, of counsel), for appellants. Sheridan & Fox and Richards & Currier, for respondents.

SLOSS, J. Andrew L. Huyck died on October 18, 1901, leaving an alleged will, which was, on the 4th day of December, 1901, admitted to probate by the superior court of Santa Barbara county. Some of the decedent's heirs at law commenced this proceeding to revoke the probate, on the grounds of insanity and undue influence. Issue having been joined, the case went to trial before a jury. At the trial, the contestants abandoned their claim of undue influence, and the verdict of the jury was in favor of proponents on the other issue. A motion for new trial was made and denied, and contestants appeal from the order denying their motion. There is no contention that the evidence was not sufficient to justify the jury in its finding that the decedent, at the time of the execution of his will, was of sound and disposing mind. It is urged that the court erred in certain rulings made during the trial, and the points so made will, so far as their importance seems to require, be considered.

1. Several witnesses, called by contestants, were not permitted to state their opinion as to the mental sanity of the decedent. Under our Code, such opinions may be given by "intimate acquaintances" of the person whose mental condition is in question. Code Civ. Proc. § 1870, subd. 10. In the cases of two of the witnesses, Lenz and Boyer, the proponents objected that the required intimacy had not been shown, and the objection was sustained. The trial judge must determine, in the first instance, whether or not a proposed witness as to sanity is or is not an "intimate acquaintance" within the meaning of the Code provision. His determination of this question will not be disturbed on appeal, unless a clear abuse of discretion appears. "And so it has been held, and wisely, that the trial judge is to be accorded wide discretion

and latitude in this respect; and his ruling will not be disturbed except where the evidence is so lacking as to leave no room for question that the discretion has been improperly exercised." People v. McCarthy, 115 Cal. 255, 46 Pac. 1073; People v. Hill, 116 Cal. 562, 48 Pac. 711; People v. Manoogian, 141 Cal. 592, 75 Pac. 177; People v. Suesser, 142 Cal. 354, 75 Pac. 1093. The testimony of witness Lenz may well have been viewed as showing that his acquaintance with decedent was of a merely casual character. Boyer had given massage treatment to the decedent on three occasions, which afforded the extent of his opportunities for observation. There was no abuse of discretion in excluding the opinions of these witnesses.

The witness De Rome qualified as an intimate acquaintance. It did not appear, however, that he had seen the decedent within several months of the 15th day of May, 1900, the date of the execution of the will. He was asked whether he had an opinion as to "whether or not Mr. Huyck, about the 15th day of May, 1900, was possessed of a sound and disposing mind and memory." The question was objected to on the ground, among others, that "the evidence does not establish that Mr. De Rome saw Mr. Huyck on the 15th day of May, 1900." The court sustained the objection, saying that "the law only contemplates that a witness of that character shall testify to the mental capacity of the person at the time he has an opportunity to observe." We think the ruling, and the remarks made in support of it, entirely sound. The "intimate acquaintance" is allowed to give his opinion merely because he has had exceptional opportunities for observing the mental condition of the person in question, and the result of his observation cannot be given adequate expression except in the form of an opinion. But such opinion must be based on the witness' observation, and should be limited to some period of time at which the witness has come in contact with the person whose mental condition is the subject of inquiry. What has just been said applies as well to the point made regarding the testimony of the witness Cook.

Mrs. Calvert testified that she had known the decedent for 15 years. She was asked to give her opinion as to whether he was of sound and disposing mind and memory. The question was not directed to any specific period, and by its terms had reference to the entire 15 years of the witness' acquaintance with decedent. The court sustained an objection to the question on the ground of indefiniteness as to time. The ruling was manifestly correct. While evidence as to the mental condition of a testator at times more or less remote from the date of the execution of the will is admissible, the court may properly require the party offering such evidence to specify the time to which it relates, in order that its weight may be intelligently estimated. For the same reason, it was not error to sustain objection to the questions put to the witness Cook, in which he was asked whether, "prior to May 15, 1900," Huyck was able to attend to his business transactions, or to find his way on the public streets. In each of these instances the objection was made and sustained on the specific ground of indefiniteness as to time. This objection could easily have been obviated by the putting of another question, and appellants should have adopted this method of eliciting the desired testimony.

2. Mrs. Calvert testified that the decedent, Huyck, a man of advanced years, had told her that he was going to marry her niece, a girl of seventeen. She was then asked: "Do you know whether any one conversed with him or endeavored to dissuade him from the belief that a marriage would take place between himself and your niece?" Proponents' objection was properly sustained, as the question called for hearsay, and hence incompetent, testimony. The answer to a further question, "Did he, or did he not, continue in his belief?" was likewise properly excluded, as was the answer to a third question, "Do you know whether or not your niece had any intentions of marrying him?" A witness cannot testify as to the knowledge or belief of another. Sneed v. Marysville Gas & Electric Co. (Cal. Sup.) 87 Pac. 376. Evidence of statements or actions by the testator indicating his belief would have been competent, but contestants did not frame their questions so as to call for such evidence. It is argued that the existence of a delusion regarding a marriage was material, but the materiality of a fact does not permit a party to establish it by incompetent testimony.

3. E. M. Sheridan, one of the attorneys for the proponents, had drawn the will. He was called by the contestants and examined at some length regarding the circumstances attending the preparation and execution of the instrument. During this examination he testified that he had drawn the will according to the testator's instructions; that he had read the will, when drawn, to the testator; that the testator had spoken to him on prior occasions regarding the will; and that, while the will was being prepared, he and the testator had discussed its various provisions, section by section. He was also examined as to other wills. On cross-examination he was asked the following questions: Q. "Now, you say you fix this date about the will as being subsequent to July 9, 1898, on account of the making of certain deeds? A. Yes, sir. Q. Did the making of those deeds according to any statements to you, have any effect as to his desire in regard to the testamentary disposition of the rest of his property?" The objection to the last question, on the ground that it was not cross-examination, was overruled. There was no error in this. The contestants having questioned the witness regarding the directions and instructions given by the decedent for the drawing of his will,

it was proper cross-examination to go fully into all that was said by the testator to the witness regarding his testamentary wishes. The question called only for statements as to such wishes. If the answer went further than this, the contestants' remedy was to move to strike out so much of the answer as was objectionable. This they did not do.

4. The witness Sheridan identified a certain lease as one that had been agreed upon between the decedent and others after negotiations conducted in the presence of the witness. To the offer in evidence of the lease the contestants objected, on the ground that it was "incompetent, irrelevant, and immaterial; the proper foundation for its introduction has not been laid." There was no merit in the objection, and it was properly overruled. The lease was material as tending, in some degree, to show the business capacity of the testator; being an act of the testator himself, it was competent evidence, and the proper foundation had been laid by the testimony of the witness, coupled with the proof of due execution afforded by the notarial certificate of acknowledgment attached. Code Civ. Proc. §§ 1948, 1951. A second lease was produced, and the witness was asked whether he had prepared it. There was no error in overruling this objection to this question, which was merely preliminary and for the purpose of identification. Furthermore, the question was answered in the negative, and the lease referred to was offered and admitted in evidence without objection.

5. Jules Klein was called by the proponents. He testified fully concerning the ability of decedent to conduct his business affairs. After giving the details of a certain transaction between Huyck and himself, he was asked whether, in this transaction, Huyck "received as much, in your estimation, as was coming to him; you having knowledge of all the facts at hand." The objection to this as incompetent, and calling for a conclusion of the witness, was good, and should have been sustained. The subject of the inquiry was not one calling for expert or opinion evidence. The witness should have been required to state the facts and circumstances of the transaction, and the jury could then have drawn its own inference as to whether or not Huyck had received an advantage. But the ruling worked no substantial injury. The witness testified without objection that, in his opinion, Huyck was a man who "could fully keep or control the interests of his property and subserve his own interests." He had also testified that in this particular transaction Huyck had looked sharply to his interests. The answer to the objectionable question added nothing to the force of what was already before the jury.

6. The court gave to the jury full and fair instructions on the law governing the issue to be determined. No exception was taken to any instruction given. After the cause had been submitted to the jury, they were brought into court and had instructions and testimony read to them. At this point, the contestants orally requested an instruction to the jury "that they are not bound in finding their verdict under the testimony of the witnesses to the will, or that if they are not satisfied from their testimony as against the testimony of others, that they may exclude the testimony." The court properly refused to comply with this request. It is unnecessary to cite authorities to the point that, in this state, where, under the constitutional provision, judges are prohibited from charging juries as to the facts, it is improper for the court, in its instructions, to select the testimony of particular witnesses as entitled to special weight or consideration. Similarly, it is improper to indicate that less regard is to be paid to the testimony of one witness than to that of another. The requested instruction was calculated to discredit the subscribing witnesses. The weight to be given to the testimony of these, as of all other witnesses, was solely for the jury, and the court had so instructed, both on originally submitting the cause, and again in response to the request for the instruction in question.

There is no other point meriting attention. On a view of the entire record, we perceive no error affecting the substantial rights of the appellants.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(151 Cal. 399)

## SMITH v. PELTON WATER WHEEL CO.*

(L. A. 1,609.)

(Supreme Court of California. June 19, 1907. Rehearing Denied July 19, 1907.)

1. VENUE — CHANGE — SUCCESSIVE APPLICATIONS.

Where successive applications are made for change of venue, it is the duty of the court to consider the last application, and decide it with reference to the conditions existing at that time, and not with reference to the conditions existing at the time of the original demand.

2. SAME—LACHES.

On August 4, 1903, defendant filed a demurrer to the complaint, accompanied by a demand for a change of venue, accompanied by affidavits of certain of defendant's officers, which motion was denied without prejudice on November 9, 1903. On November 16, 1903, defendant made a second application on the same proof, and an additional affidavit of its secretary, and this application being denied on December 23, 1903, defendant's demurrer was submitted and overruled, and defendant was given time to answer, pending which defendant applied for leave to file a new application for change of venue, based on two additional affidavits of defendant's officers, which stated no new facts. This motion was heard on March 4, 1904, and granted, whereupon the motion for a change of venue was presented and forthwith denied. *Held* that, though the court might have granted the motion at the time it was last presented, the denial thereof was sustainable as a proper exercise of discretion, because defendant had lost its right to a change by laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, §§ 94-99.]

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*For dissenting opinion, see 90 Pac. 1135.

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Beauchamp H. Smith against Pelton Water Wheel Company. From an order denying defendant's motion for a change of venue, it appeals. Affirmed.

Rehearing denied in bank; Beatty, C. J., and Lorigan, J., dissenting.

Rigby & Rigby and G. C. De Garmo, for appellant. J. F. Conroy, for respondent.

SHAW, J. Appeal from an order denying a motion for change of venue. After the taking of the appeal, Wm. T. McArthur was substituted as plaintiff. The order appealed from was made on March 4, 1904. The action was begun in July, 1903. On August 4, 1903, the defendant appeared and filed a demurrer to the complaint, accompanied by a demand and notice of motion for a change of place of trial and two affidavits of Edward L. Brayton, vice president of the defendant. The ground of the motion, as stated, was that the county of Los Angeles was not the proper county for the trial of the cause, inasmuch as the plaintiff was a corporation organized under the laws of this state, and its place of business and residence was the city and county of San Francisco. This motion was denied without prejudice on November 9, 1903. On November 16, 1903, the defendant filed a second notice of motion for the change of venue, based on the prior demand and affidavits, and also on the affidavit of David Donzel, secretary of the corporation, additional thereto. The grounds of this motion were the same as before, with the addition that the contracts sued on were neither made in the county of Los Angeles, nor to be performed there, and that the obligation did not arise, nor the breach thereof occur, in that county. This motion was duly presented on briefs on November 20, 1903, and was denied by the court on December 23, 1903. On January 15, 1904, the demurrer to the complaint was submitted to the court for decision, and on January 25, 1904, the court made an order overruling the demurrer and allowing the defendant 10 days within which to answer. This time to answer was afterward extended by the court on the defendant's application. Before the time to answer, as extended, had expired, the defendant filed a notice of motion for leave to renew the former motion for change of venue. This notice stated that the motion was to be based on the affidavits before filed, on two other affidavits by the same parties, and upon the former demand and the papers on file in the case. The ground of the motion for leave to renew was that the former motion had never been heard upon the merits. The notice also stated that the motion for change of venue would be made upon certain grounds set forth at length therein, which were in substance the same as set forth in the notice of November 16, 1903. The new affidavits of Brayton and Donzel stated no additional facts in support of the motion for leave to renew, nor did they contain any new matter relating to the grounds of the application for a change of venue. They merely stated with greater detail the facts set forth in the former affidavits. The record shows that the motion to change the venue had been previously heard upon the merits. The motion for leave came on for hearing on March 4, 1904, and it was granted, whereupon the motion for change of venue was again presented and forthwith denied.

It was the duty of the court, upon the last presentation of the application for change of venue, to consider and decide it upon the conditions as they existed at that time, and not upon the conditions existing at the time of the original demand. The demand was filed in August, 1903. Two attempts were afterwards made to present the motion upon the merits. No reasons were apparent why it could not have been done as well at either of those times as upon the latter hearing, and at the second hearing the same facts were shown as upon the last hearing. There is nothing to show that all the facts bearing upon the application were not as well known to the vice president and secretary of the corporation defendant at the time of the demand as they were on March 4, 1904. In the meantime the motion had been twice denied, the demurrer to the complaint had been overruled, time had been allowed the defendant to answer the complaint, and, at its request, this time had been extended. Under these circumstances, it was a matter resting in the sound discretion of the court whether to grant the motion or refuse it, conceding, as we do for the purposes of this case, that the court could again entertain such a motion after it had been once decided. In Cook v. Pendergast, 61 Cal. 79, the court says: "It has always been held that such motions, being dilatory, must be prosecuted with diligence." And further: "If he [the defendant] relies on the fact that the action is brought in the wrong county, he ought to move for, or at least demand, a transfer on his first appearance in the cause." Page 80. "The rule is uniform that an application for a change of venue on this ground should be made at the earliest opportunity." 4 Encyc. of Pl. & Pr. 421; Pearkes v. Freer, 9 Cal. 642; Jones v. Frost, 28 Cal. 246. And if it is made afterwards the applicant must "explain any seeming lack of diligence on his part." 4 Encyc. of Pl. & Pr. 422. If we concede, therefore, that the court might have granted the motion at the time it was last presented, it must be also conceded that the court had the power, in its discretion, to refuse it because of the lack of diligence displayed by the defendant in prosecuting it. If the defendant, as it claims, had the right to a change of venue to San Francisco at the time the demand was made, and if this right was shown by the affidavits produced upon the last hearing, we must presume, in view of the decision of the lower court, that it was of the opinion that the right had been lost by laches, and that it denied the motion upon that ground.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

151 Cal. 394

## SMITH v. PELTON WATER WHEEL CO.

(L. A. 1,695.)

(Supreme Court of California. June 19, 1907. Rehearing Denied July 19, 1907.)

1. JUDGMENT—DEFAULT—VACATION.

Code Civ. Proc. § 473, authorizes the vacation of a judgment taken against a party through his mistake, inadvertence, surprise, or inexcusable neglect, provided the application is made within a reasonable time, in no case exceeding six months after such judgment, order, or proceeding is taken. *Held*, that the six months' limitation is merely a limitation on the power of the court to grant any relief, regardless of the merits of the application, and does not prevent the court, in the exercise of discretion, from refusing such an application made within less than six months because not made within a reasonable time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 265.]

2. SAME—NEGLIGENCE.

Where a default judgment for failure to answer was rendered against defendant, who was represented by local and nonresident attorneys, after the time to answer had been several times extended, defendant's application to set aside such judgment, not made until more than four months after its attorneys had notice of the entry thereof, was properly denied; the only excuse being that one of the nonresident attorneys who had charge of the matter had been ill during a portion of the time, and that the resident attorney erroneously believed that an appeal taken from the denial of an application for a change of venue operated to stay further proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 269, 281, 288.]

3. APPEAL—DISCRETION—REVIEW.

The exercise of a trial court's discretion on an application to set aside a default judgment will not be interfered with on appeal, unless it plainly appears that such discretion has been abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3823.]

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Beauchamp H. Smith against the Pelton Water Wheel Company. From a judgment in favor of plaintiff, and from an order denying defendant's motion to vacate the same, defendant appeals. Affirmed.

Rehearing denied in bank; Beatty, C. J., and Lorigan, J., dissenting.

Rigby & Rigby and G. C. De Garmo, for appellant. J. F. Conroy, for respondent.

ANGELLOTTI, J. These are appeals by defendant from a judgment given against it for $5,642.95, and from an order denying its motion to vacate and set aside such judgment. The judgment was given upon the failure of defendant to answer after its demurrer to the complaint had been overruled; its default for not answering having been duly entered. After the taking of the appeals, Wm. T. McArthur was substituted as plaintiff.

It is admitted that no error or irregularity is shown by the judgment roll. The only contention made on these appeals is that the lower court erred in denying the motion to vacate and set aside the default and judgment. The motion to vacate was based on the ground that the default and judgment were taken against defendant through mistake, inadvertence, surprise, and excusable neglect. The action was commenced in the superior court of Los Angeles county on July 28, 1903. On August 14, 1903, a demurrer to the complaint was filed by a San Francisco law firm retained by defendant. This law firm continued in charge of the case for defendant throughout the proceedings in the lower court, but employed a Los Angeles attorney as associate counsel. The demurrer was overruled January 25, 1904, with leave to defendant to answer within 10 days. The Los Angeles attorney was regularly notified of this action of the court on February 5, 1904, and informed by opposing counsel that the plaintiff was urging a speedy trial, and that the answer must be filed in due time, or a default would be entered. Orders extending the time to answer were obtained from the court; the last expiring about March 12, 1904. In the meantime, on March 9, 1904, defendant perfected an appeal from an order theretofore made in the action refusing to grant its motion for a change of place of trial from Los Angeles county to the city and county of San Francisco. No answer was filed, and on March 16, 1904, the default of defendant and judgment for plaintiff in accord with the prayer of the complaint were regularly entered. It is undisputed that both the Los Angeles and San Francisco attorneys had actual knowledge of the entry of judgment during March, 1904. No intimation of any intention to move to vacate the default and judgment was given until July 16, 1904, four months after their entry. On that day notice of such a motion to be made on July 22, 1904, accompanied by copies of certain affidavits and a proposed answer and cross-complaint, was served on plaintiff's attorney. The only reason advanced for the failure to answer was that the Los Angeles attorney mistakenly believed that defendant's appeal from the order refusing to change the place of trial operated as a stay of all proceedings pending the appeal, and therefore did not cause an answer to be filed. Counter affidavits were filed, and in one of these affidavits it was alleged that subsequent to the entry of the judgment some of plaintiff's witnesses had disappeared, and plaintiff no longer knew where they could be found. The motion to vacate was denied on August 3, 1904, but, by leave of the court, it was renewed on August 12, 1904; additional affidavits being presented on behalf of both parties, and denied. The evidence before the lower court showed that the San Francisco law firm at all times retained control and management of the case for defendant, and prepared the various pleadings, notices of motions, and affidavits; the Los Angeles attorney acting under their direction. The only excuse given for the delay in instituting proceedings to vacate the default and judgment was that given by the senior member of the San Francisco firm, to the effect that for over two months after learning of the default and judgment he was suffering from ill health, and was not in regular attendance at his office, and could only attend to his business occasionally; that thereafter he was engaged to the utmost of his capacity in court work and other business that needed prompt attention; that his partner was not familiar with the facts, and was not in the habit of handling litigation of this character; and that ever since the entry of default and judgment he had been in frequent correspondence with his associate in Los Angeles, and from time to time had explained to him that the papers for the motion were in course of preparation, and why they were delayed.

Passing without consideration other points made in support of the order denying defendant's motion, we are satisfied that the order must be affirmed upon the ground that the delay in applying for relief was such, under all the circumstances, as to warrant the lower court in holding that the application was not made within a reasonable time. Section 473, Code Civ. Proc., authorizes the granting of relief to a party or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, "provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken." The six months' limitation there provided is simply a limitation upon the power of the court to grant any relief, regardless of any question either as to the merits of the application, or as to whether or not the application was made within what might be held to be a reasonable time under the circumstances. Under this statute, in addition to being made within the six months' period, the application must be made within "a reasonable time," and what is a reasonable time in any case depends upon the circumstances of that particular case. The question as to whether the application has been made within a reasonable time is one to be determined in the light of the circumstances of the case by the court to which the application is addressed. In the determination of that question, a large discretion is necessarily confided to that court. It is well-settled law in this state that the appellate court will not interfere with the exercise of the discretion of the lower court on an application of this nature, unless it is plainly made to appear that such discretion has been abused, and this rule is applicable whether the motion for relief has been granted or denied. See O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105; Moore v. Thompson, 138 Cal. 23, 70 Pac. 930; Winchester v. Black, 134 Cal. 125, 66 Pac. 197, and cases there cited.

The delay of nearly four months in the matter of making the application, after full knowledge of the facts, accompanied by the failure to give any intimation to the opposing party of an intention to so apply, certainly required some satisfactory explanation to warrant a conclusion that the application was made within a reasonable time. Was the explanation given satisfactory? The court below must here be presumed, in support of its order, to have concluded that it was not, and we are of the opinion that the court was amply warranted in so concluding. The evidence was also sufficient to support a conclusion upon the part of the lower court that relief could not be granted to defendant after this long delay without injuriously affecting plaintiff's rights. Under these circumstances, we cannot say that the court was not justified in concluding that the application had not been made within a reasonable time, and should be denied.

As to certain language used by this court in Wolff v. Canadian Pac. Ry., 89 Cal. 332, 337, 26 Pac. 825, in affirming an order vacating a default judgment, relied upon by defendant, it is sufficient to say that it is not applicable here, for the reason that the delay was not assented to by the plaintiff, and the court was warranted in concluding that the vacating of the judgment on an application so long delayed would be injurious to plaintiff's rights.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; SLOSS, J.

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151 Cal. 377

## MONTECITO VALLEY WATER CO. v. CITY OF SANTA BARBARA et al.

(L. A. 1,863.)

(Supreme Court of California. June 5, 1907.)

1. WATERS—MISAPPROPRIATION—DEGREE.

Where, in a suit to determine water rights, it was found that defendant B. was unlawfully depriving plaintiff of 2½ inches perpetual flow of water, the court properly required him to deliver such amount to plaintiff out of the waters conveyed by defendant from his tunnel into plaintiff's pipe line, and refused to allow defendant to discharge such water into the bed of the stream from which the water was taken, where it would be lost by percolation and evaporation.

2. Same—Riparian Owners—Use of Water.

A riparian proprietor is not entitled to take water from a stream for use on land which was valueless for agricultural purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 33–35.]

Department 2. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by the Montecito Valley Water Company against the city of Santa Barbara and others. From a judgment for plaintiff, defendant James L. Barker appeals. Affirmed.

W. S. Day, for appellant. George H. Gould and Canfield & Starbuck, for respondent.

HENSHAW, J. The facts, conditions, and circumstances of this case may be learned by a reference to Montecito Valley Water Co. v. City of Santa Barbara et al., 144 Cal. 578, 77 Pac. 1113, which was another appeal in the same litigation. This is an appeal by James L. Barker, who the court found was unlawfully depriving the respondent of 2½ inches perpetual flow of water. The court required appellant to deliver this 2½ inches to respondent "out of the waters conveyed by defendant from his said tunnel in his said flume or conduit into the box or appliance connected with the pipe line constructed or to be constructed by plaintiff," etc. Appellant's contention is that he should be allowed to discharge this water into the bed of the stream 1,300 feet above respondent's dam. The effect of this unquestionably would be that respondent would lose the water, because the intervening Eaton tunnel would draw down a portion of it, and, the bed of the stream having become dry, the rest would be wasted by percolation and evaporation. Appellant's contention then is that, notwithstanding that he is a wrongdoer, he should be permitted to dispose of the waters, of which he has unlawfully deprived respondent, in such a manner as to do neither himself nor the respondent the slightest good. The judgment which the court rendered contained a wise provision for the conservation of these waters, and the direction for their disposition by appellant was not only clearly within the equitable powers of the court, but wholly just.

Appellant's claim to the waters as a riparian owner is not pressed with much seriousness, and this is natural, considering that there is no pleading as to his riparian need for use of these waters, either as to quantity or amount of land upon which they are to be employed. Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. 889. Moreover, it is without dispute in the case, and so declared upon the appeal in the Montecito Valley Water Co. v. City of Santa Barbara et al., 144 Cal. 578, 77 Pac. 1113, that the lands upon which the waters are derived are valueless for agricultural purposes, and the waters are carried for use to cities, towns, and fertile lands beyond the watershed. A riparian proprietor's claim to make such use of the waters of a stream is of course without legal foundation.

The judgment appealed from is therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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151 Cal. 234

## BANK OF LEMOORE v. FULGHAM.

(Sac. 1,338.)

(Supreme Court of California. May 13, 1907. Rehearing Denied June 12, 1907.)

1. Appeal — Harmless Error — Overruling Demurrer.

Overruling a demurrer based on the ground of ambiguity, uncertainty, or unintelligibility is not reversible error if the demurrant was not misled by the defects in the pleading, and the cause was fairly tried upon its merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4098–4105.]

2. Time—Computation—Tax Sale—Publication—Notice—Sufficiency.

Under Pol. Code, § 3767, providing that a tax sale must not be less than 21 days from the first publication of notice thereof, and section 12, providing that the time in which an act is to be done is computed by excluding the first day and including the last, etc., sufficient notice of a tax sale held June 18th was given where it was first published May 28th.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Time, §§ 11, 19, 20; vol. 45, Taxation, § 1340.]

3. Taxation — Tax Sale—Certificate—Sufficiency.

Under the express terms of Pol. Code, § 3776, the only amount required to be stated in a tax sale certificate is the amount of the assessment, and a certificate is not invalidated by failure to separately set forth the amount of the penalties, costs, and charges.

4. Same—Description of Land—Sufficiency.

The description of land in a tax sale certificate and deed was not insufficient for failing to state the base and meridian, where the county was named and there was but one tract which could have answered the description.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1378.]

5. Evidence—Judicial Notice—Surveys.

Judicial notice is taken of the system of surveys in a state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 9–12.]

6. Taxation — Certificate of Sale — Error Cured.

Error in a tax sale certificate fixing the date when the period of redemption would expire was cured by the express terms of St. 1903, p. 63, c. 59.

7. Same—Tax Deed.

A tax deed conveying land "with appurtenances," etc., conveyed no more than was assessed or included in the certificate of sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1544.]

8. Same—Stamping Tax Bills—Necessity.

A tax sale was not subject to attack for the nonobservance of Pol. Code, § 3680, providing that, whenever property sold for taxes remains unredeemed, upon each subsequent assessment the assessor must enter the fact of the sale, and the date thereof, and that upon all bills or statements "sold for taxes" and the date of sale must be written or stamped, since under the express terms of section 3787 a tax deed is conclusive evidence of the regularity of the proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1556.]

9. Same—Power of Legislature.

While the Legislature may not make a tax certificate or deed conclusive as to any of the essentials of listing, valuation, and apportionment, or notice, it may make it conclusive as to matters or things which in the first instance the Legislature might not have required to be done, and which are in their nature nonessentials.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1557.]

10. Same—Constitutional Provision.

Const. art. 5, § 14, providing that all grants and commissions shall be in the name and by the authority of the people, signed by the Governor, etc., does not apply to the sale of lands acquired by the state for delinquent taxes, and, since the state may dispose of such lands in any way not plainly violative of the Constitution, the Legislature may make the tax collector or any other person its agent and attorney in fact to pass legal title to the lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1504, 1506.]

Beatty, C. J., dissenting in part.

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Bank of Lemoore against John J. Fulgham. Plaintiff appeals from a judgment for defendant and an order denying a motion for a new trial. Affirmed.

Chas. G. Lamberson, for appellant. O. E. Larkins, for respondent.

HENSHAW, J. When this case was in department it was decided without reference to the curative act found at chapter 59, p. 63, of the Statutes of 1903. This was so because the briefs made no mention of, and placed no reliance upon, the provisions of that act. In Baird v. Monroe (Cal. Sup.) 89 Pac. 352, this act and its effect are considered. It is held to be constitutional and to relieve tax certificates and deeds from the irregularities and informalities enumerated. Consideration of the case at bar must, therefore, be had in the light of this curative act.

Plaintiff's appeal is from a judgment in favor of defendant, and from an order denying its motion for a new trial. The action was tried for the purpose of quieting title to certain real property situated in Tulare county. Plaintiff claims title as the successor in interest of George H. Davis, who, it is conceded, was on the first Monday of March, 1896, the owner of the property. Defendant deraigns title under a sale to the state for delinquent taxes, and the subsequent deed to him from the tax collector, dated October 1, 1903. Various objections are made by the appellant to the validity of the proceedings, which were held by the trial court to have vested title in the defendant. But preliminarily plaintiff interposed a demurrer to defendant's answer, and urges that the demurrer should have been sustained. The demurrer was both general and special. The general demurrer was properly overruled. The answer denied plaintiff's allegation of ownership, and thus raised a direct issue upon this matter. Defendant filed his supplemental answer, and there undertook to set forth in detail the nature of his title. While there may be some foundation for the criticism that the pleading in this regard is somewhat ambiguous or uncertain, there was no such ambiguity or uncertainty as to have prejudiced plaintiff in meeting the issues which the answer tendered. It is plain therefrom that defendant was relying upon the tax title and nothing else. Even an error in overruling a demurrer upon the ground of ambiguity, uncertainty, or unintelligibility is not reason for reversal, if it appears that the demurring party was not misled by the defects in the pleading, and that the cause was fairly tried upon its merits. Alexander v. Central L. & N. Co., 104 Cal. 532, 38 Pac. 410; Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413; Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258.

Coming thus to the specific objections urged against the sufficiency of the tax deed, the published notice of sale declared that unless the taxes, with costs, etc., were paid, the property would be sold to the state on the 18th day of June, 1897, and the sale actually took place on that day. The first publication of this notice was made upon the 28th day of May, 1897. Section 3767 of the Political Code provides that the sale must not be less than 21 nor more than 28 days from the time of the first publication. It is insisted in this case that the sale was premature. But, as the sale did not take place until the twenty-first day, excluding the day of publication, it must, under section 12 of the Political Code, and the decisions of this court upon the matter, be held to have taken place in accordance with the requirements of the statute. Hannah v. Green, 143 Cal. 19, 76 Pac. 708; Misch v. Mayhew, 51 Cal. 514; Wilson v. His Creditors, 55 Cal. 476; Dean v. Grimes, 72 Cal. 442, 14 Pac. 178. The certificate of sale which was offered in evidence recited that the amount of the tax levied on the property was $19.20, and that the "penalties, costs, and charges which have since accrued thereon amount to the further sum of $———." It is urged that the amount for which the property was or should have been sold is thus not stated, but there were further recitals that the sale was made to the state, "for the amount of said taxes of every kind charged against said property, and penalties, costs and charges, to wit, the sum of $20.66." There was sufficient evidence in the certificate to show that the penalties, costs, and charges in view of the statutory provisions of the Political Code governing such charges, costs, and penalties were $1.46—the difference between the amount of the tax as stated, and the amount of the tax with added penalties, costs, and charges for which the property was sold. The only amount which is required to be stated is "the amount of the assessment" (Political Code, § 3776), and this was stated. It did not invalidate the certificate if it failed to separately set forth the amount of the penalties, costs and charges.

The description of the property in the certificate and deed was as follows: "Situate, lying and being within the said county of Tulare, state of California, and described thus: S. ½ of N. ½ Sec. 13 T. 19 S. R. 23 E." It is urged that this description was insufficient to identify the property for its failure to state the base and meridian. But, as the property was described as in the county of Tulare, there was but one piece of land which, by any possibility, could have answered this description, and the failure to name the meridian was unimportant in view of this fact. A court takes judicial notice of the system of surveys prevailing in the state. Harrington v. Goldsmith, 136 Cal. 168, 68 Pac. 594. The error in the certificate in fixing the date when the five-year period of redemption would expire is cured by the curative act of 1903, above referred to. Baird v. Monroe, supra. In fact, the sale by the state did not take place until after the full five-year period had elapsed. The deed conveyed the real property "with appurtenances," etc. There was by this no more conveyed than was assessed or included in the certificate of sale. The fact that appurtenances were recited in the deed would not convey more property or less than if the phrase had been omitted. Pellissier v. Corker, 103 Cal. 516, 37 Pac. 465; Williams v. Harter, 121 Cal. 47, 53 Pac. 105; Sparkes v. Hess, 15 Cal. 186. Section 3680 of the Political Code provides that whenever property has been sold for taxes, and remains unredeemed, upon each subsequent assessment the assessor must enter the fact that the property has been sold for taxes, and the date of the sale, and upon all bills or statements there must be written or stamped the words, "Sold for taxes," and the date of sale. This memorandum was not made. The parties paying the subsequent taxes did not receive this notice that the property had been sold. It is urged that this was a notice which the law required to be given to the owner of the property, and that a failure to give this notice amounted to a deprivation by him of his property without due process of law, since the law had provided this means of notice. But section 3787 of the Political Code makes the deed from the state conclusive evidence upon this matter. Of course, it is true that the Legislature has not the power to make such a certificate or deed conclusive as to any of the essentials of the listing, valuation, apportionment, or notice (Cooley on Taxation, pages 355–356; 1 Blackwell on Tax Titles, § 640), but it can make the certificate or deed conclusive as to matters or things which in the first instance the Legislature might not have required to be done, and which are in their nature, therefore, nonessentials. The notice here under consideration differs entirely from the notice of proposed sale given by publication—a notice designed to afford the property owner protection, and enable him to pay his taxes before title shall pass from him. Such notice he is entitled to receive, and such notice in the case at bar he did receive. The requirment for the stamping upon the subsequent assessment or tax receipts of the words, "Sold to the state," may have been designed to serve a twofold purpose—that of convenience to the fiscal officers, and of continued notification to the taxpayer that his property had been sold. But there is nothing in the law which makes the giving of such a notice essential. No rights of the taxpayer would be violated if such a provision for notice were not required at all, and therefore, as we have said, it is but a convenience and not a right which the Legislature has provided for. It is quite within its power to do away with this provision, or, as here, to hold that the tax deed shall be conclusive evidence that it was given. De Treville v. Smalls, 98 U. S. 525, 25 L. Ed. 174; Rollins v. Wright, 93 Cal. 395, 29 Pac. 58; Klumpke v. Baker, 131 Cal. 81, 63 Pac. 137, 676. Section 14, art. 5, of the Constitution provides that "all grants and commissions shall be in the name and by the authority of the people of the state of California, sealed with the great seal of the state, signed by the Governor, and countersigned by the Secretary of State." It is contended that, as the provisions of the Constitution are mandatory and prohibitory, the scheme of the present revenue law, whereby the tax collector makes, on behalf of the state and as its agent, the deed to the purchaser of such lands, is violative of this constitutional provision, and that, therefore, the deed is void. In answer to this it may be said that it is perfectly apparent from a reading of the constitutional provisions touching the public lands of the state that lands, title to which might thus be acquired by the state for delinquent taxes, were never within its contemplation. Indeed, it is well settled that lands which originally have been part of the public domain, and have become subsequently private property, on reverting to the state or other sovereignty by escheat, forfeiture, or otherwise, are not within the purview of the general land laws relating to the disposal of public lands, but will require special authority for their disposition. Governeur v. Robertson, 11 Wheat. (U. S.) 332, 6 L. Ed. 488; Caruthers v. McLaran, 56 Miss. 371; Baker v. Kelley, 11 Minn. 480 (Gil. 358); Magruder v. Esmay, 35 Ohio St. 222; 2 Cooley on Tax., page 858. In consideration of the further fact that the state's power of taxation is a paramount power and a necessary incident of sovereignty, such lands may be disposed of in any way that is not, in and of itself, plainly violative of constitutional provisions.

For these reasons, we conclude that the

state had full power to make the tax collector, or any other person, its agent and attorney in fact, for the passing of the legal title.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.; SLOSS, J.

BEATTY, C. J. I am not prepared to say that I dissent from the judgment in this case, but there is one point upon which I should greatly desire to hear further and fuller argument.

The law (Political Code, § 3680) provides that whenever land has been sold to the state for failure to pay the taxes, and remains unredeemed, there shall be entered upon each subsequent assessment book, immediately after the description of the property, the fact that said property has been sold for taxes, with the date of the sale, and that upon all bills or statements of or for taxes subsequently accruing upon the same property up to the time of redemption or conveyance by the state, there shall be legibly written printed, or stamped the words, "Sold for taxes," with the date of sale. The object of this law is plain. It is intended not only to give notice to the delinquent taxpayer, but to his grantees every year for five years, of the fact of the delinquency and sale, and the necessity of effecting a redemption. The utility and necessity of such a provision in order to prevent the grossest injustice to owners of real property is obvious. The payment of taxes is largely intrusted to agents. Agents for that purpose have often proved unfaithful or negligent, and the absent owner who has provided the money to pay the taxes, relying upon this law for timely warning of any neglect on the part of his agent to make the payment, may, if this law is disregarded, find himself at the end of five years despoiled of his property by the misconduct of the state's agents, notwithstanding the state has all the time been receiving from him the taxes subsequently levied, while his title was being secretly undermined. Of course, it can be seen that the Legislature so far from intending such a consequence, has provided ex industria an effective means of preventing it, and such a provision should not be placed in the same category with those merely formal and unessential directions which have no semblance of benefit to the taxpayer. The state in this instance has given assurance to the person who continues to pay taxes on property that has been sold on account of the delinquency of his grantor, or agent, or trustee, or ancestor, that it will not forfeit his rights without express and repeated warning. To say that after thus lulling him into a fancied security the state can make a false recital in a tax deed conclusive evidence of a notice that has never been given as to disregard a principle of equity, which it seems to me ought to bind even a sovereign state.

I think that upon more mature consideration the court might have found a way to decide the cause according to its manifest equity.

151 Cal. 386

## HOFFMAN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 4,755.)

(Supreme Court of California. June 12, 1907.)

1. Records—Lost Records—Proceedings to Supply—Establishment of Title.

St. 1906, p. 78, c. 59, providing for the establishment and quieting of titles to real estate in case of a loss or destruction of the public records, provides that plaintiff shall file with his complaint an affidavit stating that he does not know and has never been informed of any other person who claims, or who may claim, any interest in, or lien upon, the property adversely to him, or, if he does know or has been informed of any such person, then the name and address of such person. If the plaintiff is unable to state any one or more of the matters required, "he shall set forth and show, fully and explicitly, the reasons for such inability." *Held*, that a showing of diligence in making inquiry to ascertain whether there are other persons having or claiming interests is not necessary to give jurisdiction, and an affidavit that plaintiff did not know and had never been informed of any other person who claimed or might claim an interest adverse to plaintiff was sufficient.

In Bank. Mandamus by Robert O. Hoffman to compel the superior court of the city and county of San Francisco and Frank J. Murasky, as judge thereof, to pronounce a judgment in favor of relator in proceedings by him under St. 1906, p. 78, c. 59, for the quieting of title in case of a destruction of the public records. Writ awarded.

Sullivan & Sullivan and Theo. J. Roche, for petitioner. Costello & Costello and Page, McCutchen & Knight, for respondent.

SHAW, J. This is a proceeding in mandamus to compel the superior court of the city and county of San Francisco to pronounce a judgment in a case presented to that court for determination.

The petitioner instituted a proceeding under the provisions of the act approved June 16, 1906, for the establishment and quieting of titles to real estate in case of a loss or destruction of the public records, commonly known as the "McEnerney Act." St. 1906, p. 78, c. 59. The proceeding was numbered 125 in said court and was entitled "Robert O. Hoffman, Plaintiff, v. All Persons Claiming Any Interest in or Lien Upon The Real Property Herein Described, Defendants." The matter was duly presented to the superior court, and it thereupon found that the petitioner had sufficiently made out his case to entitle him to the relief provided in the statute and prayed for in the petition, and that the proceeding was in all respects regular, with the supposed exception that the affidavit filed with the complaint, as required by the statute in question, was insufficient to give the court jurisdiction to proceed to judgment.

The affidavit was made by the petitioner. So far as material it is as follows: "I am the plaintiff in the above-entitled action. I have and claim an estate of inheritance in, and am in the actual and peaceable possession of, that certain real property [describing it]. The character of my estate, right, title, interest, and claim in and possession of said real property is as follows, to wit: I am the owner in severalty and in fee simple of said real property. I am in the actual and peaceable possession thereof, by myself, claiming title thereto adversely to the whole world. My estate, right, title, interest, and claim in and possession of said real property have existed during the period of five months. I obtained said estate, and all my right, title, interest, and claim in and possession of said real property from Henry A. Arnold. I have never made any conveyance of said real property, or any part thereof, or any interest therein. There is no existing mortgage, deed of trust or other lien on said real property. I do not know and have never been informed of any other person who claims, or may claim, any interest in or lien upon said real property, or any part thereof, adversely to me." The supposed defect in the affidavit is that it does not state what inquiry, if any, was made by the plaintiff to determine whether or not there was at that time any other person in existence who claimed, or who might claim, any interest in, or lien upon, the said property, adversely to the plaintiff. It is conceded that the court ought to proceed to give judgment for the petitioner as prayed for, unless this defect deprives it of power to proceed otherwise than to require of the plaintiff another and more perfect affidavit and to proceed anew from the beginning. The court took the latter view and refused to render judgment.

The theory that a showing of diligence in making inquiry to ascertain whether or not there are other persons having or claiming interests in the property is necessary to give jurisdiction to the court is based on a misconception of the effect of the statute. The part of the act which is supposed to contain this requirement is section 5, which, so far as material, is as follows: "At the time of filing the complaint, the plaintiff shall file with the same his affidavit, fully and explicitly setting forth and showing (1) the character of his estate, right, title, interest or claim in, and possession of the property, during what period the same has existed, and from whom obtained; (2) whether or not he has ever made any conveyance of the property, or any part thereof, or any interest therein, and if so when and to whom; also a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon; (3) that he does not know and has never been informed of any other person who claims, or who may claim, any interest in, or lien upon, the property, or any part thereof, adversely to him, or if he does know or has been informed of any such person, then the name and address of such person. If the plaintiff is unable to state any one or more of the matters herein required, he shall set forth and show, fully and explicitly, the reasons for such inability." The language of the third clause above quoted does not require a statement that there are no persons in existence who claim, or who may claim, an adverse interest, if, in fact, the plaintiff has no knowledge or information of any. In that case all that is required is that he shall state his own lack of personal knowledge and information that such persons exist. This is a fact which inheres in his own consciousness and of which he, alone, can have knowledge. The only inquiry necessary to enable him to make the statement required in the statute on this point, is a scrutiny of his own mind and memory. It is a matter which he could not be "unable to state" and to which the last clause above quoted can have no application. That clause relates exclusively to the other matters required in the affidavit. For instance, if the plaintiff knew, or had been informed, that there were adverse claimants, it would be necessary for him to state that fact in the affidavit. He might, however, be ignorant of the names or addresses of such persons. In that event it would be his duty to make diligent inquiry to ascertain such names and addresses. If such inquiry proved ineffectual, it would be necessary for him to give the "reasons for such inability," and this would include a statement of the steps taken by him in making the inquiry, so that the court could determine whether or not the reasons were sufficient. Forbes v. Hyde, 31 Cal. 342; Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. But, as to the positive statement that "he does not know and has never been informed of" any adverse claimants, the rule must be the same as in the case of an affidavit for publication of summons based on the fact that the defendant is a nonresident of the state, under similar statutes. The positive statement of the plaintiff to the fact is sufficient, without giving the reasons for the statement, or the inquiry made to ascertain the fact. Anderson v. Goff, 72 Cal. 69, 13 Pac. 73; Furnish v. Mullan, 76 Cal. 646, 18 Pac. 854; Parsons v. Weis, 144 Cal. 415, 77 Pac. 1007; Johnson v. Miner, 144 Cal. 785, 78 Pac. 240. This question was referred to, but not decided, in the case of Title, etc., Co. v. Kerrigan (Cal. Sup.) 88 Pac. 363, in which the statute was held to be valid. It is there said: "It is not clear that section 5 of the act requires a statement of the examination and inquiry made by the plaintiff to enable him to aver that 'he does not know, and has never been informed of' any person claiming adversely." The point was again before the court in the same case upon the petition for rehearing, but upon the filing of the petition in this case it was left open for further consideration. We now conclude that, by the terms of the statute, it is sufficient for the plaintiff to state positively, in the language of the section above quoted, "that he does not know and has never been informed of" any adverse claimant, and that thereupon, if the affidavit and proceedings are otherwise regular, the court will have jurisdiction to proceed to trial and judgment.

Something is said further in the same connection, in the case last cited, in regard to the duty of the plaintiff to make inquiry and the knowledge that would be imputed to him, if he should be aware of facts sufficient to put him on inquiry as to the existence of adverse claimants. These considerations would be of importance and the neglect to make such inquiry might be of great weight, on the question of the fraud or bad faith of the plaintiff, in any subsequent attack upon the decree upon the ground that there was extraneous fraud of the plaintiff in making a false affidavit to obtain jurisdiction. The affidavit, on this point, may be false in fact, and the plaintiff may know it to be false. This, if proven, would go far toward establishing the fraud, upon such subsequent suit. So, in any case, an affidavit to a fact, made to obtain process and secure jurisdiction, may be false, with like effect. The law, however, assumes good faith, and does not presume fraud. In any case where constructive service is authorized, it is unnecessary, unless the statute expressly, or by implication, requires it, that the existence of good faith or the absence of fraud on the part of the plaintiff, in the preliminary steps to acquire jurisdiction of the proceeding, should be affirmatively shown upon the face of the record, either in the affidavit or elsewhere. If fraud or bad faith in this respect was practiced, it does not affect the jurisdiction of the court, nor render the decree invalid on its face. The remarks on that subject in the opinion referred to are not to be considered as intended to declare that the rule on the subject applying to proceedings under this statute is in any respect different from that applying to other final judgments upon constructive service. In Title, etc., Co. v. Kerrigan, supra, the validity of this statute, from a constitutional point of view, was elaborately discussed and the statute was upheld. Some of the same objections are again presented in a somewhat different form.

It is argued that constructive service is permitted only because of necessity, and that no such necessity can arise from the mere fact that the plaintiff in the particular case has no knowledge or information of the existence of outstanding claims or interests in the property inconsistent with the title alleged in plaintiff; that this alone cannot justify the dispensing with personal service upon the owner of such outstanding claim, and that, before substituted service upon him can be allowed under the Constitution, it must, at least, appear that the plaintiff has made diligent inquiry to learn of the existence of such interests; and that as the statute requires no inquiry on that point, but only a statement of the plaintiff's ignorance and want of information, it would operate to deprive the owners of such unknown interests of their property without due process of law. We are unable to perceive any substantial difference in this respect between this and other instances wherein constructive service is authorized by statute. It has long been thoroughly established that, when necessary in order to reach property within the state, constructive service may be made upon nonresidents, or persons absent from the state. Eitel v. Foote, 39 Cal. 441; Perkins v. Wakeham, 86 Cal. 581, 25 Pac. 51, 21 Am. St. Rep. 67. In such cases the statute requires no showing of inquiry as to the fact of nonresidence, or absence, but allows service by publication only, upon the bare affidavit of the plaintiff that such is the fact. In the case of the probate of a will, or the distribution of the estate of a deceased person, a mere general notice posted or published, referring only to the estate and not addressed to any person by name, is held to be sufficient to constitute due process of law upon all interested persons, known and unknown. Estate of Davis, 136 Cal. 590, 69 Pac. 412; Crall v. Poso Irr. Dist., 87 Cal. 147, 26 Pac. 797. The same is true of many other kinds of proceedings affecting property within the state. 17 Ency. Pl. & Pr., 31, 38; Title, etc., Co. v. Kerrigan, supra. In the case of proceedings in estates above mentioned, no affidavit or other proof of the necessity for dispensing with personal or actual notice is required. The Legislature itself has decided that the necessity exists. It arises, in part at least, from the nature of the proceeding and the object to be accomplished, namely, a conclusive and effectual disposition of the estate. This cannot be had unless a notice can be given which will bind all persons whatsoever with respect to the property. An equal necessity appears here. The records having been destroyed, the ordinary sources of knowledge of outstanding claims and means of proof of title are wanting, and hence the title cannot be satisfactorily established or quieted, except by similar means. The Legislature has accordingly provided for a general notice to all persons interested, to be given upon the filing of an affidavit by the plaintiff to the truth of the facts specified in section 5 of the act. The Legislature is primarily the judge of this necessity, and of the degree and character of the proof by which it is to be established, in case it chooses to require proof in each particular case. Matter of Empire Bank, 18 N. Y. 216. The only limitation upon this power with which we are concerned here is that the occasion or fact, upon which the Legislature has authorized such service, must be sufficient to show a reasonable necessity for the service prescribed. We cannot say that there was not, in the present instance, reasonable cause for the proceeding in question, nor that the affidavit prescribed does not present facts which show a reasonable necessity for the constructive service.

In this connection it is proper to say that in determining whether or not due process of law is afforded other statutes applicable to the proceeding may be considered. The provisions of section 473 of the Code of Civil Procedure apply in such cases. Any person interested in the property and having no actual notice of the decree may come in at any time within a year after its rendition, and by showing that he has not been personally served with process, and stating facts constituting a good defense to the proceeding—that is, facts sufficient to show that he has a valid adverse interest in the property—he may have the decree vacated as to him and be allowed to answer to the merits. Gray v. Lawlor (Cal. Sup.) 90 Pac. 691.

It is again contended here, as in the former case, that courts have no power to adjudge unless there is an actual controversy; that title to real property cannot be quieted until it has been questioned; and hence that the proceeding is purely administrative or ministerial, and not a judicial function, and that therefore, the statute is an unauthorized delegation of administrative power to the judicial department of the state. This objection also was considered in the former case of Title, etc., Co. v. Kerrigan, supra. It was further considered and again held to be unfounded in Robinson v. Kerrigan (Cal. Sup.) 90 Pac. 129. For a full discussion of the question, as also of the various other objections urged upon the present hearing, we refer to the opinions in those cases. The petitioner had the right to demand the action of the superior court upon the case as presented. We cannot assume to direct that court as to the decision it shall render in the matter. But it is bound to give final judgment, either by granting the decree prayed for, or by denying it and dismissing the proceeding.

Let a writ of mandate issue, commanding the superior court and the judge thereof to proceed to render judgment in the proceeding aforesaid.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

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151 Cal. 209

## TELLER v. BAY & RIVER DREDGING CO. et al. (Sac. 1,362.)

(Supreme Court of California. May 13, 1907. Rehearing Denied June 12, 1907.)

1. NEGLIGENCE—PERSONS LIABLE—INDEPENDENT CONTRACTOR.

A dredging company under contract to cut through a levee and excavate a ditch, stipulating that it would be ready to commence work at a specified time and place, fixing the compensation, for the sole use and service of the dredger and crew by the other party, binding the company to furnish a dredger in first-class working order and an efficient and diligent crew, and authorizing the termination of the contract on the other party being dissatisfied with the work or with the progress thereof, is an independent contractor, and liable to a third person for injuries sustained in consequence of his land being flooded by reason of a failure to properly rebuild the cut made in the levee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 68.]

2. DAMAGES—GROWING CROPS—DESTRUCTION.

The measure of damages for the total destruction of a growing crop is the value of the crop in the condition it was at the time and place of destruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 266.]

3. LANDLORD AND TENANT—INJURIES TO CROP—COMPUTATION OF DAMAGES.

In an action by a tenant entitled to three-fourths of a crop for the total destruction of the crop while growing, the court in arriving at the value of the crop at the time of its destruction found the probable yield of the crop and the market value thereof, deducting therefrom the cost of producing and marketing the crop, and deducting therefrom one-fourth of such value as the landlord's share. *Held* the true measure of damages.

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by J. R. Teller against the Bay & River Dredging Company and others. From a judgment for plaintiff against defendant the Bay & River Dredging Company, it appeals. Affirmed.

Jackson Hatch, Walter H. Linforth, and Louttit & Louttit, for appellant. Plummer & Dunlap and Nicol & Orr, for respondent.

HENSHAW, J. Plaintiff brought his action to recover damages for the unlawful flooding of his lands and consequent injury to his growing crop. The judgment of the trial court held the dredging company alone responsible and awarded damages. That company appeals, advancing two contentions: First, that Henry Brack and his associates were alone responsible; and, second, that the court (the cause was tried without a jury) adopted an incorrect rule for the measure of damages, the application of which rule resulted in an excessive award against appellant. Appellant entered into a contract with defendant Frankenheimer Bros. as follows: "We, the undersigned, do hereby agree with Frankenheimer Bros. that our 20-foot ditching dredger, shall on or before the 25th day of May, 1903, be at the point in the South Fork of the Mokelumne, to be designated by said Frankenheimer Bros., ready to commence work cutting through the Brack Tract levee at a point above stated, and shall so commence. It is understood that Frankenheimer Bros. are to pay $70 per day of 22 working hours for the sole use and service of above-named ditcher and full crew for the construction of two and one-half miles of ditch; that no other costs shall be assessed to them for any other service whatsoever. We hereby agree that our dredger shall be in first-class working order, and that the crew will be efficient and diligent in the prosecution of the work, which we agree will be done in a good and workmanlike manner. The time for which $70 per day of 22 working hours is to be paid shall commence when the ditcher starts cutting through the levee, and shall end when the ditcher shall have finished cutting its way out. It being further understood and agreed that if at any time during the progress of the work aforesaid, Frankenheimer Bros. are dissatisfied with the work done by said ditcher, or with the progress of such work, that they may immediately terminate this contract on paying to the undersigned the amount due to us, at the rate above mentioned, for the time during which said ditcher has been actually employed. Any overtime said ditcher may work to be at the above named rate of $70 per day of 22 hours." The dredger was at the point designated and duly commenced work. To excavate the ditch, it was necessary that the dredger should pass from the river through the levee, and so on to the lands of defendants. This was accomplished without injury. Before cutting through the levee the crew of the dredger, under the direction of the captain, constructed a back dam behind the dredger to restrain the water from flowing in through the gap in the levee. The lumber which was used in building this dam was furnished by Frankenheimer Bros. The ditch was constructed along a line indicated by the defendant Brack, who, with Frankenheimers, was a lessee of the land. The ditch work was completed and the dredger ready to leave on July 14th. Prior to this date the captain requested Brack to supply him with lumber with which to build a back dam as the dredger again cut the levee for its exit to the river. This lumber was furnished, but no dam was constructed, and before the dredger was taken out through the cut the inflowing waters inundated a large portion of plaintiff's land, completely destroying a growing crop of beans and potatoes.

We think, upon the face of this contract, as well as from the evidence of the surrounding circumstances which was properly received, that the dredging company was an independent contractor, and solely responsible for the negligent omission to construct the back dam. It is true that Frankenheimer Bros. were to have the "sole use and service of the ditcher and full crew," but it does not appear that they had any control over the ditcher, its captain, and its crew, other than the general right which would belong to any owner to designate the place of performance and the general character of the work. The provision to the effect that, if Frankenheimer Bros. became dissatisfied with the work or its progress, they might terminate the contract, is at variance with the theory that they exercised any right of active control, since, if so, there would have been the power to employ and discharge men, and there would have been no occasion for dissatisfaction in this regard. The corporation contracted that the dredger would be manned by an efficient and diligent crew, and that the work should be done in a good and workmanlike manner When attention is paid to the evidence of the attendant and surrounding circumstances, the conclusion that the dredging company was an independent contractor becomes the more irresistible. Before going to the work, the captain of the dredger received his instructions from an officer of the defendant company, by whom all of the crew were employed and paid. The dredger was entirely under the supervision and control of its captain, and he, in turn, received his instructions from the officers of the company, saving alone the general instruction as to the location and character of the work to be performed. The Frankenheimer Bros. neither had, nor attempted to exercise, any power of hiring or discharging the members of the crew, and the court finds upon sufficient evidence that neither Brack nor the Frankenheimers had, or attempted to exercise, any control over the captain or crew of the dredger in the performance of the work, and that the appellant and its employés had full control of the work, and were in no way subject to the direction of the other defendants, save as to the place where the canal was to be excavated. Moreover, upon the face of these facts, it would be a conclusion amounting almost to absurdity to say that the Frankenheimers, who were shown to be no more than farmers and unskilled in dredging work and in the use of dredgers, should be held accountable for the necessary details in the proper performance of an undertaking such as this, and that it was, or ever could have been, contemplated that they, and not the dredging company, knew how the work should have been performed, and that a back dam was necessary for its proper performance, and that they had undertaken the legal responsibility of such construction. It is concluded upon this point, therefore, that the trial court was correct in attaching the responsibility to the appellant corporation. Callan v. Bull, 113 Cal. 595, 45 Pac. 1017; Hedge v. Williams, 131 Cal. 459, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366; Frassi v. McDonald, 122 Cal. 401, 55 Pac. 139; Louthan v. Hewes, 138 Cal. 119, 70 Pac. 1065; Green v. Soule, 145 Cal. 97, 78 Pac. 337.

It is contended that the court erred in arriving at the amount of damage sustained by plaintiff. In strictness the contention is not that the court erred in declaring the measure of damage, but that it erred in arriving at the damage under a statement of the true measure. The true measure of damage for the total destruction of a growing or standing crop is the value of the crop in the condition it was at the time and place of destruction. Such is the unquestioned rule, and such was the rule the court declared in the following language, which language, as the cause was tried without a jury, is copied from the opinion of the trial court: "In arriving at the value of the crops as they then stood (at the time of their destruction) and in the condition in which they were, the court has adopted, as the best means available, the probable yield of each tract multiplied by the market value of the crop, deducting therefrom the cost of producing and marketing said crops, and deducting therefrom the one-fourth of such value as and for the landlord's share, and has awarded the remaining three-fourths to the plaintiff, as the assignee of the tenants so sustaining such loss."

The question thus turns upon the mode of ascertaining the value of a growing crop at the time of its destruction. The appellant contends that the rental value of the land, with the cost of labor and materials up to the time of destruction expended in producing the crop, with legal interest at legal rate thereon, furnishes the correct method of arriving at this value. Such a method finds support and has been adopted by the Supreme Court of South Carolina in the case of Horres v. Berkeley Chemical Co., 35 S. E. 500, 57 S. C. 189, 52 L. R. A. 36. The objection to this method is that it is not a determination of value at all. It is but a determination of cost, which, while always an element of value, never furnishes its exact measure. By such a method of computation nothing is allowed for the fact that the crops, simply as growing crops, and before maturity, are necessarily an expense and not a profit to the owner. They are of value to him, not as growing vegetation upon his land, but because in the course of nature they will come to fruition, and so have a market value, and so will bring to him profit for his disbursement and expenses in their care and maintenance. Moreover, in taking cost as the measure of value, there is lost sight of the fact that by the destruction of the crop it cannot for that year at least be replaced, and that the very possibility, aside from the reasonable expectation, of future profit is forbidden to the agriculturist. And, finally, that cost cannot be the measure of the detriment under such circumstances ought to become patent from consideration of the fact that if you should upon successive years destroy the farmers' crops, and in full compensation therefor pay him only the money which he had expended in their growth up to the time of destruction, you could in a very short time starve to death every agricultural community in the United States. The true rule in arriving at the value at the time of destruction is that laid down by the trial court and abundantly supported by authority. The Supreme Court of Utah well states the proposition (Lester et al. v. Highland Boy Gold Min. Co. et al., 76 Pac. 341, 27 Utah, 470, 101 Am. St. Rep. 988): "In cases of destruction of growing crops it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land not destroyed and on other similar lands in the immediate neighborhood, cultivated in like manner, the stage of growth of the crops, at the time of injury or destruction, the expense of cultivating, harvesting and marketing the crops, and the market value at the time of maturity, or within a reasonable time after the injury or destruction of the crops. And," proceeds that court, "while all such evidence may be considered by the jury in determining the amount of damages, if any, still the true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction." In Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62, the introduction of such evidence as the means of arriving at value is distinctly approved, and the same proposition is recognized as containing the true element for determining damage in Ellis v. Tone, 58 Cal. 289. And that such is the generally accepted rule is abundantly established. 8 Am. & Eng. Ency. of Law, p. 330; Jones on Ev. § 384; Sutherland on Dam. §§ 120, 1023; Sedgwick on Dam. § 191.

For these reasons, the judgment and order appealed from are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; SHAW, J.

BEATTY, C. J. (dissenting). I dissent from the order denying a rehearing and from the judgment of the court.

This case grows out of a contract exactly parallel to a hiring by the hour of a carriage, horses, and driver from a liveryman. In such a case the carriage, team, and driver are put at the sole use and service of the hirer, but he does not assume to direct the driver how to guide his horses, or what precaution he must observe in order to avoid collision with other vehicles. As to such matters the driver takes his orders from his employer, the liveryman, and for any injury caused by his dereliction in those particulars the liveryman is responsible. But, as to the direction in which he is to drive and the places to which he is to go, he takes his orders from the hirer, and, if he should be directed by him to drive into an inclosed field on the hirer's ranch and on returning to leave the gate open behind him, allowing cattle to enter and destroy the tenant's crops, I should think the hirer, and not the liveryman, would be responsible for that damage. As I construe this contract, the Frankenheimers hired the dredger and crew just as one would hire a carriage and driver. They had nothing to do with the operation of the dredger. As to that the crew took orders from the defendant, who by its officers did nothing more than to send the dredger and crew to a point outside the levee selected by the Frankenheimers (just as a liveryman sends his carriage to your door). At that point they took charge to the extent of directing it to cut its way in through the levee, and thereafter to excavate a certain canal. From the time it commenced cutting its way in until it should cut its way out it was subject, as to its movements, to their exclusive control, and their control was to last just as long as they were willing to pay $70 per diem. When it came to cutting out, it was for them to decide whether they would pay at the rate of $70 a day for the time required to construct a back dam, or whether they would take the risk of cutting out without a back dam. Undoubtedly they had the power (and as between them and the defendant were bound to exercise it) to forbid the cutting of the levee before a back dam was constructed, and they should be held responsible for the consequences of their choice. The loss of plaintiff's crops was caused by them—not by the appellant.

As to the rule of damages, the decision seems to be in conflict with the decision in Crow v. San Joaquin, etc., 130 Cal. 314, 62 Pac. 562, 1058.

I think the judgment should have been reversed.

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151 Cal. 379

STIMSON v. HANLEY, Street Superintendent, et al. (L. A. 1,887.)

(Supreme Court of California. June 7, 1907. Rehearing Denied July 5, 1907.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—SUFFICIENCY OF BIDS.

Where bids were invited for the paving of a street as one work, bids for less than the whole work were not in response to the invitation, and might be disregarded.

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Charles M. Stimson against James Hanley as street superintendent of Los Angeles and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Frank G. Finlayson and A. B. McCutchen, for appellant. W. B. Matthews, Leslie R. Hewitt, Bicknell, Gibson & Trask, and Dunn & Crutchen, for respondents.

McFARLAND, J. A general demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment was rendered for defendants. From this judgment plaintiff appeals.

Plaintiff is the owner of certain city lots in the city of Los Angeles abutting on Ninth street, between the east line of Center avenue and the east line of Santa Fé avenue, and the city council of said city duly passed a resolution of intention that certain street work be done on said Ninth street between the two points above stated. The board determined that the contemplated work was of more than local and ordinary public benefit, and declared external boundaries of a district to be benefited by the improvement and to be assessed to pay the cost thereof; and it also found that the cost of improvement was exceeding 50 cents a foot on each line of the street, and determined that bonds should be issued to represent the cost, as provided by statute. No objection was made by appellant to these proceedings. The work or improvement ordered consisted of paving, guttering, and curbing Ninth street between the said two terminals, and constructing certain culverts. An invitation was duly given for sealed proposals or bids for doing the work, and no objection was made by appellant to any of the proceedings down to this point. Bids were opened on the day fixed for that purpose, and it then appeared that the defendant, the Fairchild-Gilmore-Wilton Company, a corporation, and which we will call hereafter for brevity the Fairchild Company, had bid for the whole work at the rate of 17½ cents per square foot for the paving, 5 cents per lineal foot for the curbing, 15 cents per square foot for guttering, and $12.50 per lineal foot for the culverts. Only one other bid was made for the whole work. This was of Andrew Holloway, but it was for a larger amount than the bid of the Fairchild Company. There was also another bid by C. Clifford for the curbing alone, which was lower than the bid for the Fairchild Company for that part of the work; and there was also a bid by Charles Stansbury for the guttering and culverts, which was lower than the bid of the Fairchild Company for the said item. The board awarded the contract to the Fairchild Company, and this action was brought to enjoin the defendant James Hanley, who is street superintendent of said city, from entering into the contract with the Fairchild Company pursuant to said award. The sole contention of appellant is that the order of the council was erroneous and without warrant because the Fairchild Company was not the lowest bidder, and that it was not the lowest bidder because another person who bid only one part of the work had bid lower on that part. We do not think that this contention is maintainable. The purpose of the council was to improve Ninth street between the said terminal points into a completed street, and to receive bids for the necessary work to accomplish that result. The resolution of intention and the invitation for bids speaks of the thing to be done as a "work" or "improvement"—in the singular—and evidently contemplates that this "work" is to be dealt with as a unit. The invitation for bids was clearly for this "work" as a whole, and a bid for less than the whole work was not in response to the invitation, and was properly disregarded. The Fairchild Company's bid for the whole of the work was in perfect response to the invitation, the estimate of the cost of one part of the work was manifestly based upon the consideration that it was to do the whole work, and it was under no obligation, legal or moral, to undertake any of the work less than the whole. The council had the right, as it admitted, to have this work done under one contract, and there is no reason to think that it contemplated four distinct contracts with four assessments, warrants, etc. Four separate contractors, each claiming to do his part of the work at his convenience, would lead to conflicts and confusion, while one contractor for the whole could do each part of the work at the appropriate time. Moreover, the determination by the council that the work was of more than ordinary importance, calling for the creation of a distinct district, and the declaration that bonds should be issued to represent the cost, were evidently based on the improvements as one work, and would be inconsistent with a contemplation of several independent contracts with different contractors, to be followed by different assessments, warrants, series of bonds, etc.

Appellant contends that his point is supported by two cases heretofore decided by this court—Los Angeles Lighting Company v. Los Angeles, 106 Cal. 156, 39 Pac. 535, and Bates v. Twist, 138 Cal. 52, 70 Pac. 1023—but we do not so construe those cases. In the first-named case there was involved only the right of the lot owners to protest against the contemplated improvement; and it was there held that when the contemplated improvement included several classes of work, an effectual protest might be made as to some of the classes of work, without objection being made to all, the court saying that "the owner may protest against a portion of the work included in the resolution without including in his protest all of the work embraced therein." But this proposition does not reach the question of the validity of a bid which is involved in the case at bar. In Bates v. Twist there had been a resolution of intention providing certain improvements on N street in San Francisco, and also of street work of various kinds upon streets other than N street. The resolution ordering the work done did not include all the work included in the resolution of intention, and it was contended that for this reason the contract and subsequent proceedings were void. The court held the contract valid, and made a distinction between work ordered on a part of a particular street, and work to be done at different parts of the city—which it was held might be all included in one resolution of intention. The court say: "It may often happen, as in the present case, that the public interest requires the improvement of streets situate in widely separated parts of the city, and, if so, no reason is shown or can be suggested why the board may not cause such improvements to be included in the same resolution of intention, without requiring them to be contracted for by the same individual," and then the court proceeds as follows: "The designation by it of a street or a portion of a street which is to be improved, with a description of the work to be done thereon, becomes thereby a distinct and separate improvement, whether it be the only improvement specified in the resolution of intention or in the resolution ordering the work, or whether other improvements are included with it." All this is entirely in accord with the views hereinafter expressed. Moreover, in Bates v. Twist reference is made to Treanor v. Houghton, 103 Cal. 54, 36 Pac. 1081, and the court say that in Treanor v. Houghton: "The city council of San Jose ordered the improvement of Julian street between First street and the eastern limits of the city. The improvement thus ordered was an entirety within the principles above stated and should have remained so throughout the subsequent proceedings." In the same case of Treanor v. Houghton the subject is elaborately discussed and the conclusion reached is that the resolution of intention to improve a particular piece of street, although the improvement may consist, as it usually does, of two or more classes of work, must be considered as a unit, and the work must be let under a single contract, and that the "city council has no power to award separate contracts in such a case for the performance of a single improvement."

Our conclusions are that the Fairchild Company was legally the lowest bidder and entitled to have the contract; that there is no valid reason why the defendant, the street superintendent, should not enter into the contract with the other defendant which was awarded by the council; and that the demurrer to the complaint was properly sustained.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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5 Cal. App. 541

## Ex parte HAASE. (Cr. 47.)

(Court of Appeal, Third District, California. May 16, 1907.)

1. Criminal Law — Judgment — Determination of Degree of Offense.

Pen. Code, § 1192, declares that upon a plea of guilty of a crime divided into degrees the court must, before passing sentence, determine the degree. Section 1017 declares that, if the defendant pleads guilty, the plea shall be substantially that defendant pleads that he is guilty of the offense charged. *Held* that, where to an information charging burglary in general terms so as to include both degrees defendant pleaded guilty of burglary in the first degree, no substantial right of defendant was invaded by the court's failure to determine the degree of the offense, as required by section 1192.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2494.]

2. Same—Presumption of Jurisdiction.

Where the record does not show whether the court determined the degree of the offense on a plea of guilty of burglary in the first degree to an information charging burglary in general terms so as to include both degrees, as the court is required to do by Pen. Code, § 1192, upon a plea of guilty of a crime divided into degrees, and judgment was pronounced for burglary in the first degree, on collateral attack on the judgment, the presumption is, if any be necessary to support the judgment, that notwithstanding the plea of guilty in the first degree the court heard evidence and determined that the offense was burglary in the first degree.

Application by Henry Haase for a writ of habeas corpus. Writ discharged, and petitioner remanded.

R. T. McKisick, for petitioner. U. S. Webb, for respondent.

BURNETT, J. Petitioner asks to be discharged from the custody of the warden of the state prison on the ground that the "judgment and sentence were and are void, that said court had no authority in law to enter said judgment or to pronounce said sentence; that the same are in excess of the jurisdiction of the court, and are nullities." The return to the writ shows that petitioner is imprisoned by virtue of a commitment issued out of the superior court of the state of California in and for the county of San Bernardino in the following form: "The district attorney, with the defendant, who had heretofore waived counsel, came into court. The defendant was duly informed by the court of the nature of the information filed against him for the crime of burglary committed on the 6th day of October, 1904, of his arraignment and plea of guilty on the 8th day of October, 1904, of burglary in the first degree. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had none. And, no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment that, whereas, the said Henry Haase having been duly convicted in this court of the crime of burglary in the first degree, it is therefore ordered, adjudged, and decreed that the said Henry Haase be punished by imprisonment in the state prison of the state of California at Folsom for the term of eight years."

It is insisted that the court had no jurisdiction to sentence the defendant because of its failure to determine the degree of the crime. In this connection petitioner cites section 1192 of the Penal Code, which provides: "Upon a plea of guilty of a crime distinguished or divided into degrees the court must, before passing sentence, determine the degree." And, in response to the suggestion that the defendant by the form of his plea obviated the necessity of the court's actual determination of the degree, attention is directed to section 1017 of the same Code, providing for the form of the plea as follows: "Every plea must be oral and entered upon the minutes of the court in substantially the following form: (1) If the defendant plead guilty, 'The defendant pleads that he is guilty of the offense charged.'" The usual and proper practice undoubtedly is to charge in general terms in the information the offense of burglary without specifying the entry as having been made in the day or nighttime. If the defendant then pleads guilty, the plea should be, in orderly sequence, "Guilty of the offense charged," to wit, burglary. The duty would then be cast upon the court to determine the degree before passing sentence. And, if the court failed to determine the degree, it would be prejudicial error. People v. Jefferson, 52 Cal. 452. But what objection could be urged against an information charging burglary in the nighttime? The effect would be simply to confine the plea or the trial to the crime of burglary in the first degree. People v. Smith, 136 Cal. 208, 68 Pac. 702. But if the defendant were arraigned upon such an information and should plead guilty of "burglary in the first degree," and were sentenced to eight years in the penitentiary, it could not be said that the judgment was void or even voidable. In such a case the plea would be equivalent to that "of guilty of the offense charged" and it would be a substantial compliance with the requirement of the statute.

When, as in the case at bar, the information charges burglary in general terms so as to include both degrees, why should the defendant be precluded from pleading in harmony with the facts guilty of either one of said offenses if he so desires? How is any substantial right of the defendant invaded if the court accepts his confession that the crime was committed in the nighttime instead of calling a witness to prove such fact? Ordinarily the court would determine the degree by the examination of witnesses, but it would seem to be entirely unnecessary where the defendant—presumably upon sufficient information as to the nature and consequences of the offense—confesses in effect that he committed the crime in the nighttime and is therefore guilty of burglary in the first degree.

But, aside from the foregoing consideration, it is manifest from the record before us that petitioner is not entitled to his discharge. The only question admittedly that we can consider upon this application is the jurisdiction of the court below to sentence the defendant. Forbes v. Hyde, 31 Cal. 342; Ex parte Hollis, 59 Cal. 405; In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149. Again the proceeding of habeas corpus is not a substitute for appeal. Ex parte Long, 114 Cal. 159, 45 Pac. 1057; Keller v. Davis, 95 N. W. 1028, 69 Neb. 494. And, in reviewing the record of a court of general jurisdiction, it must be remembered that every intendment is in favor of the judgment, and that the want of jurisdiction must affirmatively appear. This is a collateral and not a direct attack, and, in order to entitle petitioner to his discharge, the record must show that the judgment is a nullity.

In Re Eichhoff, 101 Cal. 603, 36 Pac. 11, Mr. Justice Harrison, speaking for the court, said: "More than 200 years ago it was said in Peacock v. Bell, 1 Wm. Saund. 74, that 'the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged'; and this rule has been so frequently repeated as to have become a maxim in the law. This presumption extends to everything necessary for the support of the judgment, as well those facts which are necessary to give the court jurisdiction of the defendant as those which are necessary to sustain its decision of fact or conclusion of law thereon. * * * The fact that the court has rendered a judgment implies a determination by it, before it assumed to hear the controversy, that it had jurisdiction over the subject-matter of the action, and of the defendant against whom the complaint was directed. * * * Its determination upon this question is to be made upon evidence of some nature; * * * and if its conclusion is incorrect it is merely error which can be reviewed only upon a direct appeal. Even though it should determine the question without any evidence before it, the same presumption of verity attends its decision upon this point as upon any other issue which it may determine without evidence. Nor does this presumption of its jurisdiction to make the decision depend upon the existence of any record of the decision. * * * If it makes a record of the facts giving it jurisdiction, or of its exercise of such jurisdiction, there is no occasion to invoke any presumption. It is only when the record is silent that the necessity for presumption arises." It would seem impossible to add anything to the foregoing statement of the rule. The doctrine is announced also in the late case of Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 674, 74 Pac. 301, through Mr. Justice Angellotti, as follows: "Every presumption is in favor of the validity of the judgment, and any condition of facts consistent with the validity of the judgment will be presumed to have existed rather than one which will defeat the judgment. Unless the record of the judgment itself affirmatively shows that the court was without jurisdiction to render the judgment, the judgment is not void upon its face." See, also, In re Brown, 32 Cal. 49.

In the case at bar it is not required that the record shall show that the court heard evidence and determined the degree of the offense, even if we assume that under the peculiar circumstances such determination was necessary. The only material parts of a judgment are the statement of the offense for which the defendant has been convicted, omitting therefrom all that is contained in the previous papers and therefore not necessary to be repeated, and the sentence of the court. In re Ring, 28 Cal. 253. Hence here the commitment, which is merely a certified copy of the judgment, is properly silent as to whether the court formally determined the degree or whether any evidence on the subject was received. If necessary, however, to support the judgment, it must be presumed that, notwithstanding the plea of guilty of burglary of the first degree, the court heard evidence and determined that the offense was committed in the nighttime and was therefore burglary of the first degree. There is no ground for the contention of petitioner that it appears affirmatively that no such proceeding was had. The affidavit of the clerk verifying the minutes of the court was received in evidence at the hearing, but it simply discloses the fact that the record is silent as to whether the court determined the question as petitioner claims it should have done before passing sentence.

We have not referred to many of the decisions cited and suggestions made by counsel, as we deem the foregoing decisive of the issue.

The writ is discharged, and the petitioner is remanded.

We concur: CHIPMAN, P. J.; HART, J.

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5 Cal. App. 525

## PETERSON et al. v. CHAIX et al. (Civ. 255.)

(Court of Appeal, Third District, California. Feb. 20, 1907. On Rehearing, May 15, 1907.)

1. EVIDENCE — PAROL EVIDENCE—CONSTRUCTION OF WRITTEN INSTRUMENT—EXISTENCE OF AMBIGUITY.

Code Civ. Proc. § 1856, declares that, when the terms of an agreement have been reduced to writing by the parties, no evidence of the agreement other than the writing, except in certain cases, shall be admitted, but provides that it shall not be held to exclude evidence of the circumstances under which the agreement was made, as defined by section 1860, or to explain an extrinsic ambiguity. Section 1860 declares that, for the proper construction of an instrument, the circumstances under which it was made may be shown. Civ. Code, § 1625, declares that the execution of a contract in writing, shall supersede all the oral negotiations. *Held*, that the terms "about" and "more or less," used in a contract of sale of "about" 250 tons of grapes "more or less," did not create such an ambiguity in the contract as to the amount intended to be sold, as would let in extrinsic evidence or previous or contemporaneous conversations to show intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2074, 2106.]

On Rehearing.

2. SAME.

Extrinsic evidence of the terms of a contract of which merely an incomplete memorandum has been made is admissible only as to such matters concerning which the memorandum is silent, or as to which terms are used which import ambiguity or uncertainty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1882.]

3. SAME.

Whatever the law implies from a contract in writing is as much a part of the contract as that which is therein expressed; and to the extent that the contract, with that which the law implies, is clear and complete, it cannot be varied as added to by extrinsic evidence.

4. SAME.

Extrinsic evidence is not admissible to show that a contract is partly written and partly oral, if the matter proposed to be made part of the contract by such evidence is inconsistent with the terms of the writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2030.]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by U. G. Peterson and another against Adrien Chaix and another. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Judgment and order reversed.

E. B. Young and J. W. Oates, for appellants. J. R. Leppo, for respondents.

CHIPMAN, P. J. Action upon a contract for the sale of certain grapes. The cause was tried by the court without a jury, and plaintiffs had judgment, from which, and from the order denying their motion for a new trial, defendants appeal.

It is averred in the complaint that on September 22, 1902, plaintiffs entered into a contract with defendants, whereby plaintiffs agreed to sell and deliver to defendants at their winery in Santa Rosa, and defendants agreed to buy and receive, the crop of grapes owned and grown by plaintiffs on their vineyards near said city for the season of 1902, said grapes to be of sound quality, but not required to contain any specified percentage of sugar, and that defendants agreed to pay to plaintiffs for the same, cash on delivery, the sum of $27 per ton; that prior to October 27, 1902, plaintiffs delivered to defendants, under said contract, 256.817 tons of said grapes and defendants then and there duly received and accepted the same under said contract, amounting to $6,934.05; that plaintiffs were ready and willing to deliver the balance of their said crop to defendants, but defendants gave plaintiffs notice that they, defendants, "would not receive or accept or pay for any more of the said crop and then and there refused to receive or accept any more of said grapes"; that there remained undelivered of said crop 166.155 tons of grapes of quality called for by said contract; that after defendants' said refusal, to wit, on October 28, 1902, plaintiffs sold to the best advantage said remaining grapes (except 10 tons hereinafter mentioned), receiving therefor the sum of $20 per ton, amounting in the aggregate to $3,123.10, and that the difference between said sum and the sum agreed by defendants to be paid is $1,093.08; that there remained undelivered to defendants 10 tons of grapes, which by reason of defendants' said refusal became decayed and valueless. Defendants by their answer admitted the delivery to them agreeably to the contract of 239.291 tons, but alleged that 17.495 tons delivered to defendants prior to August 27, 1902, were of inferior quality, for which defendants agreed to pay the reasonable market value, which they allege was and is $317.43, and admit an indebtedness of $6,778.30, which sum they allege they tendered to plaintiffs prior to the commencement of this action, and that plaintiffs refused to receive the same, and they aver a present willingness to pay said sum to plaintiffs. Defendants deny specifically the allegations of the complaint, except as to the above admissions. The court made findings in accordance with the facts set forth in the complaint, and found that "no contract or agreement other than the one above mentioned (i. e., alleged in the complaint) was ever made between plaintiffs and defendants for the sale and purchase of plaintiffs' said crop of grapes for the season of 1902." The court also found that no tender had been made by defendants, as to which finding the matter may be dismissed, as it is not now claimed that any tender was made by defendants.

It appeared by the opening statement of counsel for plaintiffs and during the examination of the first witness called by plaintiffs that a written contract was entered into by the parties, defendants acting through one Hood, admittedly their agent, plaintiffs, however, claiming that it was but a part of the contract. This instrument bears date as alleged of the contract pleaded in the complaint, and is as follows: "Santa Rosa, Sept. 22nd, 1902. In consideration of one ($1.00) dollar, paid to me in hand, I sell and promise to deliver to Chaix & Bernard at James G. Hood's winery at Santa Rosa, Cal., about 250 tons grapes more or less tons of grapes, at the stipulated price of $27.00 per ton cash after delivery. Grapes to be of sound quality. ~~and not less than (22) Twenty-Two per cent. of sugar.~~ Seller: Peterson Bros. Buyer: James G. Hood." The last clause shown in the contract as erased was so erased before signing. Over the objection of defendants, the plaintiffs were permitted to introduce the testimony of several witnesses as to the circumstances leading up to the signing of the above memorandum, to show that the sale was intended to include the entire crop of plaintiffs' grown upon their vineyards, explaining the varieties of grapes and estimated tons of each, that the grapes were not to be subject to the sugar test. In short, witnesses were permitted to testify to all the conversations and details relating to the transaction that took place during the negotiations and contemporaneously with the signing of the contract. Upon objections being interposed and after argument, the court remarked: "My understanding is that all these matters of the conversation precedent are merged in a written contract, but under section 1860 of the Code of Civil Procedure I will permit the question and you can take your exception." The objections and ruling ran to all this line of testimony, of which there was much, and present the principal question before us. Respondents' view of the matter as stated in the brief is that "the writing of September 22d is only a commercial memorandum, and does not purport to fully set forth all of the contract of sale and purchase of the grapes"; and hence all the circumstances attending the making of the contract may be inquired into.

Section 1860, Code Civ. Proc., upon which reliance is placed, reads as follows: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." This section is not to be read as applicable to every contract that may come before the court for interpretation. It has its limitations, and must be read in connection with other provisions of our Codes. To give it a literal and universal application would bring it into direct conflict with section 1856, Code of Civil Procedure, which provides: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings; (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud." In the present case there is no allegation or proof of mistake, of invalidity of the contract, or of fraud. Section 1625, Civ. Code, must also be read and harmonized with section 1860, Code Civ. Proc. It reads: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument." From these and other sections which might be cited it is plain that section 1860 is to be restricted in its application. The court said in Balfour v. Fresno C. & I. Co., 109 Cal. 221, 225, 41 Pac. 876, 877: "If the language of the contract be, as defendant contends, plain and unambiguous, and susceptible of but one construction, then the objection was good, and the evidence properly excluded. If, however, the language employed be fairly susceptible of either one of the two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties"—citing section 1860, Code Civ. Proc., and cases. In Johnson v. Pugh, 110 Wis. 167, 85 N. W. 641, it was broadly contended that testimony of the circumstances surrounding and leading up to the making of a written contract is always admissible, not for the purpose of changing or varying the terms of the written instrument, but for the purpose of putting the court in possession of the circumstances of the parties at the time of the making of the contract. "Not so," said the court. "Where there is no ambiguity in the contract either in its literal sense or when it is applied to the subject thereof, it must speak for itself entirely unaided by extrinsic matters. Where such ambiguity does exist, then evidence of the circumstances under which the contract was made is proper to enable the court in the light thereof to read the instrument in the sense the parties intended, if that can be done without violence to the rules of law."

The meaning of section 1860 may be discovered in the light of the foregoing decisions. Before resort can be had to extrinsic evidence, the language employed in the contract must not only be "fairly susceptible of either one of the two interpretations contended for," but this must be "without doing violence to its usual and ordinary import," and it must also be "without doing violence to * * * some established rule of construction." Balfour v. Fresno C. & I. Co., supra. It is no part of the office of construction to add to the contract or take from it, but it is to ascertain what the parties intended by what they have said. If there be no ambiguity in the contract, it must speak for itself. It is true, as provided in section 1861, Code Civ. Proc., that, although "the terms of a writing are presumed to have been used in their primary and general acceptation," still evidence is admissible to show "that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly." Such was the case of Higgins v. Cal. P. Co. 120 Cal. 631, 52 Pac. 1080, cited by respondents, where the terms used were "short tons." It was there held that it is not necessary that the contract should expressly indicate a local, technical, or peculiar signification but "that it may be shown by evidence that the language is used in a technical, local, or peculiar sense, and not merely that evidence may be introduced to show what such meaning is when language is so used." That case, however, was not intended to change the rules above mentioned. The rules stated in sections 1860 and 1861 do not apply where the terms used in the contract are free from ambiguity or are not used in a technical, local, or peculiar signification. The Code rule enunciated in section 1856, Code Civ. Proc., has been frequently enforced by our Supreme Court and was the rule before being incorporated into the Code. Goldman v. Davis, 23 Cal. 256. See of later cases Schurtz v. Romer, 82 Cal. 474, 23 Pac. 118; West Coast L. Co. v. Apfield, 86 Cal. 335, 24 Pac. 993; Beall v. Fisher, 95 Cal. 568, 30 Pac. 773. And also McDonald v. Poole, 113 Cal. 437, 45 Pac. 702, construing section 1625, Civ. Code. Among cases in other jurisdictions the following may be consulted with profit. They come down finally to the simple proposition that, where there is no uncertainty of sense, there is no room for construction. Hart v. Hart, 117 Wis. 639, 94 N. W. 890; Fawkner v. Smith W. P. Co., 88 Iowa, 169, 55 N. W. 200, 45 Am. St. Rep. 230. If it be claimed that the contract is incomplete, it must so appear upon inspection before parol evidence is admissible to complete it, and such evidence must be consistent with and not contradictory of it. Brantingham v. Huff, 174 N. Y. 53, 66 N. E. 620, 95 Am. St. Rep. 545; Ferguson C. Co. v. Manhattan T. Co., 118 Fed. 791, 55 C. C. A. 529.

In the case here the only terms which have given rise to any controversy are the terms "about" and "more or less," as applied to the quantity of grapes sold. The sugar test was stricken out, and it so appears upon the face of the contract. There is no uncertainty that the plaintiffs agreed to sell and deliver 250 tons of grapes at a place named, and that the buyer was to pay $27 per ton upon delivery, the grapes to be of sound quality. The material question which has arisen between the parties as to the meaning of the contract is the single question of quantity agreed to be sold and delivered. Parol evidence was not admitted to show that the terms "about" and "more or less" had a local or technical or otherwise peculiar signification, and were so understood in the particular instance, but the evidence was introduced to prove that it was part of the agreement that the buyer should receive all the grapes grown by the seller on the several vineyards mentioned by the witnesses, that when the matter of quantity in the vineyards was under discussion, and the estimate of plaintiffs was from 250 to 290 tons, defendants said it would make no difference as to the amount, for they would take all the grapes that plaintiffs had. Plaintiffs made an unsuccessful effort to show by parol that the terms "more or less" had by custom among buyers and sellers of wine grapes a local and peculiar signification which meant all grapes grown by the seller. Defendants objected to the testimony, however, and the objection was sustained. It seems to us that the conversations occurring when the parties were estimating the quantity thought to be on the vines should be regarded in the light of opinions which were to form some safe quantity to name in the contract which plaintiffs were willing to agree to sell and deliver and not as part of the contract itself. So important a matter as that the buyers agreed to take all the grapes grown by the sellers, regardless of quantity, should have found expression in the contract, either directly or by introducing some extrinsic ambiguity, and, not having been so expressed, cannot now be added thereto by parol. This additional quantity is 166 tons, or 60 per cent. greater than the quantity stated in the contract by the sellers. Possibly, had this large excess been suggested during these conversations, the buyers would have hesitated to say that it made no difference as to the quantity. However this may be, the terms "about" and "more or less" have frequently found their way into contracts, and courts have without disagreement held that they introduce no ambiguity, and that extrinsic evidence of previous or contemporaneous conversations is not admissible to show what the parties meant by their use, unless the contract on its face makes reference to some independent circumstances to identify the goods sold.

Both parties cite Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622. This is a leading case and has been often cited. It lays down certain rules for the guidance of courts in the construction of similar contracts. In that case the contract was to deliver at a certain army post "880 cords of sound, first quality of merchantable wood, more or less, as shall be determined to be necessary, by the post commander, for the regular supply," etc. It appeared that the quartermaster's department had made an estimate of the quantity required and had accordingly advertised for 880 cords. The bids were opened April 15, 1871, and the contract was awarded May 6th, but, though dated on that day, was not executed until June 14th. About June 18th the post commander notified plaintiff, the claimant, that but 40 cords of wood would be required and forbade his hauling any more to the government yard. He had, however, at great expense, before the contract was signed, gone forward and cut the full quantity and hauled it near to the yard. The court held that "the substantial engagement was to furnish what should be determined to be necessary by the post-commander for the regular supply for the year," and plaintiff failed in his action. The opinion is valuable for its concise and accurate statement of the rules governing similar contracts. Said the court, by Mr. Justice Bradley: "Where a contract is made to sell or furnish certain goods identified by independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific lot, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity. But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words, 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight. If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith. So, where a manufacturer contracts to deliver at a certain price all the articles he shall make in his factory for the space of two years, 'say a thousand to twelve hundred gallons of naphtha per month,' the designation of quantity is qualified not only by the indeterminate word 'say,' but by the fair discretion or ability of the manufacturer, always provided he acts in good faith. * * * Reference is made to the previous negotiations which led to the making of the contract, the bid of the claimant, the fact that the contract was awarded to him on his bid as early as May, and that, on the faith and expectation that the quantity named would be wanted, he had cut the 880 cords of wood before the contract was signed. All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

The importance of the question and the earnest contention of respondent that the lower court ruled correctly is our justification for a still further notice of some of the many cases in which the matter has been considered. In Shickle v. Choteau H. & V. Iron Co., 84 Mo. 161, the opinion, as rendered in the Court of Appeals, 10 Mo. App. 242, was adopted. The contract read: Your proposal for four hundred tons, more or less, of wrought scrap, consisting of one, one-half and three-eighth plate blacksmith scrap, and lot of gas pipes from Southern Hotel, and other scrap, as shown your Mr. Fusz, at twenty-two dollars per net ton in our yard, is accepted. You can commence hauling same at your convenience." The court said: "Defendant admitted the purchase and receipt of the iron at the price mentioned and nonpayment of the balance claimed, but by way of counterclaim alleged that said iron was delivered in part performance of the contract above under which they claimed that it was agreed that defendants were to have all the scrap iron in plaintiff's yard. Evidence was offered to show that at the time the terms were agreed upon the parties were in the yard containing the scrap and made estimates of the quantity, and defendants offered to prove that it was then agreed that they were to have all the scrap iron." The court held this evidence inadmissible. As reported in 10 Mo. App., the court said: "The words 'more or less' in a written contract are never understood to permit more than a small departure from the quantity named in the contract. Such being the meaning affixed by law to the words 'more or less' in a written contract, the use of such words does not create such an ambiguity in the contract as will let in parol explanation. The words '400 tons more or less' are to be taken, not as mere words of expectation, but as words of contract limiting and defining the quantity to be sold. Morris v. Levison, 1 C. P. Div. 155; Leeming v. Snaith, 16 Q. B. 275. The construction put upon the contract by the defendant has the effect of erasing from the contract the words '400 tons.' This cannot be done. It is well settled, in interpreting any written instrument, that such a meaning shall be put upon it as will, if possible, give effect to all its parts." In Cabot v. Winsor et al., 1 Allen (83 Mass.) 546, the contract was as follows: "Sold to Nath'l Winsor Jr. & Co. for account of Stephen Cabot, Esq., five hundred (500) bundles, more or less gunny bags at 10c. per bag." It appeared in evidence that both parties knew that the object of the defendant in making the purchase was to fill the ship Hesperus then lying at India Wharf, and that at the time of the purchase it was uncertain what number of bundles would be needed for that purpose. Only 200 bundles were actually taken on board of the Hesperus, that being all that proved to be necessary to fill the ship. The remainder, about 275 bundles, were left on the wharf. Defendants claimed that under the contract they were to have 500 bundles, or more or less than that number, as might reasonably be found necessary to fill the ship, or at their election; and that as they did not require any more than the 200 bundles for that purpose, and as they in fact never received any more than that number, they were only bound to pay for 200. But it was held at the trial that there was no latent ambiguity in the contract, and that its construction was for the court. Defendants offered to prove by parol that both parties understood the contract differently and that it was not intended to cover more than enough to fill the ship, and they offered to prove the declarations and acts of the plaintiff before, at the time of, and after the making of the contract, for the purpose of showing that he so construed it; but the judge excluded the evidence. On the appeal the Supreme Judicial Court said: "We are unable to perceive any ground on which it can be held that this contract falls within any of the exceptions to the familiar and well-established rule which excludes all parol evidence in the construction of the written agreements of parties. The language in which it is expressed is not technical, nor is it alleged to have any peculiar or local signification, or to have been used with reference to any custom or usage, which would vary or change its natural and ordinary meaning. Nor are the terms of the contract rendered uncertain or doubtful by reference to extrinsic facts, so as to create a latent ambiguity. The words 'more or less,' which seem to have given rise to the contention between the parties, have a plain, ordinary, and popular signification, and are often used in contracts relating both to real and personal estate." After speaking of the sales of merchandise, especially in large quantities, where these terms are frequently used in connection with the specific quantity named in the contract, the court said: "But in such cases parol evidence is not admitted to show that the parties intended to buy and sell a different quantity or amount from that stated in the written agreement. On the contrary, it is held to be a contract for the sale of the quantity or amount specified; and the effect of the words 'more or less' is only to permit the vendor to fulfill his contract by a delivery of so much as may reasonably and fairly be held to be a compliance with the contract, after making due allowance for an excess or short delivery arising from the usual and ordinary causes, which prevent an accurate estimate of the weight or number of the articles sold." It was held that the readiness to deliver 475 bundles was sufficient compliance, and that "a variation of 5 per cent. in so large a quantity was not such a deficiency as to fall outside of the fair and reasonable limit of short delivery." In Creighton v. Comstock, 27 Ohio St. 548, the sale was of timber "supposed to be twenty-three thousand feet white pine timber, more or less, now lying in the river immediately under said Creighton's logway in the Ohio River at Columbus." A delivery of 16,000 feet was held to be insufficient, and involved too great a variation or deficiency to be brought within the meaning of the term "more or less." In Holland v. Rea, 48 Mich. 218, 12 N. W. 167, the court held that 473,000 feet of lumber would not satisfy a call for 500,000 feet, "more or less." See, also, the rule stated in Kirwan v. Van Camp Packing Co., 12 Ind. App. 1, 39 N. E. 536.

Respondent cites the case of Day v. Cross, 59 Tex. 595. In that case the sale was of all the cattle of certain brands, 10,000 head, more or less, except a certain number of the cattle of certain brands. The court held that it was not a guaranty as to the number of the cattle in said marks and brands, but a contract for the sale of the marks and brands, and that the seller was only bound to exercise good faith, care, skill, and energy to collect the cattle, taking them from the range where they were accustomed to run at the making of the contract. Here the controlling feature was the marks and brands, and not the designated number as indicating what was sold. In Tilden v. Rosenthal, 41 Ill. 385, 89 Am. Dec. 388, by the written contract defendant agreed to deliver on a certain day "262 head, more or less, of good fat cattle * * * to average thirteen hundred pounds, and are the cattle known as the McCoy and Bishop lot, now being fed in the vicinity of Council Bluffs, Iowa." Plaintiffs tendered 178 head, which defendants refused to receive and plaintiffs brought suit for this number. The court held that the phrase "more or less" was used by the parties to cover such trifling deficiencies in number as might be caused by the ordinary casualties of death or loss. "But," said the court, "the deficiency was nearly one-third of the whole number contracted for. We are not prepared to say that, when a person contracts for a lot of cattle containing 262 head, he shall accept 178." See cases collected in Benjamin on Sales, § 692 et seq. For discussion of rule in sale of land see Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120, and note; Harrell v. Hill, 19 Ark. 102, 68 Am. Dec. 202.

Appellants make no point in their brief as to the 17 tons for which they allege that they agreed to pay the market value. The sole question discussed relates to the liability of defendants for the 166 tons of grapes which they refused to accept.

Our conclusion is that in accepting the 256.817 tons defendants became liable therefor at the contract price, but that they were not bound to accept the excess tendered by plaintiffs and refused by defendants.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

### On Petition for Rehearing.

It is urged in the petition for rehearing that the written memorandum did not constitute the whole of the agreement entered into, the remaining portion being verbal, without which latter there was no complete agreement; that this is a case "where a verbal contract is entire, and a part only in part performance is reduced to writing"; and that in the decision heretofore rendered due consideration was not given to the contention of respondents in these particulars.

We think the case, as to the matters above referred to, should be again examined.

The rehearing is granted. The cause will be placed at the foot of the April calendar and the parties notified hereof.

We concur: BURNETT, J.; HART, J.

### On Rehearing.

In their petition for rehearing plaintiffs urged that the written memorandum did not constitute the whole of the agreement between the parties; but that there were conditions resting in parol, which were an essential part thereof, and that the case presents an instance "where a verbal contract is entire, and a part only in part performance is reduced to writing," and hence parol testimony was admissible to establish the complete agreement. We do not think that an extended discussion is called for in disposing of plaintiffs' contention. It may be conceded, and as we understand defendants' position they admit, that where the contract appears to be merely an incomplete memorandum, or to be partly in writing and partly in parol, extrinsic evidence is admissible to show what the mutual stipulations were. But this is true only as to such matters concerning which the written memorandum is silent or as to which terms are used which import ambiguity or uncertainty; i. e., which on their face admit of doubt as to what the parties meant by their use. There is another principle to be observed, namely, that whatever the law implies from a contract in writing is as much a part of the contract as that which is therein expressed; and to the extent that the contract, with that which the law implies, is clear, definite, and complete, it cannot be added to, varied, or contradicted by extrinsic evidence. A still further principle is not to be overlooked, namely, extrinsic evidence is not admissible to show that a contract was partly written and partly oral if the matter proposed to be made part of the contract by such evidence is inconsistent with the terms of the writing. We may add a still further and salutary rule, which has been recently given careful and extended discussion by this court, in the case of Hale Bros., Inc., v. Milliken, (Cal. App.) 90 Pac. 365, and it is this: While it is competent in construing a contract to show the situation of the parties, the subject-matter of the contract, and acts of the parties under the contract, as tending to show how they understood it, still this cannot be done to the extent of varying or contradicting a written contract, where such contract is certain, complete, and unambiguous. The foregoing principles are stated to be the law in the very well-reasoned case, supported by cited authorities, of Fawkner v. Smith Wall Paper Company, 88 Iowa, 169, 55 N. W. 200, 45 Am. St. Rep. 230. In that case the memorandum read as follows: "On demand I promise to deliver to the order of E. F. Fisher Eight hundred dollars (less twenty per cent. discount), in wall paper, at wholesale prices, good, clean, assorted stock out of my store on Fifth Street, Des Moines, Iowa. No storage. Lew Smith Wall Paper Co." The defendant pleaded that at the date of making the order, and of its acceptance by Fisher, the wholesale price for good, clean, assorted wall paper, and the price upon which said order was based, and at which said paper was to be delivered by the defendant to, and accepted by, the payee was agreed upon, and set forth on a card then shown Fisher; that the schedule of prices printed upon the card was then agreed upon between the parties to said order as the then wholesale prices at which paper was to be delivered, and said card accompanied the order, as a part of it, and a part of the contract fixing the wholesale price of said paper. Defendant was permitted to prove at the trial that, when the contract was made between the parties, he handed the plaintiff's assignor a card, having printed thereon a price list of wall paper, and that he was to take the paper mentioned in the contract at the prices stated on the card. It was not attached to or made part of the written contract or referred to in it. The evidence was objected to, as tending to vary and contradict the written contract of the parties. Defendant claimed that the evidence was admissible as constituting part of the contract; that, though it was on a separate piece of paper, still it was in fact but a part of and altogether constituted but one contract. The Iowa Supreme Court held that the lower court erred in admitting the evidence. In speaking of the terms "wholesale price," the court said: "There is no claim that the schedule of prices, as set forth on the card introduced in evidence, was to be a part of the written contract, and was omitted by accident, mistake, oversight, or fraud. No such issue is presented. The evidence objected to would work a material change in the terms of the contract. It shows that the paper was to be received at a price which was agreed upon when the contract was executed, and outside of the provisions of the written contract. It measured the amount of paper that should be received under the written contract by the then wholesale market price, when the written contract measured the amount of paper to be delivered under it by the wholesale price at the time of demand made for the goods."

In the case here the sole controversy relates to the quantity of grapes which defendants agreed to receive. It is true the contract is silent as to the agreement of defendants to receive any of the grapes. But they did receive them and no question arises as to this. The law would have implied an agreement to pay at the stipulated price for all grapes received by them of the quality named. True, also, that the contract is silent as to the varieties of the grapes, but as all bore the same price, and as no dispute arose upon this point, the fact is immaterial. So also as to the omission to state when the delivery was to be made or whence the grapes were to come. Reduced to the actual matter in controversy, the sole dispute was whether plaintiffs could prove by parol testimony that defendants had agreed to receive all of plaintiffs' crop, or to receive 166 tons of grapes in excess of the "250 tons more or less," specified in the written memorandum. It is not necessary to repeat the observations upon this point heretofore made. We are still of the opinion that extrinsic evidence was not admissible to materially add to the quantity mentioned in the memorandum. The principle invoked by respondents, when rightly applied, affords them no relief.

For the reasons stated in our former opinion and herein, the judgment and order are reversed.

We concur: HART, J; BURNETT, J.

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5 Cal. App. 558

## HEALDSBURG ELECTRIC LIGHT & POWER CO. v. CITY OF HEALDSBURG. (Civ. 301.)

(Court of Appeal, Third District, California. May 20, 1907.)

1. Municipal Corporations — Injuries to Property—Torts by Agents—Liability.

A municipality is not liable for injuries to property resulting from torts committed by its agents acting outside the scope of the powers conferred on it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1566, 1584.]

2. Same.

A complaint, in an action against a city for the malicious destruction of private property, which alleges that the street commissioner was directed to destroy the property, and which shows that the city itself destroyed the property, without averring any agency through whom it was accomplished, and which shows that the acts complained of were outside of any general or special powers given to the city, states no cause of action against the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1546.]

Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

Action by the Healdsburg Electric Light & Power Company against the city of Healdsburg. From a judgment for defendant on sustaining a general and special demurrer to the complaint, plaintiff appeals. Affirmed.

Wright & Lukens, for appellant. J. A. Barham, for respondent.

CHIPMAN, P. J. Action for damages alleged to have been caused by the oppressive, malicious, and violent acts of defendant, resulting in the destruction of parts of plaintiff's plant and with intent to compel it to discontinue business. A general and special demurrer was sustained, and, plaintiff failing to amend, judgment passed for defendant, from which plaintiff appeals.

It is alleged in the amended complaint that plaintiff is a corporation formed under the laws of this state for the purpose of supplying electric light and power to the residents of the city of Healdsburg, and that plaintiff ever since March 15, 1899, has been and on that day was lawfully so engaged. The complaint then describes the property and apparatus constituting plaintiff's plant; avers, in paragraph 7, that the said plant was not injurious to health or offensive to the senses or in any wise interfered with the comfortable enjoyment of life or with the free use and passage of the public parks and streets of said city and in no manner constituted a nuisance, public or private. That on February 6, 1899, defendant, "well knowing the premises but solely with the design and intent to oppress this plaintiff, and to compel it to discontinue its business aforesaid, duly passed an ordinance designated 'Ordinance No. 81,' in the words and figures as follows." Then follows the ordinance, which purports to prescribe the kind and character of the material to be used in the construction, maintenance, and repair of electric lighting plants, or systems now in use in the city of Healdsburg, or to be hereafter erected therein. The amended complaint next charges that with like intent the said city on the same day duly passed ordinance No. 82, which declared certain described electric poles and wires to be a nuisance. It is next alleged that with like intent defendant, on March 10, 1899, served written notice upon plaintiff, directing it "within four days from the hour of 7 o'clock of the forenoon of the 11th day of March, 1899," to abate and remove all its unpainted electric poles now standing, etc., and all wires conducting electricity not properly insulated. Defendant was further directed to comply with the provisions of said ordinances Nos. 81 and 82, copies of which were attached to said notice. It is then alleged that on March 14, 1899, all the trustees of defendant met, and with like design and intent to oppress plaintiff, and compel it to discontinue its business, passed a resolution, which is set forth in full, and which in substance recited the notice given plaintiff of March 10th; that the time in which plaintiff should comply therewith would expire at 7 o'clock a. m. of March 15, 1899; that said plaintiff has not abated or removed said nuisances, etc., therefore, resolved "that the street commissioner * * * be, and he is hereby, instructed to abate and remove said nuisances, commencing at 7 o'clock a. m., March 15, 1899, and that he employ sufficient assistance to accomplish that purpose." It is then averred that "thereupon said defendant, * * * on the 15th day of March, A. D. 1899, wantonly and willfully intending and devising to oppress this plaintiff, and to compel it to discontinue entirely its business at the city of Healdsburg, forcibly and violently cut, uprooted, threw down, broke and so injured divers parts of the plant and property of the plaintiff as to prevent the plaintiff entirely from continuing its business aforesaid at Healdsburg." That "by reason of said acts" the plaintiff was obliged to wholly discontinue its business to its damage in the sum of $20,000. There is no allegation in the complaint that plaintiff ever had or now has the right to erect poles or wires in said city. The defendant demurred for insufficiency of facts, and also specially on the grounds of uncertainty, ambiguity, and unintelligibility.

In its brief appellant makes the following statement: "The plaintiff was engaged in a lawful business at Healdsburg, mainly producing and supplying the city of Healdsburg and its residents with electric light and power. The business was not in itself a nuisance, and could only become so in the manner of conducting it. But for the purposes of this demurrer the allegations of paragraph 7 of the complaint are conclusive upon the defendant, and the only refuge remaining for the defendant is to plead that the acts complained of are ultra vires the municipal corporation. This in fact is what counsel for the defendant did in the court below, and it is for the correction of the error in so holding that this appeal is prosecuted." Appellant limits the discussion to the single question: Is a municipal corporation liable for the torts of its agents and servants whose acts are concededly ultra vires? We shall confine ourselves to this single question, and we shall also assume, as conceded, that the acts complained of were ultra vires. We take it, when counsel use this phrase, it is with knowledge of its import, i. e., that it denotes, in the present case, an act or acts of tort done on behalf of the corporation, not within the scope of the powers conferred upon it. It is charged that defendant wantonly, willfully, and with intent to oppress plaintiff, and to compel plaintiff to abandon its business, "forcibly and violently cut, uprooted, threw down, broke, and so injured divers parts of the plant and property of the plaintiff as to prevent the plaintiff entirely from continuing its business aforesaid." It does not appear by direct averment whether this was pursuant to said ordinances and orders set forth; nor does it appear that the alleged injuries were done by the street commissioner pursuant to the order of the defendant. On the contrary, it appears that the defendant itself did the alleged mischief, without averring other agency through whom it was accomplished. We are unable to discover any lawful authority for the destruction of plaintiff's property in the manner alleged. That it was ultra vires in the strictest sense of that phrase seems clear. Whatever may be the doctrine in other jurisdictions, it is settled law in this state that a municipality cannot be held liable for injuries to private property thus perpetrated. The principle was applied in Wichmann v. City of Placerville, 147 Cal. 162, 81 Pac. 537, in a matter of contract obligation, where it was held that the ultra vires acts of a municipal corporation are absolutely void; and we believe there is no distinction in the application of the principle between such acts arising out of contract and in tort. In Sievers v. San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153, the doctrine of respondeat superior was quite fully discussed, where the injury complained of was to private property, resulting from certain street grading. The court there said: "In the performance of its governmental or public functions, the corporation is either deemed a public agency, a mandatary of the state, as in Barnett v. Contra Costa County, 67 Cal. 77, 7 Pac. 177, and therefore not liable to be sued civilly for damages, or it is considered, in the performance of these functions, to be clothed with sovereignty, and therefore not liable in an action. Lloyd v. Mayor of New York, 5 N. Y. 369, 55 Am. Dec. 347. Where the injury results from the wrongful act or omission of an officer charged with a duty prescribed or limited by law, the officer is not treated as the servant or agent of the corporation in the performance of the duties enjoined, but is held to be the servant and agent of, and controlled by, the law, and for his acts the municipality will not be held liable." This case was referred to in Ukiah v. Ukiah Water & Imp. Co., 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107, where it is stated to be the established rule in this state that a municipality is not liable for damages occasioned by the negligence of its officials or employés, citing, also, Huffman v. San Joaquin Co., 21 Cal. 426; Chope v. City of Eureka, 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113. In Chope v. City of Eureka, it was held that, in the absence of a statutory provision imposing the liability, a municipal corporation is not liable for personal injuries to individuals occasioned through the neglect of the officers of the corporation to properly perform their duties. Mr. Dillon says: "If the act complained of lies wholly outside of the general or special powers of the corporation as conferred in its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act, or whether it be done by its officers without its express command." 2 Dillon, Mun. Corp. § 968. See Winbigler v. City of Los Angeles, 45 Cal. 36; also extended note in Goddard v. Inhabitants of Harpswell, 84 Me. 499, 24 Atl. 958, 30 Am. St. Rep. 373, 376.

Plaintiff seems to have been careful to show that the acts complained of were outside of any general or special powers given defendant, and to frame its pleading upon the theory, contended for now, that, though ultra vires, defendant was liable for its alleged acts. We think plaintiff has misconceived the law as applied in this state.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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5 Cal. App. 546

## HINER v. HINER. (Civ. 316.)

(Court of Appeal, Third District, California. May 16, 1907.)

Courts—Courts of Appellate Jurisdiction—Supreme Court—Equity.

An action for separate maintenance is an equitable action, and an appeal therein lies directly to the Supreme Court, under Const. art. 6, § 4, providing that the Supreme Court shall have appellate jurisdiction in all cases in equity, except such as arise in justice's court.

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by Alice E. Hiner against J. F. Hiner for separate maintenance. From an order granting alimony, etc., defendant appeals. Case transferred to the Supreme Court.

J. F. Thompson, for appellant. J. W. Oates, for respondent.

CHIPMAN, P. J. Plaintiff is the wife of defendant, and brings the action for separate maintenance for herself and three children of the marriage. The complaint alleges that in October, 1902, plaintiff and defendant were residing together in the county of Chehalis, state of Washington; that in said month defendant abandoned and willfully deserted plaintiff, and has never returned to plaintiff or to their said residence, but still continues to abandon and desert plaintiff; that defendant came to California shortly after October, 1902, "and is now a bona fide resident of Sonoma county"; that "plaintiff ever since October, 1902, has been and is now a bona fide resident of said Chehalis county, state of Washington"; that defendant is possessed of considerable means, setting forth a description of property alleged to be owned by him; and that plaintiff, when so abandoned and deserted by defendant, was left with no means of income and with property "of but little value, and plaintiff now has no means of support." Plaintiff alleges that she is in need of $100 per month from October, 1902, thenceforth "for her support and for the support of her said minor children"; that "under the laws of the state of Washington the plaintiff has a cause of action against defendant for divorce." The prayer of the complaint is that it be decreed that plaintiff "has a cause for divorce against defendant; that $100 per month is a proper amount for the support of plaintiff and her said minor children, and has been ever since said desertion of plaintiff by defendant." Attorney's fees are also prayed for in the sum of $250, and $100 pending the trial of the action, and for costs and expenses of suit, and "that the same may be made a charge upon said land and premises," and for such other relief as may be meet and proper. Plaintiff gave notice to defendant that at a time stated she would move the court for an order requiring defendant to pay plaintiff $100 per month, commencing at the filing of the complaint; also for $400 attorney's fees, and $300 for costs and expenses; that said motion would be heard upon the pleadings and upon certain affidavits, copies of which were served with the notice. The matter came on to be heard upon said papers and upon counteraffidavits filed by defendant, and upon the hearing the court made an order that defendant forthwith pay $210 as and for alimony, $50 costs of suit, and $100 as attorney's fees, and directed that execution issue to enforce collection of the same. The appeal is from this order, and is taken directly to this court.

Section 137 of the Civil Code provides for the payment of alimony "where an action for divorce is pending." As amended in 1905 (St. 1905, p. 205, c. 205), it also provides further: "When the wife has any cause of action for a divorce as provided in section ninety-two of this Code, she may, without applying for a divorce, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children. During the pendency of such action the court may, in its discretion, require the husband to pay as alimony any money necessary for the prosecution of the action and for support and maintenance, and execution may issue therefor in the discretion of the court. The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court." It was held, in Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709, that divorce is an action in equity within the meaning of the Constitution, conferring appellate jurisdiction upon the Supreme Court; and in Benton v. Benton, 122 Cal. 395, 55 Pac. 152, it was held that in actions for divorce, with application for alimony or allowance for support pendente lite, the cause of action is divorce, and the support of the wife pending suit is an incident. Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906, was an action for maintenance, without applying for a divorce. The statute gave the action then "when the husband willfully deserts the wife." The court said: "Proof of willful desertion by the husband is therefore an essential element in the plaintiff's cause of action." As the statute now reads, we should hold it to be an essential element of the plaintiff's cause of action that the wife should show "a cause of action for divorce as provided in section 92" of the Civil Code. To do this she must appeal to the equity side of the court, and hence it would seem to follow that the action for maintenance must be addressed to the equity powers of the court. If, however, this reasoning be doubtful, the language of the section removes all doubt. The judgment contemplated is a judgment confided to the discretion of the court, and may be enforced at its discretion by order or orders, and these orders may with like discretion be varied, altered, or revoked. Clearly, a jury trial could not be demanded to assess an amount which rests wholly within the discretion of the court, and which may upon cause shown be taken away by the court. The Supreme Court is given appellate jurisdiction "in all cases of equity, except such as arise in justice's court." Article 6, § 4, of the Constitution. The appeal, in our opinion, should have been taken directly to the Supreme Court, and not to this court. By the same section it is provided that, where the appeal is not taken to the proper court, it shall not be dismissed, "but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto."

It is therefore ordered that the cause be transferred to the Supreme Court; the costs to attend the final disposition thereof by that court.

We concur: BURNETT, J.; HART, J.

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5 Cal. App. 549

## Ex parte FOWLER. (Cr. 43.)

(Court of Appeal, Third District, California. May 18, 1907.)

1. Information—Charging a Different Offense Than That in Commitment.

An information charging a different offense than that for which the accused was committed has no proper basis, and the district attorney has no authority to file it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 322.]

2. Habeas Corpus—Grounds of Remedy—Invalidity of Proceedings in Criminal Case.

Where an accused was committed for assault with a deadly weapon, and the superior court ordered the papers returned to the committing magistrate for recommitment, and the magistrate thereupon committed the accused for assault with a deadly weapon with intent to commit murder, and an information was filed by the district attorney charging the accused of that crime, the validity of the information based on the new commitment cannot be considered in habeas corpus, since the superior court had jurisdiction of the subject-matter and the legality of the proceedings therein can be considered only in that court or by the Supreme Court on appeal.

3. Information—Time of Filing—Mandatory Effect of Statute.

Pen. Code, § 809, providing that an information shall be filed within 30 days after examination and order of commitment, is mandatory, and, unless good cause for the delay is shown, as provided by section 1382, the superior court acquires no jurisdiction to try an accused on an information filed after that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 153.]

4. Same—Excuse for Not Filing Within Statutory Period.

Where a district attorney filed an information in due time, which was set aside because the commitment on which it was based did not appear to sufficiently state the offense charged therein, and by order of the court the papers were returned and a new commitment filed, and a second information based thereon was filed more than 30 days after the original commitment, the facts are sufficient to excuse delay in filing the information, within the intent of Pen. Code, § 1382, providing that, unless good cause to the contrary be shown, the court must dismiss the prosecution where an information is not filed against the accused within 30 days after he has been held to answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 153.]

Habeas corpus by Elmer Fowler. Writ dismissed.

Ben. Berry and B. T. Fowler, for petitioner. U. S. Webb, Atty. Gen., for the People.

HART, J. Petitioner, who is held under restraint by the sheriff of Merced county, under an information charging him with the crime of assault with a deadly weapon with intent to commit murder, makes this application for his release from the custody of said sheriff on habeas corpus.

On January 20, 1907, a complaint or deposition was filed in the justice court of township No. 3 of Merced county, charging the petitioner with the crime of assault with a deadly weapon. Upon an examination of the charge on the 31st day of January, 1907, the magistrate made and entered an order, obviously attempting to commit the petitioner for trial in the superior court for the offense of assault with a deadly weapon with intent to commit murder. On the 14th day of February, 1907, the district attorney of Merced county filed in the superior court an information charging petitioner with the crime for which the magistrate thus attempted to order him committed. Upon appearing in court for arraignment under said information, on the 4th day of March, 1907, petitioner made a motion to set the same aside on the ground that prior to the filing thereof he had not been legally committed for the offense charged therein. On the following day the court made an order granting petitioner's motion by setting aside said information, and made the further order "that the clerk of said court return all the papers to the committing magistrate for recommitment." The order made by the magistrate and entered in his docket, committing petitioner for trial, reads as follows: "Whereupon the case being submitted, it is by the court ordered that Elmer Fowler be held to answer to the superior court upon a charge of assault with a deadly weapon with intent to commit murder, committed as follows: That said Elmer Fowler on or about the 20th day of January, 1907, at Los Banos, in said county of Merced, state of California, willfully, unlawfully, and feloniously did assault one James Cowan, a human being, with a deadly weapon, to wit, a loaded pistol with intent to commit murder." On the 8th day of March, 1907, the magistrate made the following entry in his docket: "* * * Received March the 8th, 1907, from county clerk of order of superior court directing of return of papers for recommitment." Thereafter, and on the 13th day of March, 1907, the following order was entered in his docket by the magistrate: "March 13th, 1907. People vs. Elmer Fowler. Wherefore, the papers being returned for recommitment, it appearing to me that the offense of assault with intent to commit murder has been committed as follows: That on or about the 19th day of January, A. D. 1907, Elmer Fowler did unlawfully, willfully, feloniously, and with malice aforethought assault one James Cowan in the town of Los Banos, Merced county, state of California, with a deadly weapon, to wit, a loaded pistol, with intent then and there to kill and murder said James Cowan, and there is sufficient cause to believe the within Elmer Fowler guilty thereof, I order that he be held to answer to the same," etc. The same order in substance and effect was thereupon indorsed by the magistrate on the complaint filed with him on the 20th day of January, 1907. The new or amended commitment, with the other "papers," having been by the magistrate returned to the clerk of the superior court, a new information was, on the 21st day of March, 1907, filed in said court by the district attorney, charging petitioner with the crime of an assault with a deadly weapon with intent to commit murder. On the 30th day of March, 1907, upon his appearance for arraignment upon the charge alleged in said information, petitioner "moved said superior court to set aside the information upon the ground that, prior to the filing thereof, he had not been legally committed for the offense charged in said information, and upon the further ground that on the 13th day of March, 1907, the committing magistrate was without jurisdiction to make and enter the judgment and order holding the petitioner to answer before the superior court for trial for the offense therein indicated; that the indorsement of said judgment and order upon the complaint by the committing magistrate was void and the information based upon such indorsement was void." The court denied the motion. Upon the same day, and after the court refused to grant petitioner's motion to set aside the information, a motion was made by petitioner "to dismiss the prosecution of said charge upon the ground that the information had not been filed within thirty days from the time the preliminary examination was held and petitioner held to answer before the superior court of said county of Merced on the 31st day of January, 1907." This motion was denied by the court.

The petitioner thus presents two points or grounds upon which he claims to be entitled to his release: (1) "That the committing magistrate was without jurisdiction to make and enter his judgment and order on the 13th day of March, 1907, and hence the commitment based thereon is void." (2) That the said information was not filed in the superior court within 30 days after the petitioner had been examined and committed, as required by section 809 of the Penal Code. It will be observed that the defect in the original commitment consisted in the failure of the magistrate to properly designate or describe the offense for which it was his evident intention to commit the petitioner. The complaint or deposition charged an assault with a deadly weapon, and the other depositions or testimony presumably developed, in the judgment of the magistrate, a case of assault with a deadly weapon with intent to commit murder. The magistrate entered an order in his docket, attempting to commit petitioner for the last-mentioned assault, but omitted, in his description thereof, the words "with malice aforethought," which are indispensably essential to the description or charging of that offense. The district attorney, in the information based upon that order of commitment, charged the petitioner with the crime of an assault with a deadly weapon with intent to commit murder. The superior court, upon motion, set aside the information because it appeared that the petitioner had not been legally committed for the offense charged in said information, and ordered the clerk of said court to "return all the papers to the committing magistrate for recommitment." The course pursued by the court thus far was regular, if the order of commitment involved only an irregularity. The information, based upon a commitment which held petitioner for an offense different from that charged in such information, had no proper basis on which to rest, and the district attorney was not authorized to file it. People v. Thompson, 84 Cal. 601, 24 Pac. 384; sections 872, 997, 998, Pen. Code.

But it is contended that a new information should have been based upon the original order and in conformity thereto; that the court, having once made the order committing the petitioner for assault with a deadly weapon, which said order was entered in his docket, lost all further jurisdiction of the case, and could do nothing further with reference thereto than to correct some irregularity, if any existed, in such order of commitment; that the proceeding had by him with regard to the "papers returned for recommitment" involved not simply the correction of an irregularity or defect in the order of commitment, but constituted the making of an entirely new order, committing petitioner for an entirely different and distinct offense from that for which he was originally held. We are of opinion that this point presents a question which cannot be reviewed in this proceeding. Ex parte Nicholas (on habeas corpus) 91 Cal. 641, 28 Pac. 47. The so-called new information charged the petitioner with an offense of which the superior court has jurisdiction, and it gave the court jurisdiction of the person of the petitioner, and the court therefore had jurisdiction, upon the motion to set aside the information, to hear and determine "whatever questions of law or fact were involved in the motion, and its decision, although it may be erroneous, is not void. On the contrary, it is valid and binding until reversed on appeal." Ex parte Nicholas, supra; Ex parte Walpole, 85 Cal. 362, 24 Pac. 657. If there was any irregularity in the order of commitment by the magistrate affecting the substantial rights of petitioner, it was subject to review, first in the superior court, upon motion to set aside the information based upon such order of commitment, and then by this or the Supreme Court upon appeal; but it is not a ground for discharging the prisoner on habeas corpus. Ex parte Walpole, supra. It is elementary that, when a court has jurisdiction of the subject-matter of the litigation and of the persons of the parties litigant, it has jurisdiction to make errors as well as to not make them. This is, of course, only putting in another form the rule that such errors are not reviewable in an extraordinary proceeding, or in a proceeding the sole purpose of which is to try the question of jurisdiction. In other words, jurisdiction is "the power to hear and determine," and, when a court has once determined a proposition within its jurisdiction, such determination, whether right or wrong, is at an end and is conclusive until challenged, through some motion or in some other proper legal proceeding. It may, however, be suggested (though it need not be here decided) that it at least seems clear that the magistrate attempted to make an order committing the petitioner for the very offense for which he finally ordered him to be committed, and that the attempt was ineffectual only because of the omission in the order of certain technical words necessary to the description of the crime. It would at least appear to harmonize with common sense to hold that where the language of the order is such as to lead to no other rational conclusion than that the magistrate intended to commit the prisoner for a certain offense, but fails to do so merely because he has not described the same in the order of commitment with the technical nicety and precision which is required in stating the offense in an indictment or information, it amounts only to an irregularity which it is within the power and authority of the magistrate to correct upon being directed to do so by the superior court. We find nothing in any language used in Ex parte Branigan, 19 Cal. 133 et seq., in conflict with this suggestion. Of course, we are not to be understood as suggesting that a magistrate, after once committing an accused for a certain offense, may thereafter change his order and commit him for another and distinct offense. Nor is there anything involved in our suggestions upon this point to be construed as a disapproval of the opinion in the case of People v. Nogiri, 142 Cal. 597, 76 Pac. 490. On the contrary, we think that that case with great clearness straightened out certain propositions which had theretofore been misconceived and misunderstood, and expounded them in accordance with the real intention of the lawmakers. The opinion in that case is not, however, in point here, if the suggestion we have made that the omission in the order of commitment was but a mere irregularity be sound. If the suggestion is erroneous, then the Nogiri Case would no doubt be an authority upon appeal, if the case ever reaches that point.

The second point urged is, we think, without substantial merit. The proposition involved in this point is whether or not there was failure on the part of the district attorney, in the matter of the filing of the information, to comply with the mandate of section 809 of the Penal Code. That section requires that an information shall be filed within 30 days after the examination and the order committing a defendant for trial in the superior court. It has been held that this provision is mandatory, and that default by the district attorney in filing an information within the time limit prescribed therein, unless good cause therefor be shown, forfeits his right as such officer to do so at all upon the commitment returned by the magistrate, and that the superior court cannot, under an information filed after such time, acquire jurisdiction to try the prisoner for the offense therein charged. In re Begerow, 133 Cal. 349, 65 Pac. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178. At least, the court held in that case that subdivision 2 of section 1382 of the Penal Code, which provides that the prosecution against a defendant must be dismissed, the trial not having been postponed upon the application of defendant, unless good cause be shown therefor, if the defendant is not brought to trial within 60 days after the finding of the indictment, or filing of the information, is imperative and mandatory. We can see no reason why the same may not be said of subdivision 1 of that section, prescribing the time limit of 30 days within which the information must be filed. The only question here, then, is: Was the filing of the new or second information by the district attorney more than 30 days after the date of the making of the original order, or, perhaps more correctly speaking, the attempted order committing the petitioner for the crime of assault to commit murder, an idle and nugatory and void act and the information thus filed insufficient to confer upon the superior court jurisdiction to try said petitioner thereunder? The power of the court, upon setting aside an information for the reason that it does not charge the offense for which the prisoner has been committed, or because of any irregularity in the order of commitment, to order a new information to be filed, or directing any irregularity in the order of commitment to be rectified by the magistrate, and a new information based thereon filed, is unquestioned and conceded. Sections 997 and 998 of the Penal Code; People v. Thompson, supra; Ex parte Walpole, supra; People v. Lane, 101 Cal. 515, 36 Pac. 16. If section 809 of the Penal Code could be held to be applicable to a case where an information has been dismissed or set aside and a new one directed by the court to be filed in its place, and such new information is filed more than 30 days after the time at which the order of commitment was made, we are of the opinion that the conditions which gave rise to the necessity for the filing of the new information after the 30 days after the original order of commitment has been made constitute the "good cause" contemplated by section 1382, supra, as an excuse for a failure to file the information within the time prescribed by said section 809, supra. But it seems to us that the Supreme Court has settled this question in a number of cases. In the case of People v. Lee Look, 143 Cal. 221, 76 Pac. 1029, the court, speaking through Mr. Justice McFarland, says: "There is nothing in the point that the second information was not filed within 30 days after appellant was held to answer. The provision of section 809 of the Penal Code has no reference to the new information which may be directed by the court after a demurrer sustained to the information." There can be no distinction upon principle between the case of a demurrer sustained to an information and where the information has, upon motion, been set aside. In the Case of Begerow, supra, the court, among other things, said: "* * * And, indeed, a mistrial is not a trial, within the meaning of the Constitution or statutory provision. *The fact that there has been an attempted trial may constitute the good cause which the prosecution is required to show to excuse delay.* * * *" (Italics ours.) So, as we have suggested, the fact that the district attorney has attempted to file an information within the 30 days, and has failed, should be, we think, sufficient cause to excuse the delay which, but for the order of the superior court setting aside the information—an order which the law commanded should be made—would not have occurred. In the cases of People v. Thompson, supra, and People v. Lane, supra, and, in short, in every case where the point has been presented to and noticed by the court, it is declared that there is no necessity, after an order setting aside an information, upon the ground of irregularity in the order of commitment, to go into another examination of the charge in order to justify the filing of a new information. It would certainly entail upon both the people and the defendant great inconvenience and expense if a re-examination of the charge were necessary where an information had been set aside or dismissed because of some irregularity in the order of commitment or by reason of a failure of the district attorney to keep within the terms of the order of commitment in drafting and filing the information. The Legislature could have had no such intention, and surely there can be found no reason for justifying the courts in giving the law a construction which would produce a result so unnecessary. But such a construction would inevitably be required if the true rule is, as contended by petitioner, that a second information, directed to be filed in the place of one filed within the time, but set aside, must be filed within 30 days after the order of commitment is made.

For the foregoing reasons, the writ will be discharged, and petitioner remanded.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

5 Cal. App. 471

## Ex parte WOOD. (Cr. 57.)

(Court of Appeal, Second District, California. April 30, 1907.)

1. INFANTS — JUVENILE DELINQUENTS — INCARCERATION—JURISDICTION—STATUTES.

St. 1889, p. 116, c. 108, § 20, subd. 1, provides that it shall be lawful for the board of trustees of the state reform school for juvenile offenders to receive minors between the ages of 8 and 18 years committed to custody by any judge of a superior court on the written complaint of the minor's parent or guardian, alleging incorrigibility, etc. *Held*, that a superior court had no jurisdiction to commit to a reform school, under such section, a female over 18 years of age at the time of commitment; nor had the board of trustees of such institution any power to receive and retain her in custody.

2. SAME—AGE—MAJORITY.

Civ. Code, § 25, defines minors to include males under 21 years of age and females under 18 years of age; and section 26 provides that the age of a minor must be calculated from the first minute of the day on which he or she was born to the same minute of the corresponding day completing the period of minority. *Held*, that where petitioner's daughter was born on March 17, 1889, she completed her minority and became an adult at the commencement of the day on March 16, 1907, prior to her commitment on that day to a reform school as a minor delinquent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 1.]

Application by Lawrence D. Wood, on behalf of his daughter, Julia A. Wood, for writ of habeas corpus. Writ granted, and petitioner's daughter discharged.

Hugh J. Crawford, for petitioner. J. G. North, Deputy Dist. Atty., for respondent.

SHAW, J. Application made by Lawrence D. Wood, on behalf of his daughter, Julia A. Wood, for a writ of habeas corpus to be directed to the superintendent of the Whittier state school.

On March 16, 1907, a complaint was filed in the superior court of Los Angeles county by one A. C. Dodd, wherein it was alleged that Julia A. Wood, a female, was a minor under the age of 18 years; that she was guilty of incorrigible conduct; and praying that she be committed to the Whittier state school. At the hearing, had on the day of filing the complaint, it was by the court adjudged that said Julia A. Wood was an incorrigible under subdivision 1 of section 20 of an act of the Legislature of California entitled, "An act to establish a state reform school for juvenile offenders, and to make an appropriation therefor," approved March 11, 1889 (St. 1889, p. 116, c. 108), and the acts amendatory thereof, and that she was a fit subject for commitment to said school; and thereupon the court, on said 16th day of March, 1907, made an order committing her to said Whittier state school until she arrived at the age of 21 years.

Among other grounds urged in support of the issuance of the writ, it is contended that said Julia A. Wood was not a minor at the date of said adjudication and commitment, and hence the court had no jurisdiction to order her committed to said institution as an incorrigible under subdivision 1 of section 20 of said act, which is as follows: "It shall also be lawful for the said board of trustees, under such rules as they may prescribe to receive into the care and guardianship of said institution, whenever it may be convenient so to do, minors between the ages of eight and eighteen years, committed to custody in any of the following modes: (1) Minors committed by any judge of a superior court of this state on the complaint, in writing, filed and due proof thereof made by the parent or guardian of such minor, showing that by reason of the incorrigible and vicious conduct or nature of such minor, he is beyond the control and power of such parent or guardian, and that from a regard for the future welfare of such minor and the protection of society, it appears that such minor should be placed in the care of such institution." It will thus be seen that it is only minors between the ages of 8 and 18 years who may be lawfully received under the protecting care of said institution by said board of trustees, with the further provision contained in subdivision 1, which makes it applicable to minors committed as therein provided. Clearly, the court had no right under this provision to adjudge said Julia A. Wood guilty of incorrigible conduct and commit her to said institution, unless she was a minor. Nor did the board of trustees of said institution have any power to receive and retain her in custody, unless she was at the time of such commitment "between the ages of eight and eighteen years." It appears that she is a female, and was born on March 17, 1889. By section 25 of the Civil Code minors are defined as: "(1) Males under twenty-one years of age; (2) females under eighteen years of age." And section 26 of the Civil Code provides that "the periods specified in the preceding section (i. e., section 25) must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority." It thus conclusively appears that the said Julia A. Wood completed the period of her minority at the commencement of the 16th day of March, 1907, and that at the time of said adjudication and commitment she was of full adult age. Ganahl v. Soher, 5 Pac. 80. The respondent has presented no argument nor authority in justification of the action of the court, and we find no warrant in subdivision 1 of section 20, under which the proceedings were had, authorizing the commitment of adults to any such institution upon the charge that they are guilty of incorrigible conduct. The benefits of the Whittier state school, according to the title of the act as amended in 1893, were intended for juvenile delinquents only.

This conclusion renders it unnecessary to pass upon the question as to the power of the court to commit her for a period extending three years beyond the time when she arrived at adult age, as well as other questions presented by the petition.

It is therefore ordered that the said Julia A. Wood, on behalf of whom said application is made, be discharged.

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 475

## TEICH v. ARMS. (Civ. 305.)

(Court of Appeal, Third District, California. April 30, 1907.)

1. LANDLORD AND TENANT—LANDLORD'S TITLE—DENIAL—ESTOPPEL OF TENANT.

While a tenant is estopped to deny the title of his landlord so long as it remains as it was at the time the tenancy commenced, the tenant is not estopped to plead that the title under which he entered has expired or been extinguished during the tenancy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 176.]

2. TAXATION—SALES FOR TAXES—RIGHTS OF OWNER—POSSESSION.

Pol. Code, § 3817, provides that in all cases where real estate has been sold or may be sold for taxes to the state, and the state has not disposed thereof, the person whose estate is sold or his successors in interest shall be entitled to redeem at any time before the state shall have disposed of it. *Held*, that the owner of land sold to the state for taxes prior to a sale by the state is entitled to possession, with the right to redeem.

3. LANDLORD AND TENANT—LANDLORD'S TITLE — TERMINATION — EFFECT—PAYMENT OF RENT.

Civ. Code, § 1463, provides that a covenant to pay rent runs with the land. Section 821 declares that a person to whom any real property is transferred or devised, on which rent has been reserved, or to whom any such rent has been transferred, is entitled to the same remedies to recover rent as his grantor or devisor had; and section 1111 provides that grants of rents or reversions or of remainders are good and effectual without attornments of the tenants. *Held*, that where property leased to defendant was sold to the state for taxes prior to the execution of the lease, and during the term was sold by the state to a bank, the landlord's title and right to possession were terminated by the deed to the bank, which was a complete defense to the landlord's suit against the tenant for unlawful detainer for nonpayment of subsequent rent, notwithstanding section 1948, providing that the attornment of a tenant to a stranger is void unless made with the consent of the landlord or in consequence of a judgment of a court of competent jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1211.]

Appeal from Superior Court, Madera County; H. C. Gesford, Judge.

Unlawful detainer by Annie E. Teich against S. Arms. From a judgment for defendant, and from an order denying plaintiff's motion for a new trial, she appeals. Affirmed.

S. L. Strother and M. K. Harris, for appellant. Frank H. Short and F. A. Fee, for respondent.

BURNETT, J. This is an ordinary action for unlawful detainer. The complaint alleges the execution of a written lease for one year from August 1, 1904, for the monthly rental of $35, payable on the first of each month; that defendant entered into the occupation and possession of the premises; that on January 16, 1905, a demand in writing was made upon defendant to pay $175, the amount of rent unpaid, or surrender possession within three days; that defendant refused to do either, and the prayer is for the rent due and for damages. The answer sets up as a defense that on June 26, 1897, the property was sold to the state for delinquent taxes, and June 24, 1903, the deed was regularly made to the state; that thereafter on August 6, 1904, the property was sold and conveyed to the San José Safe Deposit Bank of Savings; and that thereupon said bank entered into possession and leased and hired the premises to defendant, and on or about the 15th day of August, defendant entered into possession as the tenant and lessee of said bank and has continued as such and has paid to the bank all the rent due. The judgment was for defendant. The plaintiff brings the appeal from the judgment and order denying her motion for a new trial.

Appellant admits the regularity and validity of the tax proceedings, and does not question the sufficiency of the conveyance to the state and to the bank. The only controversy, she says, is as to the effect of the deeds upon the relation to each other of plaintiff and defendant. The vital question is: Was the transaction set up in the answer sufficient in law to destroy the relation of landlord and tenant between the parties to this action and absolve defendant from any liability to pay rent to plaintiff? The question was presented to the trial court when defendant offered in evidence the deed from the state to the bank. The objection was made that "said deed is incompetent, irrelevant, and immaterial in this case on the ground that a tenant in possession could not dispute his landlord's title or attorn to a stranger; that the said deed constituted no defense to this action."

At the outset it is contended by appellant that the question of title is foreign to the issue in unlawful detainer. As a general proposition, this is undoubtedly true. It is always true when we limit it to the title of the plaintiff at the time of the execution of the lease. This follows from the nature of the action. The question at issue is not title, but the right to the possession. Hence evidence of title could only be received as showing the right to the possession of the property, and this evidence could not be directed to the time of the execution of the lease, for the simple reason that on well-known principles of equity the defendant, having entered into the possession of the property by virtue of his recognition of plaintiff's title, is estopped from thereafter denying it. In Mason v. Wolff, 40 Cal. 250, the court, speaking through Mr. Justice Temple, said: "Here the question of title is not involved and cannot be raised. In a certain sense the suit is brought upon the lease, and the consequence of entering into that contract can only be avoided by showing some fraud or mistake which would have been sufficient to set aside the lease itself." In that case, it will be observed, the errors reviewed consisted in the improper admission of evidence which did not question the validity of plaintiff's title, but it is obvious the rule stated by the court, in its general application, is correct. To the same effect are Bostwick v. Mahoney, 73 Cal. 239, 14 Pac. 832, Felton v. Millard, 81 Cal. 541, 21 Pac. 534, 22 Pac. 750, and Knowles v. Murphy, 107 Cal. 113, 40 Pac. 113, where, through Mr. Justice Harrison, it is declared as follows: "It was immaterial, for the purposes of this action, whether the deed from the defendants to Salor was absolute or by way of mortgage. The question of title was not involved, and the defendants could not avoid the obligations assumed by them by reason of the lease by showing that Salor did not have the title of the premises which he demised to them." In all the foregoing cases, the title considered was the title at the time of the execution of the lease, and the doctrine announced is not only correct on principle, but it accords with all the authorities. But defendant is not estopped from contending that since the execution of the lease the title of plaintiff has been extinguished; and such evidence may be material as tending to show that plaintiff since the transaction with defendant has lost the right to the possession of the premises, and that the relation of landlord and tenant no longer exists between the parties. The authorities so hold. In Jackson v. Rowland, 6 Wend. (N. Y.) 670, 22 Am. Dec. 557, the Supreme Court of New York said: "A tenant cannot dispute the title of the landlord so long as it remains as it was at the time the tenancy commenced, but he may show that the title under which he entered has expired or has been extinguished." Greenleaf declares the same rule: "The tenant may always show that his landlord's title has expired, or that he has sold his interest in the premises, or that it is alienated from him by judgment and operation of law." 2 Greenleaf, 253. Our own courts have so decided. In McDevitt v. Sullivan, 8 Cal. 596, it is said: "Although as a general rule a tenant cannot dispute his landlord's title, he may show that it has terminated"—citing Chitty on Contracts, p. 296. In Wheelock v. Warschauer, 21 Cal. 317, again it is declared: "The right to maintain the action depends upon the existence of a tenancy, and a tenancy once created is presumed to continue so long as the tenant remains in possession. This presumption may be rebutted, however, for the rule which estops a tenant from disputing the title of his landlord does not preclude him from showing that the tenancy has been determined." And in Tewksbury v. Magraff, 33 Cal. 244, Mr. Justice Sanderson, speaking for the court, reaches the same conclusion: "Whether a tenant can dispute his landlord's title depends upon a variety of circumstances. * * * One exception to the general rule is where the tenant has been ousted by title paramount he may plead it; also, that the landlord's title has ceased or become extinguished."

In the case at bar the defendant did not question the title under which he entered. He did not dispute plaintiff's possession or right to the possession at the time of the execution of the lease. The effect of the deed to the bank was to extinguish plaintiff's title and right of possession, and since it did not become operative until after the creation of the defendant's tenancy, it was admissible under the authorities cited. By the recitals of the deed it appears that before the execution of the lease the property had been sold to the state, but the evidence was not offered nor received for the purpose of attacking plaintiff's title at the time she leased to defendant. On the contrary, this deed shows that the state simply held the property for security with the right of possession and redemption in plaintiff until the deed was executed to the bank some days after defendant went into possession. Section 3817, Pol. Code, as it now stands, provides that: "In all cases where real estate has been sold or may hereafter be sold for delinquent taxes to the state, and the state has not disposed of the same, the person whose estate has been or may hereafter be sold, his heirs, executors, administrators, or other successors in interest shall at any time after the same has been sold to the state and before the state shall have disposed of the same have the right to redeem such real estate," etc. At the time of the lease, therefore, the plaintiff was in possession of the land; she had a right to the possession and the right to redeem. That included the title as far as involved in the transaction between plaintiff and defendant. When, however, the state "disposed of the same" on August 6th, the right to redeem was foreclosed, the right of plaintiff to remain in possession no longer existed, plaintiff's title was completely extinguished, and the whole interest was conveyed to the bank. In the American and English Encyclopedia of Law (volume 27, p. 982), we find the general doctrine announced as follows: "The general rule is that until the expiration of the time for redemption and the execution and delivery of a deed the title to the land sold for the taxes remains with the original owner, and the purchaser acquires only a lien for the amount of his bid with interest, etc. The purchaser is not entitled to possession or to rents and profits; but after the execution of the deed the grantee is vested under the statutes in most jurisdictions with an interest in fee to the exclusion of all prior interests and incumbrances." The deed to the bank undoubtedly vested in it the entire estate in and to the property. The covenant to pay rent runs with the land. Section 1463, Civ. Code. By virtue of the conveyance from the state, the bank became entitled to the rent accruing after said conveyance and could have maintained an action therefor. The rule was different at common law. In Taylor's Landlord and Tenant it is stated as follows: "No person can take advantage of a covenant or condition except he be a party or privy thereto; consequently the assignee of the reversion could at common law neither sue nor be sued upon covenants contained in a demise, whether such demise were for life or for years. * * * The principle seems to have followed from that provision of the feudal law which prevented a lord from transferring his seigniory without the consent of his vassel. * * * But as experience showed that property best answers the purpose of civil life when the transfer and circulation are free, this restraint upon alienation was gradually removed by the English statutes, particularly by 32 Henry VIII, c. 34. * * * By it the privity of contract, together with the privity of estate, was transferred to the assignee of the reversion, who then stood, with regard to a tenant, in the same position as the lessor did before he parted with the reversion."

We now come to the consideration of the cognate proposition stated by appellant that the bank is a "stranger," and therefore the attempted attornment to it by defendant was void. Section 1948 of the Civil Code is cited, which provides that: "The attornment of a tenant to a stranger is void, unless it is made with the consent of the landlord, or in consequence of a judgment of a court of competent jurisdiction." Whatever the scope of the section, we think it does not apply to the facts of this case. The bank is in sufficient privity with plaintiff in regard to the title as not to be a "stranger," within the contemplation of the statute. We can see in principle no difference between the facts here and where the landlord has himself conveyed all of his interest to a third party. In such a contingency no question could be raised as to the right of attornment to the grantee. Section 821 of the Civil Code is applicable here as it would be in case the plaintiff had directly conveyed the land to the bank, and it provides that: "A person to whom any real property is transferred or devised, upon which rent has been reserved or to whom any such rent has been transferred is entitled to the same remedies for recovery of rent * * * as his grantor or devisor might have had." And for the protection of the tenant it is provided in section 1111, Civ. Code, that: "Grants of rents or reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who before notice of the grant shall have paid rent to the grantor must suffer any damage thereby." In McDonald v. Hanlon, 79 Cal. 442, 21 Pac. 861, it is held that: "While real property is occupied by a tenant from month to month, where the owner makes a lease in presenti to a third person for five years, such other person may without entering into possession, and without attornment to him, change the terms of the tenancy, and upon nonpayment of the increased rent may maintain an action of unlawful detainer." See, also, Dreyfus v. Hirt, 82 Cal. 621, 23 Pac. 193; McDonough v. Starbird, 105 Cal. 19, 38 Pac. 510; Franklin v. Palmer et al., 50 Ill. 200. We have examined all the cases in other jurisdictions cited by appellant. Some support her contention, while others are opposed to it. We think the law in this state was properly determined by the court below.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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5 Cal. App. 485

## PRESTON v. HIRSCH. (Civ. 304.)

(Court of Appeal, Third District, California. May 1, 1907.)

1. Trial—Reception of Evidence—Rulings —Reservation.

Where, in a suit to quiet title, rulings on evidence were reserved by consent of both parties, it was not error for the court, in its final disposition of the case, to sustain the objections to the evidence which were specific, without stating reasons for the rulings; the matter being such that the objections could not have been obviated by other evidence supplied through unobjectionable means.

2. Evidence—Records—Certified Copies.

Civ. Code, § 1160, provides that a recorded copy of a patent shall have prima facie the same force and effect as the original, for title or for evidence, until the original letters patent are recorded; and Code Civ. Proc. § 1833, declares that a copy of such record certified by the recording officer is prima facie evidence. *Held* that, where a copy of a patent to land certified by the Commissioner of the General Land Office was recorded in the county where the land was located, a certified copy of such record was admissible without a showing that the original patent could not be produced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 570-579, 1302-1314.]

3. Taxation—Tax Sales—Proceedings.

The power to sell land for unpaid taxes being purely statutory, the proceedings to effect such a sale must strictly comply with the statutory requirements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1263.]

4. Same—Tax Deed—Recitals—Year of Assessment.

Under Pol. Code, § 3786, requiring a tax deed to recite the matters recited in the certificate of sale, and section 3776, requiring the certificates to state the name of the person assessed, the description of the land sold, the amount paid therefor, and that it was sold for taxes, giving the amount, year of assessment, and the time when the purchaser will be entitled to a deed, a tax deed failing to state the amount of the taxes and subsequent charges for which the land was sold, and reciting that the property was assessed in the year "188– for the years 1888, and 1889," was void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1507-1515.]

5. Same—Aider by Certificate.

A defective tax deed cannot be aided by reference to the certificate of sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1543.]

6. Same—Certificate—Caption.

The caption of a certificate for the sale of land for taxes, being no part of the certificate, is ineffective to aid the certificate so as to supply an omission of the year for which the property was assessed.

7. Same—Clerical Misprision.

An omission to recite the year for which land in controversy was assessed in the certificate of the sale of the land for taxes was not a mere clerical misprision, which could be avoided under Pol. Code, § 3885, authorizing disregard of irregularities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1378.]

8. Same—Quieting Title—Payment of Taxes.

Where, in a suit to quiet title against the holder of a tax title in which the rights of the state were not involved, it appeared that the tax sale certificate was fatally defective and conveyed no title, defendant was not entitled to claim that plaintiff could not recover, because no redemption had been made, and because he made no offer to pay the taxes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1586.]

Appeal from Superior Court, Mendocino County; J. O. White, Judge.

Action by J. W. Preston against Maurice Hirsch. From a judgment for plaintiff, defendant appeals. Affirmed.

J. L. McNab, for appellant. J. W. Preston, pro se.

CHIPMAN, P. J. Action to quiet title. Plaintiff had judgment, from which defendant appeals on bill of exceptions.

Plaintiff deraigns title from the government by patent to his immediate predecessor and a deed from the patentee to him. Appellant relies wholly upon his tax title. The levy was made for the year 1890–91. It was stipulated by counsel for plaintiff that the assessment, for which the attempted sale was made, was regular, and that all proceedings in relation to the delinquent tax list were duly and regularly done and made, and also all proceedings in regard to said levy, assessment, and delinquency were regular up to the time of the issuance of the tax collector's certificate of sale of the same. Defendant thereupon offered in evidence the following records in the order named: (1) The tax collector's certificate of sale to the state; (2) his deed to the state; (3) the controller's notice to the tax collector directing the sale of the property at auction; (4) affidavit of publication of controller's notice; (5) the deed by the tax collector to defendant. Plaintiff objected to the certificate of sale as irrelevant, incompetent, and immaterial because not a certificate under the law. Particularly it was objected that no money was paid by any one at the sale, or at the date of the sale, as required by section 3776 of the Political Code as it read in 1890 and 1891; also, that the certificate does not state the year of the assessment, but leaves the date blank, as it reads: "Said property was assessed in the year 18—, * * * to T. Barnhart," etc.; also, that the law then in force did not provide for the payment of any money, and no money was paid, and hence no valid certificate could be made because the prerequisite facts as contained in the statute were not and could not be complied with. It was agreed "between the court and counsel that the final admissibility of said certificate should be argued in briefs to be submitted in court," and the evidence went in subject to the future ruling of the court. Defendant next offered in evidence the tax collector's deed. Plaintiff objected to its introduction on the grounds: (1) That it had not been shown either by the deed or other evidence that the 30 days' notice required to be given by the purchaser to the party on whose land the taxes have been assessed, as required by section 3785 of the Political Code, as amended in 1891 (St. 1891, p. 134, c. 121), has been given; (2) that no proof has been made that any notice of any kind has been served as required by said section 3785; (3) that the deed does not recite what the certificate of sale recites as to the time when the state would be entitled to a deed, i. e., "the date when the state would be entitled to a deed and the date of the certificate of sale are not one and the same as stated in the deed"; (4) the language of the certificate and in the deed is not the same and does not mean the same, in short, "the language of the deed is that the state would be entitled to a deed the very day the certificate is dated"; (5) "the deed does not recite the facts contained in the certificate which the Political Code (section 3786) required." The court reserved its ruling as before. The authorization for the sale issued by the controller was admitted to have been filed January 2, 1903, and in due form. The affidavit of publication of notice of sale was objected to on the ground that it does not contain a correct estimate of the minimum price at which the land must be sold, as required by section 3897 of the Political Code; that the auditor neglected to include in his estimate what are called penalties, and hence the amount at which the land was advertised to be sold was too small to comply with the provisions of said section. The ruling of the court was reserved as in the preceding offers. No point was made that the authorization of the controller, after being received, was not published. The deed of the tax collector to defendant was then offered in evidence, to which plaintiff objected on the grounds: (1) That there is no certificate of sale to support the deed to the state; that there was no notice given as required by section 3785; that the deed could not recite the facts as contained in the certificate, "because no such deed or certificate was validly in existence." (2) That the deed purported to recite that the certificate of sale stated the land to have been assessed in the year 1890; whereas, the certificate does not recite that fact. (3) That the deed states the purchase price less than the amount of the delinquent taxes, costs, penalties, and accrued expenses, as required by section 3897.

1. At the close of the evidence, the cause was submitted, and thereafter the court, in making its decision, sustained the reserved objections without giving any reason in support of its ruling. Defendant claims that this was prejudicial error, citing Mayo v. Marzeaux, 38 Cal. 445, and Martin v. Lloyd, 94 Cal. 204, 29 Pac. 491. In these cases the Supreme Court strongly condemns the practice of suspending the rulings upon evidence, and especially advises that where the evidence is rejected at some subsequent period in the trial it is the duty of the court to give its reasons for the ruling. Raymond v. Glover, 122 Cal. 471, 55 Pac. 398. A case might be presented where the postponement of the decision would deprive the losing party of the opportunity to supply the evidence through unobjectionable means, and if this should clearly appear the ruling might be prejudicial error, if an early and timely ruling had been requested and denied. In the present instance, however, the objections were specific, and defendant was fully apprised of the grounds, and presumably counsel had the opportunity to place their views touching the objection before the

court. Furthermore, the evidence was matter of official record and could be supplied in no other way than that resorted to. Defendant could not, therefore, have been injured by the delay in ruling upon the evidence. It may be added that reserved rulings are generally with the consent of both parties, which was the case here, and no court would decline to make rulings whenever it was shown to it that further delay might prejudice the rights of one or both of the parties. It is quite unusual for trial courts to state their reasons for rulings in admitting or refusing evidence; and the instance would have to be peculiarly exceptional where, of the omission to give a reason for a ruling, prejudicial error could be predicated.

2. Plaintiff offered in evidence a certified copy of a copy of a United States patent to George Lynch, plaintiff's grantor. Defendant objected to its introduction upon various grounds, among them that there was no showing that the original could not be produced. It appears that a copy of the patent duly certified to be such copy by the Commissioner of the General Land Office was recorded in the county of Mendocino on September 24, 1903. The document offered in evidence was a copy of this record duly certified by the county recorder. The copy of the patent thus recorded "shall have prima facie the same force and effect as the original, for title or for evidence, until said original letters patent be recorded." Civ. Code, § 1160. The copy of this record certified by the recording officer is prima facie evidence. Code Civ. Proc. § 1833. The document was properly admitted in evidence.

3. The objections made to the certificate of sale have already been stated. It is well settled that proceedings on tax sale are in invitum, and to be valid must be stricti juris. The power exercised is purely statutory, and the steps directed by the statute must be strictly pursued. People v. C. P. R. R. Co., 83 Cal. 393, 398, 26 Pac. 303. It was held in Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761, that under section 3786 of the Political Code, requiring a tax deed to recite the matters recited in the certificate of sale, and section 3776, requiring the certificate of sale to state "the name of the person assessed, the description of the land sold, the amount paid therefor, and that it was sold for taxes, giving the amount and the year of the assessment, and specifying the time when the purchaser will be entitled to a deed," a tax deed, reciting that the property was assessed "in the year 188–, for the year 1888 and 1889," is void for failure to state the year of the assessment. It was also held that such a deed cannot be aided by reference to the certificate of sale; also, that the amount of the taxes and subsequent charges must be correctly stated. The same would be true of the certificate of sale in so far as the statute prescribed what must appear therein. The body of the certificate failed to state the year for which the property was assessed. Appellant claims that this omission is supplied by the caption of the certificate. It reads: "18— No. 203. No. ———, Book ———, Page ———, Sub. ———. Certificate of Sale of Real Estate. Sold for the Non-Payment of State and County Taxes for the year 1890." Then follows the formal certificate, reading: "State of California, County of Mendocino—ss.: I, J. M. Standley, Tax Collector," etc. The caption is no part of the certificate to which the tax collector certified, and cannot be referred to in aid of the certificate in a matter required by statute to appear therein. Nor was the omission of the year a mere clerical misprision to be avoided as an irregularity by section 3885 of the Political Code, as claimed by appellant. It is also contended that the certificate transferred the title subject only to defeasance by redemption (Teralta L. Co. v. Shaffer, 116 Cal. 518, 48 Pac. 613, 58 Am. St. Rep. 194), and redemption was never made; and that plaintiff cannot have his title made clear when the evidence shows that he has been divested of title, citing Peterson v. Gibbs (Cal. Sup.) 81 Pac. 121. Finally, that plaintiff cannot have his title quieted while in default in the payment of his taxes; that he must come into court with clean hands, or go out empty-handed. The answer to these various contentions is: First, that the certificate, being fatally defective, conveyed no title; and, secondly, the action is not against the state, nor does it in any wise affect the rights of the state. The maxim of equity invoked by appellant is not open to him in this case.

4. Appellant has, with commendable consideration, called our attention to the case of Johnson, Administrator, v. Taylor et al. (not yet officially reported or published in California Decisions) 88 Pac. 903, holding adversely to appellant's contention as to the validity of the tax deed. This concession renders further examination of the case unnecessary.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

5 Cal. App. 519

## YICK WO v. UNDERHILL. (Civ. 311.)

(Court of Appeal, Second District, California. May 13, 1907.)

1. EVIDENCE—SUFFICIENCY OF PRELIMINARY EVIDENCE.

There is sufficient preliminary proof for introduction, in an action by a restaurant keeper for the price of meal tickets, of his book of account, kept in the Chinese, he testifying to his business; that he kept the book in connection with such business; that it contained the original entries made at the time of the transactions; that he kept no other book; that, when he delivered a meal ticket, he immediately put it down in the book; and that the entries were all made by himself, and other witnesses testifying that the entries as to the price of meal tickets corresponded with the fixed charge therefor, and that plaintiff wrote part of the entries at the time of the transaction in their presence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1628, 1635, 1637.]

2. Appeal—Harmless Error—Admission of Evidence.

Overruling an objection to a question is harmless; the answer not being responsive, and establishing nothing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153, 4159.]

3. Trial—Employment of Interpreter.

A witness may translate to the court plaintiff's book of account kept in Chinese.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 40.]

4. Innkeepers—Meal Tickets—Action for Price—Evidence.

Testimony of a witness, in an action by a restaurant keeper for meal tickets sold to defendant's intestate, that he worked for deceased, and was paid by him a fixed sum and his board, and that this board was furnished by plaintiff, is competent, and tends to support plaintiff's claim.

5. Evidence—Books of Account.

An entry in the book of account of a restaurant keeper of a loan made by him to another, a transaction not connected with the business, is not proof of the loan.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1447.]

6. Same.

An entry in the book of account of a business man of a transaction not connected with his business does not render the book incompetent as to transactions connected with the business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1455.]

Appeal from Superior Court, Kern County J. W. Mahon, Judge.

Action by Yick Wo against M. E. Underwood, administratrix of J. H. Underhill, deceased. From an order denying a new trial, defendant appeals. Affirmed.

J. W. P. Laird and E. B. Coil, for appellant. W. W. Kaye and Thomas Scott, for respondent.

ALLEN, P. J. Appeal from an order denying a new trial. Plaintiff was the keeper of an eating house at Mojave, and Underhill, deceased, was a saloon keeper and ice deale in the same town. Plaintiff issued meal tickets representing 21 meals for a consideration of $5. Some of Underhill's employés took their meals at plaintiff's place of business. For these, meal tickets were issued to Underhill and he delivered the same to his employés, and when he settled with them he took from their wages the price of the meals so furnished by plaintiff. The court finds that the price and value of such meals so furnished Underhill's employés was $80; and, in addition, that during Underhill's life plaintiff loaned him $500 in money. Appellant was duly appointed administratrix of Underhill's estate, and plaintiff duly presented his claim against the estate for the price and value of such meals so furnished and the amount of such loan; and, the same being rejected, he brings this action. The court gave judgment for plaintiff. No appeal from the judgment was perfected within time, and the only appeal is from the order denying a new trial.

It is urged that the court erred in permitting plaintiff's book of accounts to be read in evidence, because no preliminary proof was first made entitling it to be received. The book was kept in Chinese characters, and plaintiff was properly permitted to testify as to his business; that he kept the book offered in evidence in connection with his business; that this book contained the original entries made at the time of the transactions; that he kept no other books; that, when he delivered a meal ticket, he immediately put it down in the book; that the entries were all made by himself. We think this sufficient preliminary proof, coupled with the evidence of other witnesses that the entries as to the price of meal tickets corresponded with the fixed charge therefor, and that plaintiff wrote part of the entries at the time of the transaction in the presence of such witnesses and in the book offered in evidence, all of which tended to show that the book was fairly and honestly kept. What credit should be given such entries in such book was for the trial court to determine. Were it even conceded that plaintiff was not competent to testify as to its correctness and fairness, an attempt to prove such fact by plaintiff himself was abortive. A question was asked him in relation thereto and objected to, but the answer was not responsive and established nothing, and no prejudicial error is apparent in the ruling of the court. There is some evidence in the record outside of this book which tended to sustain the finding of the court that meals to the value of $80 were furnished on and before the 12th day of June, 1904, and the price thereof unpaid. There was no error in permitting a witness to translate to the court this book so kept in Chinese characters.

There was no error in permitting the witness Taylor to testify that he was paid a fixed sum and his board by Underhill and that this board was furnished by plaintiff. It was competent evidence and tended to support plaintiff's contention.

The entry of cash loaned which appears in the book of accounts received in evidence would not of itself justify a finding in that regard. The book was competent as to the transactions connected with the plaintiff's business, and an entry therein disconnected from such business would not affect its admissibility as to those matters properly entered, but such entry was not proof of the loan. There is ample proof outside of the book to warrant the finding that plaintiff made the loan and that it was unpaid. While much of the evidence in the case was conflicting, it was for the trial court to determine the facts from such evidence, and such findings will not be disturbed.

The further point is made that plaintiff declares upon an indebtedness existing June 12, 1904, while the findings are that the indebtedness on account of the meals furnished was contracted between February 12 and June 21, 1904, the latter date being that of the decease of Underhill. The record shows that $80 of this indebtedness was contracted on and before the date alleged in the complaint, and that so much thereof as was contracted after June 12th, to wit, $20 thereof, was not considered and did not enter into the judgment. The court only rendered judgment for that portion of the account which was contracted within the time alleged in the complaint.

We find no error in the record prejudicial to appellant, and the order is affirmed.

We concur: SHAW, J.; TAGGART, J.

5 Cal. App. 522

PINKIERT v. KORNBLUM. (Civ. 317.)

(Court of Appeals, Second District, California. May 13, 1907.)

1. SALES—RESCISSION BY PURCHASER—FAILURE TO PERFORM—COMPLAINT.

A complaint demanding judgment for $1,000, alleging merely that plaintiff paid defendant $1,000, in consideration of which defendant agreed to cause to be issued to plaintiff shares of a corporation then in process of organization, that 20 days later defendant refused to perform the contract, or to return the $1,000, and that thereupon plaintiff demanded return of said sum, and defendant refused and refuses to return the same, fails to state a cause of action for the rescission of the contract of purchase, because not showing a reasonable time for performance had elapsed.

2. ATTACHMENT — DISSOLUTION — INSUFFICIENCY OF COMPLAINT.

A complaint failing to state a cause of action, and not being amended on motion to dissolve an attachment because of such failure, the motion should be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, §§ 783, 784, 796.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by S. M. Pinkiert against D. S. Kornblum. From an order, defendant appeals. Reversed.

Goldberg & Meily, for appellant. W. Joseph Ford and James L. Irwin, for respondent.

TAGGART, J. Appeal from an order denying motion to dissolve an attachment.

The verified complaint alleges that on the 9th day of May, 1906, plaintiff paid to defendant the sum of $1,000, in consideration of which defendant agreed, in writing, to issue, or cause to be issued, to plaintiff 5,000 shares of the capital stock of a corporation then in process of organization, each share of the par value of $1; that on the 29th day of May, 1906, defendant refused to perform said contract, or to return the said $1,000; that plaintiff thereupon demanded the return of said sum, and defendant refused and refuses, etc., to pay the same to plaintiff. The demand is for judgment against defendant for $1,000 and costs of suit. The affidavit avers an indebtedness of $1,000 "upon an express contract for the direct payment of money, to wit, for money obtained by said defendant at his special instance and request from said plaintiff," etc. The motion to dissolve the attachment was based upon two grounds, to wit, that the amount of plaintiff's claim as stated in the affidavit does not conform to plaintiff's complaint, and that the complaint does not state facts sufficient to constitute a cause of action. There appears to be a variance between the complaint and affidavit, but it is not the one specified in the motion. If the complaint stated sufficient facts to entitle plaintiff to recover at all, it would not state a cause of action on an express contract, but we do not regard this as material here.

Plaintiff fully paid for personal property which was never delivered to him. He was entitled therefore to rescind the contract for failure of consideration (Civ. Code, § 1689), or to affirm the contract and bring an action for its breach (Civ. Code, § 3309). In the former case he would be entitled to a judgment for the return of the money paid, in the latter, to a judgment for damages measured by section 3336 of the Civil Code. The complaint is entirely lacking in the allegations necessary to the last-mentioned cause of action, and, if sufficient to state such a cause of action, it would not support an attachment. Considered as a complaint to rescind, it appears also lacking in allegations necessary to show that the time for performance on the defendant's part had elapsed. His refusal to comply with plaintiff's request to perform on May 29, 1906, may have been entirely consistent with good faith and intent upon his part to perform his part of the contract within the time allowed by law. The contract provided no time within which he should cause the stock to be issued and delivery thereof made. The stage of the organization of the corporation then in progress does not appear. There is no allegation as to when or where it was to be organized. The law would allow at least a reasonable time to defendant to act, and, without any information as to the time required to bring about the conditions requisite to the issuance of the stock, it cannot be said that 20 days was such reasonable time. If the corporation was organized at the time of the demand, it should have been alleged. If it was not, and this was because of defendant's act, the facts should have been set forth. While it is true that the motion to dissolve an attachment cannot be made to serve the purposes of a demurrer to the complaint (Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741), and an amended complaint will be held to support an attachment issued on a complaint originally defective which has been cured by an amendment (Hale v. Milliken, 142 Cal. 138, 75 Pac. 653), yet, if the complaint fails to state a cause of action and is incurable, the attachment must be dissolved. If a motion to dissolve is made on this ground, the plaintiff must amend his complaint before the decision of the motion to dissolve (Hathaway v. Davis, 33 Cal. 169), or it will be presumed that he cannot do so.

The record discloses no amendment or attempt to amend. Therefore the attachment should have been dissolved.

The order denying the motion is reversed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 516

### FREEMAN v. BROWN. (Civ. 291.)

(Court of Appeal, Second District, California. May 11, 1907.)

1. APPEAL — ORDERS APPEALABLE — MOTION FOR NEW TRIAL — AMENDMENT OF STATEMENT.

An order denying defendant's application for leave to amend his proposed statement on motion for a new trial by inserting specifications therein under Code Civ. Proc. § 473, authorizing the court in its discretion to grant such relief, is appealable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 559, 588.]

2. NEW TRIAL — STATEMENT — AMENDMENT — DISCRETION OF COURT.

Where the supporting affidavit of a party applying for leave to amend his proposed statement on motion for a new trial which was insufficient merely stated that the insufficiency was due to an oversight and press of business it cannot be said that in denying the relief sought the court abused its discretion under Code Civ. Proc. § 473, authorizing it to relieve a party from any order taken against him through inadvertence, surprise, or excusable neglect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 282.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by J. W. Freeman against Robert A. Brown. From an order denying defendant's application for leave to amend his proposed statement on motion for new trial, he appeals. Affirmed.

See 87 Pac. 204.

George L. Keefer and Walter L. Bowers, for appellant. Barstow & Variel and H. M. Barstow, for respondent.

ALLEN, P. J. Appeal from an order denying the defendant's application for leave to amend proposed statement on motion for a new trial.

Upon the trial of the action in the court below judgment was entered against defendant, and in due time he served his notice of intention to move for a new trial and served and filed his proposed statement on such motion, which statement omitted to specify the particulars wherein the evidence was insufficient to justify the findings, and wherein the decision and judgment was against law, and the errors in law occurring at the trial and excepted to by the defendant. When the settlement of the statement came on for hearing, defendant asked leave to amend the proposed statement by filing a supplemental statement setting forth the omissions hereinbefore referred to. This application was supported by an affidavit of one of the attorneys, "that by reason of an oversight and through press of business affiant omitted to specify in the proposed statement the particulars wherein the evidence was insufficient to justify the findings, wherein the decision and judgment was against law, and the errors in law occurring at the trial and excepted to by defendant; that said errors and omissions occurred entirely through an oversight and through press of business which caused affiant to overlook said errors and omissions." The court denied this leave to amend and file supplemental statement, from which order defendant appeals.

It is settled that the order of a court made in the exercise of its discretionary power denying relief of this character is reviewable upon appeal (Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176), and in this case such appeal was taken in time (Pollitz v. Wickersham [Cal. Sup.] 88 Pac. 911). The relief sought by defendant was from the result of mistake, inadvertence, and excusable neglect under section 473 of the Code of Civil Procedure. The court has the power so to relieve, but the granting of such relief rests in the sound discretion of the court. "Whether or not the circumstances of a particular case are such that the mistake or inadvertence should be excused is a question the determination of which must of necessity be left largely to the court to which application is made, and it is well settled that this court will not interfere with the exercise of the discretion of that tribunal, except in a case where a clear abuse of discretion is apparent." Vinson v. Los Angeles Pac. R. Co., 82 Pac. 54, 147 Cal. 479. In this last case, where the affidavit showed that the press of professional duties occasioned the neglect, it was held not an abuse of discretion to grant relief. In this case, however, press of professional duties is not assigned, but press of business, which may comprehend matter foreign to the duties of an attorney, is urged. The whole matter, however, was for the trial court, and we cannot say from the meager affidavit presented and relied upon that the court abused its discretion in denying the relief sought.

The order denying leave to file supplemental statement is affirmed.

We concur: SHAW, J.; TAGGART, J.

5 Cal. App. 513

SHIVELY et al. v. HARRIS et al. (Civ. 131.)

(Court of Appeal, Third District, California. May 9, 1907.)

1. ADMINISTRATORS — JUDGMENTS — LIMITATIONS.

Code Civ. Proc. § 1504, declares that a judgment against an administrator on a claim for money against the estate only establishes the claim in the same manner as if it had been allowed by the administrator and the judge, that the judgment must be that the administrator pay in due course of administration, and that no execution shall issue, nor shall the judgment create any lien on the property of the estate nor give the judgment creditor priority of payment. *Held* that, where a judgment is recovered against administrators, limitations do not run against it pending administration of the estate.

2. ELECTION OF REMEDIES — COMMENCEMENT OF ACTION.

Where the holder of a judgment against administrators pending administration filed suit thereon before the period fixed by statute limiting actions on judgments had expired, but the action was abandoned before service of summons because wholly unsustainable, it did not constitute an election of remedies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Election of Remedies, § 12.]

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Daniel Shively and another as administrators of W. B. Shively, deceased, against Robert Lee Harris. From a judgment sustaining a demurrer to the complaint without leave to amend, plaintiff appeals. Affirmed.

Henry L. Ford and J. S. Burnell, for appellant. Gillett & Cutter, for respondents.

BURNETT, J. There are two counts to the complaint. In the first it is alleged that the respondent Harris on May 18, 1896, recovered a judgment against appellants as administrators of the estate of W. B. Shively, deceased, for the sum of $829.93, which judgment was not appealed from and became final May 18, 1897; that before the said judgment became barred by the statute of limitations, namely, on May 18, 1902, said Harris brought suit on said judgment and no summons was ever issued therein, although more than two years have elapsed since the filing of the complaint in that action; and the said Harris wrongfully maintains that by reason of said barred judgment he has a claim against the said estate and that said claim is a cloud upon said estate. In the second count it appears that respondent Clara Carter brought a similar action against appellants and recovered judgment and assigned the judgment to Harris, and in other respects the first and second counts are similar. The prayer of the complaint is: "Wherefore, said plaintiffs pray judgment of this honorable court that said barred judgment and barred cause of action is not a claim against said estate." A demurrer was interposed on the ground "that said complaint does not state facts sufficient to constitute a cause of action," and was sustained by the court without leave to amend. From the judgment entered accordingly in favor of defendants, plaintiff appealed.

There is no merit whatever in the contention of appellants. It is based entirely upon the proposition that the judgment obtained by respondents against the Shively estate was barred in five years, and that an action was necessary in order to keep alive said judgment. The truth is that the judgment against the administrators was not affected by the statute of limitations, as, during the whole time, the estate was in process of administration, and it was an idle and nugatory act on the part of Harris to institute an action to renew said judgment, as his learned counsel no doubt speedily recognized, since he did nothing after filing the complaint to bring said cause to an issue. Section 1504 of the Code of Civil Procedure provides that "a judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. * * * No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment." It would hardly be contended that while the estate was being administered the statute would run against a claim that had been allowed by the executor and approved by the judge; but by the foregoing section of the Code of Civil Procedure a judgment rendered against an executor or administrator is placed upon the same footing as such a claim. Indeed, the question has been settled by the Supreme Court in opposition to the claim of appellants. In the Estate of Schroeder, 46 Cal. 307, it is said: "We think there are several reasons why the statute does not run pending the administration against a claim allowed. * * * Other reasons might be adduced, but these are sufficient to show that the statute of limitations ceases to run during a pending administration against claims duly allowed." The opinion shows that the court was considering judgments rendered against administrators, and not claims that were allowed by said administrators. However, as stated, the doctrine applicable to both is the same. See, also, In re Arguello, 85 Cal. 151, 24 Pac. 641; Wise v. Williams, 88 Cal. 30, 25 Pac. 1064; Estate of More, 121 Cal. 635, 54 Pac. 148.

The other point, that "the defendant Harris elected his remedy by the commencement of the action, and he is now barred by his election," is equally without merit. It is based upon the proposition that, "where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers to adopt" (Rodermund v. Clark, 46 N. Y. 354), or, as stated in another case: "It is one of the very elements of the law that, when a suitor reaches the parting of the ways in the pursuit of inconsistent remedies, he must elect which road he must follow. The first step taken is an election, and the election, when made, is irrevocable." The principle is sound, but it is manifest that it has no application to the case at bar. There was no choice here between two inconsistent remedies. The course pursued by Harris in bringing the second suit was not in pursuit of any remedy at all. It had no effect whatever upon the judgment against the estate, and he very properly abandoned the action before bringing the appellants into court. The mere filing of a complaint, which could not be sustained and which was abandoned, cannot be urged as an estoppel against the assertion of a judgment against the estate which has not been satisfied and still remains in full force and effect.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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5 Cal. App. 482

## HIGGINS v. KEYES et al. (Civ. 380.)

(Court of Appeal, Second District, California. May 1, 1907.)

1. Deposits in Court—Custody of Funds.

Where money deposited in court by a party to a suit pending therein is paid to the clerk thereof, the payment is made to him as an officer of the court, and not as an individual.

2. Same.

A deposit of money in court by a party to a suit pending therein "to abide the judgment of the court, * * * and to be applied in satisfaction of such judgment as the court may direct," is a deposit to abide the judgment of the Supreme Court, and a judgment rendered by the superior court from which an appeal is pending is not the judgment prescribing the condition of the deposit.

3. Mandamus—Deposit of Money in Court—Order of Payment—Refusal to Comply.

A county treasurer holding money deposited in court by a party to a suit has not refused to perform an act in connection with the deposit until he has refused to obey an order of the court, and, until that time, mandamus does not lie to compel him to act, Code Civ. Proc. § 1085, authorizing the issuance of a writ of mandamus to compel the performance of an act specially enjoined as a duty resulting from an office or trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 44.]

Petition for mandamus by Thomas Higgins against C. G. Keyes and others. Writ denied.

Gray, Barker & Bowen and R. L. Horton, for petitioner. J. D. Fredericks, Dist. Atty., Hartley Shaw, Deputy Dist. Atty., and Chas. L. Batcheller, for respondents.

TAGGART, J. Petition for a writ of mandate. Petitioner is the defendant owner in a consolidated mechanic's lien foreclosure proceeding brought by the Los Angeles Pressed Brick Company et al., against petitioner and Alpeter, Hall & Alpeter, contractors, in the superior court of Los Angeles county.

The findings in that case recite that at the commencement of the trial in said proceeding petitioner "deposited in court the sum of $18,617.99 to abide the judgment of the court in these causes and to be applied in satisfaction of such judgment as the court may direct." Judgment was rendered in favor of said contractors against petitioner for the sum of $15,993.24 with interest, for personal judgments in various sums in favor of several of the lien claimants against the contractors; for liens in favor of two of said claimants against the property of petitioner to secure the payment of their claims; and in favor of petitioner against both the lien and claim of one of the claimants. The judgment directs the clerk to pay from the $18,617.99 deposited by petitioner, the attorney's fees of the two claimants whose liens were declared valid, and to distribute and apply the $15,993.24 awarded to the contractors to the payment, first, of the two claims which were held to constitute liens against the premises; and, next, pro rata of the claims of the other claimants who recovered judgments against the contractors. Petitioner appealed from the judgment and two adverse orders of the trial court, and filed an undertaking on such appeals. The conditions of the undertaking and obligations of the sureties covered the costs on the three several appeals, a stay of execution from a money judgment in the sum awarded in favor of the contractors and against petitioner, and $1,000—fixed by the judge of the court as the value of the use and occupation of the premises involved pending the appeal. Demand was made upon the respondents and each of them by petitioner for a return of the money deposited by him, which demands were refused, whereupon he made application to the superior court for an order requiring the clerk to pay said fund to him, said petitioner. This application was denied without prejudice, and this court is asked to issue its writ of mandate commanding the respondents to pay over said fund to petitioner.

The fund so asked to be returned was "deposited in court," and therefore paid to the clerk as an officer of the court, and not as an individual. If it was paid to him as an individual, the proceeding here begun is not the proper one for its recovery. The money, however, as stated in the findings, was "deposited in court," and remains subject to the order of the court whether in the hands of the clerk or the treasurer. When the money was delivered to the clerk, it was his duty, unless otherwise directed by law (section 2104, Code Civ. Proc.) or by a conditional order of the court (section 573), to pay it over to the treasurer. Under the latter section it was probably competent for the court to have made a different order for its custody, but, in the absence of such order, the proper place for it was in the county treasurer's hands; and no such special or different order was made in the case. It is not to be distinguished from any other deposit in court "to abide the judgment of the court." The "judgment" under such circumstances has always been construed to mean the final judgment, and there is no final judgment in an action while an appeal is pending. The judgment rendered by the superior court is not to be considered in this connection and the condition of the deposit has not been complied with. The deposit "to abide the judgment of the court" must have read into it "the Supreme Court." If it be conceded that this is a special deposit under limited instructions and the judgment of the superior court is "the judgment," the rendition of which the deposit was to abide and to the satisfaction of which the fund was to be applied "as the court may direct," then this contract may be enforced whatever the character or injustice of that judgment. We cannot read into the contract the clause, "if rendered to the satisfaction of the depositor," and, if such a strict construction as petitioner contends for be given to the contract of deposit, we would be compelled to hold that the fund be applied as directed by the superior court, regardless of petitioner's appeal.

Neither do we think it proper or competent for this court to consider and determine the questions which are directly involved in petitioner's appeal to the superior court. There being other sufficient grounds upon which this court's action can be based, we do not think it necessary for us to express any opinion as to whether or not the judgment of the superior court is void as contended by petitioner. The fund is in the custody of the court for a specified purpose, and, while the county treasurer holds the corpus of the fund, he does so merely as custodian for the court, and cannot be compelled to pay the money to any one except on the order of the court holding the deposit. Until such an order has been made, there is no duty imposed upon either the clerk or treasurer to pay out the money. Until he has refused to obey such an order properly made the treasurer has not refused to perform any act in connection with the fund so deposited with him that is specifically enjoined upon him as a duty resulting from his office, trust, or station. Section 1085, Code Civ. Proc.

Writ denied.

We concur: ALLEN, P. J.; SHAW, J.

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5 Cal. App. 494

REED et al. v. COLLINS et al. (Civ. 318.)

(Court of Appeal, Third District, California. May 6, 1907.)

1. INTOXICATING LIQUORS—STATUTORY REGULATION—POLICE POWER.

The retail traffic in intoxicating liquors is a business in which a person has no inherent right to engage, but the state, in the exercise of its police power, may prohibit or regulate it by the imposition of such conditions and restrictions as it sees fit, provided the restrictions do not interfere with interstate commerce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 4.]

2. SAME—MUNICIPAL REGULATION—GRANTING LICENSE—HEARING.

An ordinance provided that an application for permission to retail intoxicating liquors should be made by petition in writing to the board of supervisors, and that "if, after due consideration of the same by the board of supervisors, the petition be favorably acted upon," the petitioner should file a bond, etc. *Held*, that the phrase "due consideration" meant a consideration of the application upon its merits, and the return of a judgment based upon the evidence heard, and the board had no warrant to arbitrarily refuse an application without a sufficient hearing of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 68.]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Mandamus by J. W. Reed and another against J. W. Collins and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. A. Adair, for appellants. John A. Wall, for respondents.

HART, J. Plaintiffs obtained judgment in the court below, granting a peremptory writ of mandate to compel the defendants, as members of and constituting the board of supervisors of Mariposa county, to issue to said plaintiffs a license to traffic within the limits of said county in the retail liquor business. The defendants appeal from the judgment, upon the judgment roll alone.

The plaintiffs made application for said license in accordance with the provisions of an ordinance adopted by said board of supervisors on the 4th day of January, 1900, and designated and known as "Ordinance No. 73." This ordinance is set out in full in the complaint. The part of the ordinance which is important to the consideration of the question submitted here for adjudication provides that it shall be unlawful for any person or persons to "open, establish or conduct, or caused to be opened, established or conducted, any barroom or public saloon * * * where wines, spirituous or malt liquors are sold by the glass, bottle or otherwise, in less quantities than one quart, within the limits of the county of Mariposa, without first obtaining permission from the board of supervisors, and filing a bond as hereinafter provided." Provision is then made that the application for such permission shall be made by petition in writing to the board of supervisors, and that "if, after due consideration of the same by the board of supervisors the petition be favorably acted upon, it shall be the duty of the person in whose favor the petition was presented and the prayer of which was granted, before opening the said place, to file with the board of supervisors a good and sufficient bond, to be approved by the chairman of the board, with two sureties, in the sum of one thousand dollars, conditioned that the applicant shall maintain said place in a quiet, orderly, and decent manner." After declaring that on the 3d day of October, 1906, the said board of supervisors, at a regular meeting thereof, rejected said application and refused to grant the plaintiffs the license so applied for, the complaint proceeds to allege: "That in making such rejection and in refusing to grant the said license the said board of supervisors took no exception whatever to the said petition, either as regards its form, substance, or sufficiency in any respect, and said board of supervisors took no exception to the personal character or standing in the community of your petitioners or either of them, but on the contrary, the members of said board found no fault with petitioners or either of them regarding their respective characters or standing in the community." It is also charged that "the said action of the said board of supervisors in refusing to grant petitioners a license as asked for by them was purely arbitrary on the part of said board and entirely without cause, and the action of said board in so rejecting said application of your petitioners was not in the exercise of any right conferred on said board by any ordinance of the county of Mariposa, and was in violation of the provisions of the ordinance hereinbefore set forth and without right or authority."

A general demurrer was interposed to the complaint by the district attorney, acting for and in behalf of the defendants, and overruled by the court. Thereafter an answer was filed denying the necessary and material allegations of the complaint, and affirming the right of defendants to refuse the license, averring that in so doing they acted in accordance with their official duty and within their authority under the law. The court found the material facts as alleged in the complaint to be true, and, among others, "that in making such rejection and in refusing to grant the said license the said board of supervisors took no exception whatever to the petition of petitioners, either as regards its form, substance, or sufficiency in any respect and took no exception to the personal character or standing in the community of the petitioners or either of them, but, on the contrary, the said board of supervisors found no fault with petitioners or either of them regarding their respective characters or standing in the community; that at all the times mentioned in the petition the petitioners herein are and at the time of making the application for a license to the board of supervisors were fit and proper persons to be granted a license for the purpose for which they demanded the same; and that such fitness of said petitioners was at all times well known to the said board of supervisors." The court also found "that the action of said board of supervisors in refusing to grant petitioners herein a license as asked for by them, was purely arbitrary and entirely without cause," etc. The appeal being from the judgment upon the judgment roll alone, there is, of course, no attempt made to present the evidence taken at the trial, and it is further a matter of course that the evidence heard by the court must be assumed to fully support the findings.

The court below filed a written opinion, and the conclusion reached appears to be largely, if not altogether, based upon the ruling in the case of Henry v. Barton et al., 107 Cal. 535, 40 Pac. 798. That case seems to be on all fours in respect of the facts with the one before us, and it is there held that the judgment of mandate awarded to the plaintiff was proper, and it was therefore affirmed. The legislative or governing body of the city of San Bernardino had adopted an ordinance regulating the retail liquor traffic, whose provisions, so far as they concern the procedure to be followed in obtaining a license, are in effect the same as those in the ordinance before us. The plaintiff, having in pursuance of the provisions of said ordinance petitioned for a license to sell liquor at retail, and the board of trustees of said city having refused to grant the same, petitioned the superior court for, and secured, a peremptory writ of mandate compelling said board to issue to him such license. The court, in the case mentioned, says: "This action of the trustees cannot be successfully maintained. The ordinances of the city of San Bernardino as they now stand entitle any man who complies with their provisions to a retail liquor license, and this respondent complied with these provisions. Trustees of cities have no power except that given them by express provision of law, and we find no power in any of these ordinances vesting in them discretion as to the granting or denying an application for a liquor license. In the absence of some express legislative enactment granting such right, there is no principle of law that will allow the trustees of any city to say that a liquor license shall be granted to A. and the same right denied to B." According to this opinion, then, it will be noticed there must be expressly vested in the governing body "a discretion as to the granting or denying of an application for a liquor license"; otherwise, as we understand it, the license must, under any circumstances, issue. And this broad statement of the rule as declared in that opinion seems to be further justified by language previously expressed therein, that "no evidence was taken in the case, and consequently we know nothing of the specific facts or grounds upon which this action of the trustees was based; but, as we look at the case, the *grounds, whatever they may have been, are wholly immaterial.*" (Italics are ours.) That case was decided in department. We deem it no impropriety, preliminarily to stating our conclusion here, to say that, so far at least as the writer of this opinion is concerned, we do not feel that we can concur in all that appears to be said in Henry v. Barton, supra. It has been repeatedly declared by the courts that the retail traffic in intoxicating liquors is a business in which a citizen or other person has no inherent right to engage; that the sale of such liquors in that form may be by the state, in the exercise of its power of police, entirely prohibited or suppressed, or the state may regulate its sale by the imposition of such conditions and restrictions as it may see fit to adopt, provided, of course, such conditions and restrictions in no way interfere with interstate commerce. Crowley v. Christensen, 137 U. S. 91, 11 Sup. Ct. 13, 34 L. Ed. 620; Ex parte Christensen, 85 Cal. 213, 24 Pac. 747; Ex parte Campbell, 74 Cal. 20 et seq., 15 Pac. 318, 5 Am. St. Rep. 418; Ex parte McClain, 61 Cal. 437, 44 Am. Rep. 554.

The grounds upon which a governing board of a city or county bases its action in the refusal of a license to sell liquor by retail are, it seems to us, extremely material and important. If the language of the opinion in the Henry v. Barton Case is to be accepted as meaning that when a license is once applied for in compliance with the provisions of an ordinance regulating the retail sale of liquor, and which does not in terms reserve to the governing board discretion to arbitrarily refuse a license, there is no other alternative remaining to the board but to grant it, notwithstanding that evidence may be taken to satisfactorily show the petitioner to be a wholly unfit person to conduct a public barroom or saloon, then, it seems to us, that the necessary corollary of that proposition is that, while the board has the power to suppress the sale of liquor by retail altogether, if once it adopts such an ordinance licensing it, it thereby surrenders the power vested by direct grant from the Constitution in the municipality of which it is the legally constituted representative to afford full protection to the public by limiting "to the utmost the evils" which are often the offspring of such occupation. If we do not misapprehend the decision, its effect is as thus stated; and we feel no diffidence in declaring that we are not prepared to accept the proposition as sound law or as an accurate construction of the police power. We are of the opinion rather that whatever may be the provisions of an ordinance respecting the licensing of the retail liquor business—whether in express terms it clothes the governing board with a discretion to grant or to refuse a license in a given case or not—there is, nevertheless, reserved to said board sufficient of the power directly granted to it, or to the municipality for which it speaks, by the Constitution (article 2, § 11, Const.), over the subject to definitively and conclusively determine, upon due investigation, whether a license granted to a particular individual would be a public menace, and, if so, to refuse to so grant it, without occasion or ground to fear that such action could not resist the coercive power of the judicial arm of the government. There can be no doubt that the trend of judicial opinion is pointed in the direction of committing to the local authorities, as the people through their organic law seem to have endeavored to do, a very extensive discretion in the matter of dealing with and regulating this, as well as other occupations which may, and often do, without reasonable regulation, tend greatly to the debasement and demoralization of the morals, health, peace, and happiness of communities. Not only does this appear to be the judicial, but, as well, the legislative, policy of the state, for the Legislature has limited the matter of the licensing of all classes of business by the boards of supervisors of counties and the legislative bodie of incorporated cities and towns to the purposes of regulation only. Statutes and Amendments of the Codes 1901, p. 635, c. 209, adding section 3366 to the Political Code. There can be no question that if, after receiving a license to conduct a retail liquor business, the licensee should, contrary to the conditions of the bond required, suffer his establishment to become a disreputable or disorderly house, the board could recall or forfeit his license. Why, then, if before the granting of the license, evidence could be produced to show the applicant to be an unfit person to conduct such a place, or to be of a character or reputation to make the inference reasonably probable that, if given a license, he would maintain his establishment in a manner modeled along the lines of his character or reputation, should not the board, regardless of whether the provisions of the ordinance gave it such discretion, have the power to reject his application and refuse him a license, and thus prevent damage rather than postpone action until perhaps some irreparable injury resulting from the issuance of the license had been suffered by the community? If evidence taken by the board should satisfactorily show that the applicant had once been incarcerated in a state prison for the commission of one of the meanest felonies known to the law, or that the place where it was proposed to locate the saloon was not the proper one for such a business—as, for example, that it was too near a public or private school or a church, or in the residential part of the community, where it would be especially offensive—is it possible that the board would be powerless to prevent so grave a catastrophe as would follow the granting of a license under such circumstances simply because the ordinance has not expressly declared that there is vested in it discretion to say who shall or shall not have a license or where a saloon may or may not be located? The argument is often made that, where so much power upon this subject is conceded to a municipal board, the result may be, if such board should see fit to arbitrarily exercise it, the creation of a monopoly of the retail liquor trade in a community. The same argument may with equal force be addressed to the exercise of the same power of the board when it is expressed and specifically given in terms in an ordinance of regulation, as may regularly be done under the ruling in Henry v. Barton, supra. But the obvious reply to such arguments, it seems to us, lies in the fact, first, that public officers are presumed to perform their official duty faithfully, fairly, and honestly; and secondly, that if, according to the judgment of those agents of the state to whose sound discretion such matters are committed, it is concluded that the interests of the community they represent demand that the retail sale of liquor shall be so curtailed or restricted as that it may thereby result in placing it in the hands of a limited number of citizens, such consequence is only one of the many which may be expected to flow from necessary conditions which it is competent to impose upon the prosecution of an occupation in which the citizen has a right to engage, not because such right inheres in him, but only because he is permitted to exercise it by the mere sufferance or tolerance of the sovereign authority. These observations, though not necessary to a decision of the case before us, result, as we have indicated, from our interpretation of the language of the opinion in Henry v. Barton—that it is immaterial what the grounds of the rejection of an application for a retail liquor license may be, the board has no authority or right to reject, unless so empowered by some express legislative enactment, and that there is no principle of law, in the absence of such an enactment, "that will allow the trustees of any city to say that a liquor license shall be granted to A. and the same right denied to B." The effect of our views upon this subject, as we have endeavored to express them, is that the board has the right under any circumstances, whatever may be the provisions of the ordinance, to take evidence upon the question of the character or reputation of any applicant to determine whether he is a fit person to whom to grant such a privilege, or to determine as to the suitableness of the place at which it is proposed to maintain the saloon or barroom; that, when evidence is so taken, and the result is the rejection of the application, the action of the board in ordering such rejection is conclusive, and not a question for judicial interference and determination, unless it can be shown that the evidence in no manner or degree developed any good reason for the rejection based upon the character or reputation of the applicant, or in no manner or degree militated against the location of the saloon at the place proposed. These views, are, we think, in a general way in harmony with those often expressed by the Supreme Court prior to the decision of the case of Henry v. Barton, supra. Of course, we do not deny that where the board acted arbitrarily or refused to grant a license without reason, where such discretion was not expressly given it by the ordinance, such action may be reviewed and a mandate to require it to issue the license might lie. In other words, the board may not under such an ordinance have the power to refuse the license upon no reason, or what would be equivalent thereto, upon pretended grounds which do not comport with common sense—as, for instance, that the applicant, though a citizen, was not a native-born American, and like nonsensical grounds.

We have thus expressed our views upon the subject under consideration, because we felt that as we must found our conclusion here largely upon the opinion in the case to which we have referred, and uphold the judgment of the court below, it was only justice to ourselves to explain how far our judgment would permit us to commit ourselves to the principles as they appear to be declared in that opinion. We know it to be our duty to follow "the law of the case" as it has been declared by the highest court of the state. This, of course, we propose to do here. But we know of no reason why we should not state our own opinions, whatever they may be worth, upon important questions coming before us, even though they may to some extent conflict with those expressed by the court superior to this, where, as here, in reaching a final conclusion we adhere to the rule vital to the decision, as laid down by that court. As stated, there is no subject with which the courts are called upon to deal of greater concern to society than the police power, and, while upon the main point which must govern in the decision of this case we agree with the department opinion to which we have referred, we have not hesitated to present our own views, deferentially, of course, upon the important general questions to which we have given some attention. Indeed, the questions here discussed are of the greatest importance, for, within all the vast body of the law, with its endless ramifications and the infinite variety of its operations, there are not to be found doctrines which, when properly and intelligently applied, are more efficacious in the attainment of the best and highest ends and aims of organized society than those which are included in and belong to the great power of police inherent in every state of the Union. Over all the subjects coming legitimately within its range and scope, the state is sovereign and supreme. In its comprehensive sense, "it embraces," says Judge Cooley, "the whole system of internal regulation, by which the state seeks, not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." Or, as it is so forcefully and clearly put by Judge Blackstone, this power of which we speak is "the due regulation and domestic order of the kingdom, whereby the inhabitants of a state, like members of a well governed family, are bound to conform their behaviour to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." These are, of course, elementary principles with which all students of the law are fully familiar, but their restatement, when appropriate occasion arises, can do no harm, for frequent repetitions of them might, to the infinite advantage of society in general, have the effect of impressing them upon the minds of those gentlemen to whom is committed the serious duty of making and amending our laws, or of those citizens in incorporated cities and towns clothed by their fellowmen with the authority of exercising cognate duties within a more limited territorial sphere.

In the case at bar, however, from the findings of fact filed by the trial judge, we are led to conclude that the board either heard no evidence whatever, other than that furnished by the general, meager statements of the petition by plaintiffs for the license, or if evidence was taken, it found nothing against them, either as to character or reputation, or nothing militating against the issuance of the license because of the proposed location. The board, therefore, seems to have acted arbitrarily or without particular reason on the application. The case, in view of the facts thus presented by the record, appears, as suggested, to be within the ruling in Henry v. Barton, supra, and should therefore be affirmed.

The district attorney, in his brief, directs special attention to the language of the ordinance, "If, after due consideration of the same by the board of supervisors, the petition be favorably acted upon," etc., and says from that language it is "apparent that defendants reserved to themselves the right to grant or refuse a license for the carrying on of a saloon business." We see nothing in the quoted language from which it may even be implied that the ordinance intended reserving to the supervisors arbitrary discretion to reject an application for a license. On the contrary, the phrase "due consideration" means a consideration of the application upon its merits, and the return of a judgment based upon some substantial reason arising upon the evidence heard. As stated, under the ruling in the case of Henry v. Barton, and by the provisions of the ordinance pursuant to which the application was made, there is no warrant for making an arbitrary distinction as against the plaintiffs here.

For the reasons given, the judgment appealed from will be affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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## KITTS v. SUPERIOR COURT OF NEVADA COUNTY et al. (Cr. 324.)

(Court of Appeal, Third District, California. April 29, 1907.)

1. GRAND JURY—COMPETENCY OF JURORS.

The fact that a member of a grand jury, which returned an indictment, had served and been discharged as a juror in a court of record within a year of the time he was summoned and impaneled as a grand juror and of the time the indictment was returned, will not invalidate the indictment.

2. SAME.

Code Civ. Proc. § 198, provides that a person is competent to act as a juror if he is assessed on the last assessment roll of the county on property belonging to him. Pen. Code, § 995, provides that an indictment may be set aside where the defendant was not held to answer before the finding of the indictment on any ground which would have been good ground for challenge to any individual grand juror. Pen. Code, § 896, which sets forth the grounds of challenge to individual grand jurors, does not include the lack of qualifications referred to under Code Civ. Proc. § 198. *Held*, that the validity of an indictment is not affected by the fact that certain members of the grand jury which returned it were not assessed on the last assessment roll of the county on property belonging to them, notwithstanding Code Civ. Proc. § 198, since they were de facto grand jurors of a de jure grand jury.

3. PROHIBITION—PROCEEDINGS—SCOPE OF RELIEF.

Where an indictment purports, or attempts, to state an offense of a kind of which the court has jurisdiction, it is sufficient as against an application for a writ to prohibit the court from taking further proceedings in the case, whether it would be sufficient as against a special or general demurrer or not.

Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Application of Charles W. Kitts for a writ of prohibition to the superior court of Nevada county, Cal., and F. T. Nilon, judge of said court, to prohibit the trial of applicant on a certain indictment. Application denied.

Chas. W. Kitts and A. M. Seymour, for petitioner. Geo. L. Jones, Dist. Atty., for respondents.

HART, J. The grand jury of Nevada county, on the 24th day of November, 1906, returned and caused to be filed in the superior court of that county an indictment against the petitioner for the crime of assault by means and force likely to produce great bodily injury upon the person of one Martin Shoebridge. Thereafter petitioner moved the respondents to set aside said indictment upon the grounds that certain members of said grand jury were disqualified under the law from acting as such, and at the time of the presentation of said motion evidence was offered which it is claimed supported the charge of the disqualification of such jurors. The motion was denied by respondents, and thereupon the petitioner was required to answer the indictment.

It is claimed that by reason of the alleged disqualification of said jurors the indictment was not found, presented, and filed according to the requirements of law, and that the same does not therefore confer upon respondents jurisdiction to try petitioner for the offense charged against him in said alleged indictment. The petitioner asks that respondents be prohibited from trying him upon said alleged indictment, and commanded to desist and refrain from taking further proceedings in the case. The jurors who are alleged to have been disqualified from serving as members of said grand jury are J. H. Nile, W. H. Hughes, and E. G. Sukeforth. It is claimed that said Sukeforth was disqualified because he "had served in and been discharged as a juror by a court of record of this state, to wit, the superior court of the county of Nevada, state of California, within a year of the time that he was summoned and impaneled to act as such grand juror, and within a year of the finding and filing of the said alleged indictment"; and that said Nile and Hughes were not competent to act as grand jurors for the reason that they were not assessed on "the last assessment roll of said Nevada county for the year 1906, on property owned by them, standing in their names, or at all." It is alleged that the juror Hughes is not thus assessed, "except there is an assessment on said last assessment roll to 'Hughes Bros.,' which may or may not be property belonging to said William H. Hughes." It is also averred that "said alleged indictment fails to state any public offense against your petitioner."

As to the first proposition, that the juror Sukeforth was not competent to act as a grand juror because of having served as a juror and having been discharged as such within a year of the time that "he was summoned and impaneled to act as such grand juror, and within a year of the finding and filing of said alleged indictment," it is only necessary to say that the Supreme Court has recently, in the case of Ex parte Ruef, on Habeas Corpus (Cal.) 89 Pac. 605, ruled adversely to petitioner's contention. In that case the court says, speaking of the same objection as that made here: "We are of the opinion that this does not affect the validity of an indictment found by the grand jury. The Penal Code enumerates the grounds upon which an indictment may be set aside. Pen. Code, § 995. One of these grounds is 'any ground which would have been good ground for challenge to any individual juror.' Pen. Code, § 896, provides for a challenge to an individual grand juror for six specific grounds only. The particular incompetency here relied on is not included. We think that the Legislature, in declaring that persons who had been discharged as jurors within a year should not be competent, and at the same time denying to a defendant indicted by a grand jury including one or more such persons any remedy by way of motion or challenge, in effect provided that if the statutory rule prohibiting the service of such persons were not obeyed, the departure should not invalidate any indictment found."

The point that the grand jury was not a legally constituted body because jurors Nile and Hughes were not assessed upon the last assessment roll of the county on property belonging to them, and therefore could not return a valid indictment, cannot, we think, be maintained. The law provides that the grand jury shall be composed of 19 members (section 192, Code Civ. Proc.), 12 of whom may find an indictment (Pen. Code, § 940). One of the prescribed qualifications of a grand juror is that he shall be "assessed on the last assessment roll of the county * * * on property belonging to him." Section 198, Code Civ. Proc. Of course, it is true that a person not possessing the general qualifications for a juror required by section 198, Code Civ. Proc., is not competent to act either as a grand or petit juror in any case. Under the system in vogue in California prior to the adoption of our present Constitution, the only mode authorized for the inauguration of a prosecution of an ordinary felony charge was by indictment by a grand jury, a necessary prerequisite to which was a preliminary hearing of the charge by a magistrate and an order holding the accused to answer before said body. By that method of proceeding, the accused, having been held to answer, was expressly given by the law the right, and thus afforded an opportunity of interposing in open court a challenge to the panel of grand jurors or of examining them individually for the purpose of exercising any challenge of their right upon any ground prescribed by the statute to inquire into or act upon his case. Since the adoption of the present Constitution, however, the procedure with regard to the initiation of prosecutions for felony is essentially different from the former manner of proceeding. Under our present system, as established by the Constitution of 1879, and which it is safe to say is familiar to people generally, all offenses theretofore prosecuted by indictment may be prosecuted by information after an examination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law. Article 1, § 8, Const. The effect of this provision of the Constitution is, as may readily be seen, that an indictment by a grand jury may be found for a felony without a preliminary examination of the charge by a magistrate, and the accused therefore deprived of an opportunity, as formerly accorded to him, of examining the inquisitors as to their general and special qualifications to act as such before they proceed to the examination of his case. The result is, in such a case, that the accused has but one remedy which is exercisable only after the indictment is found and filed, and is in the nature of a motion to set it aside for certain specified reasons prescribed by section 995 of the Penal Code. Among the grounds enumerated by that section as requiring the setting aside of an indictment is "any ground which would have been good ground for challenge, either to the panel or to any individual grand juror." The grounds of challenge to the panel are set forth in section 995, and the cause of challenge to an individual grand juror prescribed in section 896, of the Penal Code. The incompetency of the grand juror for not possessing the qualification mentioned in subdivision 4 of section 198 of the Code of Civil Procedure is not embraced within the grounds prescribed in either section 995 or 896 of the Penal Code. There can be no doubt that, under the system which prevailed under the Constitution preceding the present one, if an examination of the grand jurors disclosed that any or all of them were wanting in any of the general qualifications required in them by law, or by section 198 of the Code of Civil Procedure, if at that time that section existed as now, such juror or jurors could have been successfully challenged upon such ground. It would seem, from adjudications of analogous questions by the courts, that where, as in this case, a section of the Code expressly mentions certain grounds upon which an indictment may be set aside, and said section does not include in such grounds certain grounds prescribed in another section or Code disqualifying a person from acting as a grand juror, the section involving the grounds upon which the indictment may be set aside is intended by the Legislature as a limitation of the grounds as to which an indictment may be set aside. Certainly the rule of construction expressed by the maxim, "Expressio unius est exclusio alterius" would warrant this conclusion. But it is not necessary to base our conclusion that petitioner's position on this point is untenable upon this reason.

Counsel upon both sides of this case have in their briefs elaborately, interestingly, and instructively discussed all the points which could conceivably be brought to bear upon the main point in the case, to wit, whether, for any of the reasons suggested by petitioner, the superior court of Nevada county is without jurisdiction to try said petitioner under the indictment of which complaint is made. But we are of opinion that the point which is under discussion has been decided against the contention of petitioner in a number of opinions filed by the Supreme Court. The case of People v. Simmons, 119 Cal. 1, 50 Pac. 844, while not directly in point, is valuable, more particularly because the court adopts the reasoning and authorities cited in the case of People v. Hecht, 105 Cal. 621, 33 Pac. 941, 27 L. R. A. 203, 45 Am. St. Rep. 96. The last-mentioned case was where a question arose as to the qualifications of certain members of a board of freeholders, elected to frame a new charter for the city and county of San Francisco. By proceedings in quo warranto it was attempted not only to oust two of the elected members of the board because they had not been, as required by the Constitution in such case, electors of the city for which they were elected for a period of five years preceding their said election, but to have declared invalid the entire board because, by reason of the disqualification of two of the members so elected, the full number of fifteen qualified electors had not been elected as such freeholders. The Supreme Court, in a characteristically able opinion by Judge Niles Searls, then a commissioner, held that under the facts as alleged in the complaint, and admitted to be true by the demurrer, the two alleged disqualified freeholders were in fact disqualified, and could not therefore act as such, on the board, but that the fact of their disqualification did not invalidate the board; that it was a legally constituted body, with full power to perform the duties designed by the Constitution, and for which it had been elected and organized. Among other things this learned judge says: "An interpretation which holds that the ineligibility, or death, or unwillingness to act of a single member thus selected invalidates the entire election, would work great hardship, and tend to thwart the will of the electors in many instances, and should not be indulged unless rendered imperative by the mandate of the Constitution. The same Constitution (article 11, § 5) provides that the Legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of 'boards of supervisors,' etc. Other portions of the Constitution provide for a Supreme Court 'which shall consist of a chief justice and six associate justices.' Again, 'the Senate shall consist of forty members, and the Assembly of eighty members.' It would, we think, hardly be contended that, because the Constitution provides for a board of supervisors, an election for supervisors, in which a single member elected was disqualified, would either invalidate the election of other members, or prevent their organizing and acting as a board. Like considerations apply to the election of members of the Senate and Assembly, and to the election, organization, and action of the Supreme Court." Further on in the opinion it is said: "Again, the office of freeholder is created by the Constitution. It is a de jure office. When Hellman and Bourn were elected by a plurality of the qualified electors, received their certificates of election, and qualified and participated in the action of the board, they were there under color of office and presumptively entitled to the office. They were de facto officers in the discharge of the duties of a de jure office, and as such their acts while they remained such were as valid and binding as those of de jure officers. There must be a de jure office to be filled before there can be a de facto officer. If the former exists, and the latter holds it under and pursuant to a regular commission purporting to empower him to act, his acts in such office, until his right thereto is judicially determined, the law holds upon principles of policy and justice to be valid so far as they involve the public and third parties."

An "officer de facto" is defined to be one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: "(1) * * * (2) * * * (3) Under color of a known election or appointment, void because the officer was not eligible, * * * such ineligibility * * * being unknown to the public. State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409. We think the principles discussed in the Hecht Case apply here. In fact, it is, as we have seen, so expressly declared in People v. Simmons, supra. The grand jury is a de jure body created by the Constitution. Article 1, § 8, Const. One who, having been regularly summoned and impaneled as a grand juror, and exercises the duties thereof, although thereafter discovered to be disqualified by reason of some provision of the law, serves under color of right, and "upon principles of policy and justice," his acts in such capacity should not be held either to invalidate the whole jury or any proceedings had by it in which he participated. Any number of cases can be found to the point that, where a grand jury has been summoned and impaneled as required by law, the death of one of the members after such impanelment, thereby reducing the number below that required by the statute, does not render invalid the jury as it remains, nor vitiate any proceedings properly coming before it. People v. Hunter, 54 Cal. 65. If the requisite number, having been regularly summoned, is sworn or impaneled as grand jurors in the first instance, no objection as to number can be urged questioning the validity of an indictment, except where it may appear that 12 of such jurors have not concurred in finding it. Upon this point it is our conclusion that the fact that jurors Nile and Hughes may not have been assessed on the last assessment roll of the county on property belonging to them does not operate to invalidate the indictment. The case of People v. Leonard, 106 Cal. 302, 39 Pac. 617, is not an authority supporting petitioner's contention. There the question was whether or not, when impaneling a grand jury, and after excuses allowed there were remaining 20 jurors from whom to select the required number, 2 of whom, in reply to questions by the district attorney, declared they were not assessed on the last assessment roll of the county, upon the excuse of such jurors by the court after challenge by the district attorney, and the ordering of a special venire for two persons from whom to complete the panel, was the proper procedure under the provisions of the Code upon the subject. The court held that the course pursued was regular and proper.

The third and last point relied upon is that the indictment does not state facts sufficient to constitute a public offense. Without passing upon the question of whether or not the indictment might in some respects be amenable to criticism under either a general or special demurrer, it may be said that the offense charged therein is sufficiently set forth to withstand attack in this proceeding. The purpose of the remedy here sought is, like that afforded by the writ of habeas corpus, solely to determine the question of jurisdiction, and consequently the principle declared upon a similar point in the case of Ex parte Ruef, on Habeas Corpus, supra, is pertinent here. In that case the court says: "On habeas corpus the inquiry into the sufficiency of an indictment is limited. We think the true rule is that where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus. The indictment here, it may be said, certainly makes "an attempt to state an offense," and with equal certainty fully meets the test, so far as a proceeding of this character is concerned, laid down in the Ruef Case. A large array of authorities is cited by the learned counsel for petitioner in the discussion of the numerous points growing out of the main contention. The briefs on both sides are voluminous and able, showing, as we have before suggested, commendable and assiduous industry; but it would only compel unnecessary prolixity to undertake to notice all the points discussed, many of which only collaterally affect the principal question in dispute, or to enter upon the laborious task of distinguishing, as can without difficulty be done, the many cases offered in support of the contention of petitioner, from the one at bar. We have given careful attention to the record, and to the arguments, oral and written, and find no reason for entertaining any doubt that the respondents have jurisdiction to try petitioner upon the charge alleged in the indictment.

For the foregoing reasons, the order to show cause will be discharged, and the application for a peremptory writ of prohibition denied.

We concur: CHIPMAN. P. J.; BURNETT, J.

5 Cal. App. 473

## COMMERCIAL BANK OF SANTA ANA v. WELLS et al. (Civ. 382.)

(Court of Appeal, Second District, California. April 30, 1907.)

1. APPEAL—BOND ON APPEAL FROM TWO DECISIONS.

Where there was a notice of appeal from a judgment and from an order denying a new trial, and the only undertaking filed was conditioned to "pay all costs and damages which may be awarded on the appeal or on a dismissal thereof, not to exceed $300," though the time for one of the appeals had expired, the appeals will be dismissed, since it is not possible to determine which appeal is referred to in the undertaking.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2097, 2098.]

2. SAME—NEW BOND.

An application for leave to file a new undertaking, after the time allowed for filing has expired, must be denied, since to allow a new bond would be equivalent to allowing a new appeal after the time fixed by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2065.]

Appeals from Superior Court, Orange County; Z. B. West, Judge.

Action by the Commercial Bank of Santa Ana against T. A. Wells and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Appeals dismissed.

J. Marion Brooks, for appellants. E. E. Keech, for respondent.

ALLEN, P. J. Motion to dismiss appeals. The notice of appeal was from the judgment and from an order denying a new trial. The only undertaking filed was conditioned to "pay all costs and damages which may be awarded on the appeal or on a dismissal thereof, not exceeding three hundred dollars." It is not possible to determine which appeal is referred to in the undertaking. "It is so ambiguous that it must be regarded as if none had been filed." People v. Center, 61 Cal. 191; Home & Loan Associates v. Wilkins, 71 Cal. 626, 12 Pac. 799. The fact that the time had elapsed within which one of the appeals should be taken is of no consequence. The notice referred to the judgment and order, both of which were appealable. A different rule applies when the notice relates to a nonappealable order. Wadleigh v. Phelps, 147 Cal. 140, 81 Pac. 418.

The application to file a new undertaking must be denied. "To allow a new one to be filed would be, in effect, to permit a new appeal to be perfected after the time fixed by law." Home & Loan Associates v. Wilkins, supra.

Application to file undertaking is denied, and the appeals dismissed.

We concur: SHAW, J.; TAGGART, J.

151 Cal. 418

## TALLY v. GANAHL. (L. A. 1,439.)

(Supreme Court of California. June 19, 1907.)

1. APPEAL—REVERSAL—LAW OF THE CASE.

Where, on appeal, the Supreme Court states a principle or rule of law necessary to a decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress both in the trial court, on a subsequent appeal, and in a subsequent suit on the same cause of action, though on its subsequent consideration of the case the Supreme Court may be of the opinion that the former decision was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4358, 4360.]

2. PRINCIPAL AND SURETY—PERFORMANCE OF CONDITIONS BY CREDITOR—BUILDING CONTRACT—CERTIFICATE OF ARCHITECT.

A building contract provided that the architect should certify any expense or damage incurred by the owner because of the contractor's failure to perform. The contractor abandoned the work before completion, and immediately thereafter the architects were discharged. Another architect was immediately employed and superintended the completion of the building. *Held*, that a certificate of damages, signed by the new architect and by the only available member of the firm whose services had been dispensed with, the whereabouts of the other being unknown, was a sufficient compliance with the contract to entitle the owner to recover on the contractor's bond.

3. INDEMNITY—BUILDER'S BOND—SCOPE OF LIABILITY.

Where the owner of a building was compelled to defend against certain mechanic's lien claimants because of the contractor's failure to perform, she was entitled to recover a reasonable attorney's fee, as an element of damage in an action on the contractor's bond, providing that the contractor should complete the building within the time specified, and deliver it to the owner free from any lien or claims that might be made against it for or in respect of any labor or materials performed or furnished, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indemnity, §§ 15, 17.]

4. SAME.

Where a building contractor's bond provided that the contractor should complete the building on or before November 1, 1897, but the completion was delayed by the contractor's default for two months and nineteen days after that date, plaintiff was entitled to recover against the contractor's sureties for the rental value of the building during the delay.

5. PARTIES—JOINT CONTRACTORS—JOINDER.

Where, in an action on a contractor's bond signed by two sureties jointly, the complaint alleged that one of them was absent from the state and without the jurisdiction of the court, it was not necessary to make such absent surety a party to the suit in order to recover a personal judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 53.]

6. DAMAGES—BREACH OF CONTRACT—INTEREST.

Where an architect's certificate showed that the owner of the building suffered damages amounting to a specified sum by the contractor's default, the owner was entitled to recover interest at least from the date of the certificate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 135, 141.]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Thomas L. Tally against J. G. Ganahl. From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. L. Batcheller, for appellant. Clarence A. Miller (Benjamin E. Page, of counsel), for respondent.

PER CURIAM. In the case of Tally v. Parsons, 131 Cal. 516, 63 Pac. 833, the judgment was reversed, and the cause remanded for a new trial. The sole appellant in that case was J. G. Ganahl, the appellant here. When the case reached the superior court, after a reversal, the plaintiff voluntarily dismissed the action without prejudice to a new action, and judgment for dismissal was entered accordingly. Thereupon he began the present action against Ganahl alone, upon the same bond as that sued on in the former action. Judgment in the present action was given in favor of the plaintiff. The present appeal is from that judgment. Certain alleged errors of law are presented upon the appeal by a bill of exceptions contained in the record. The bond sued on was given by Ganahl and others to secure the performance by the principal, H. Parsons, of a contract whereby he agreed to build for Mary A. Tally, assignor of plaintiff, a certain dwelling house, for the sum of $2,340. After partially completing the building, Parsons abandoned the work, and thereupon Mary A. Tally proceeded to complete the building herself, according to the plans and specifications mentioned in the contract, at her own expense. The judgment given in this case was for the sum of $827.05, consisting of $515.86, being the difference between the contract price and the cost of completion of the building, of $100 as attorney's fees in certain suits for the foreclosure of liens caused by the failure of Parsons to pay for labor and material, and $131.55 for rents lost to the owner during the delay caused by the contractor's failure; the balance, $79.64, being for interest due the plaintiff on account of the delay in payment.

1. The principal point decided by this court on the former appeal was that, under the terms of the contract, and upon this court's conception in that case of the theory upon which the plaintiff based his right to recover, it was an essential condition precedent to such recovery that the architects of the building should have audited and certified the expense incurred by the owner in completing the building and the damage caused by the failure of the contractor to perform. No such certificate having been made, so far as was shown by the record in the case, the judgment was reversed. This ruling, appellant claims, has become the law of the case, binding and conclusive in this action, not only upon the superior court, but upon this court and on this appeal as well. The respondent contends that the doctrine of the law of the case does not apply where the action in which the ruling was made is subsequently dismissed without prejudice, and a new action begun upon the same cause. The contrary has been held in a case where, after a decision on the defendant's appeal, reversing the judgment because a certain power of attorney was insufficient to authorize the particular conveyance on which plaintiff relied, the defendants began a new suit in equity to enjoin further claims under the void conveyance. Portland Tr. Co. v. Coulter, 23 Or. 131, 31 Pac. 280. It was also held in that case, however, that the former construction of the power was correct. But, for the purposes of this case, we think it better to assume, without deciding the point, that the doctrine laid down in Tally v. Parsons is binding in this case, so far as it presents precisely the same question. We think the ruling there made does not apply here. The doctrine of the law of the case is this: That where, upon an appeal, the Supreme Court, in deciding the appeal, states in its opinion a principle or rule of law, necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and, as here assumed, in any subsequent suit for the same cause of action, and this, although in its subsequent consideration, this court may be clearly of the opinion that the former decision is erroneous in that particular. Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Wixon v. Divine, 80 Cal. 386, 22 Pac. 224; Mattingly v. Pennie, 105 Cal. 516, 39 Pac. 200, 45 Am. St. Rep. 87; People v. Thomson, 115 Cal. 160, 46 Pac. 912. Indeed, it is only when the former rule is deemed erroneous that the doctrine of the law of the case becomes at all important. It is a necessary concomitant of this doctrine, that the former ruling is not binding upon the second hearing, except as to questions which involve and are controlled by the same principle. Mattingly v. Pennie, supra.

2. Treating the question, then, as one to be governed by the law of the former decision, appellant contends that there was a failure to show a compliance with the provision of the contract calling for the certificate of the architects to the amount of the expense and damage incurred by the owner, and that the certificate which was actually introduced in evidence was an insufficient compliance with this requirement of the contract. The facts in this regard, as pleaded and found by the court, are that Ehlers & Liddell were the architects employed to superintend the construction of the building, and were designated by name in the contract; that, immediately after the abandonment of the contract by Parsons, the contractor, these architects were discharged from employment by the owner upon the ground of their carelessness and incompetency, and the court finds that, in fact, they were careless and incompetent. The owner immediately employed another architect, who superintended the construction of the building until its completion. The certificate of this architect is given, together with the certificate of the discharged architect Liddell. The certificate of Ehlers is not produced; it appearing that the firm of Ehlers & Liddell had dissolved partnership a short time after the completion of the building, and that Ehlers, though he had been in Los Angeles at the time of the trial of the first case, was not to be found thereafter. The question thus presented is whether a justifiable excuse is shown for the failure to comply strictly with the terms of the contract. In full recognition of the right of sureties to stand upon the letter of their contract, we think a sufficient excuse is thus shown. Appellant argues, still urging the law of the case, that the proofs in this regard do not meet what he considers to be the requirements laid down in Tally v. Parsons, supra. It is there said: "The finding states that the owner discharged the architects on the ground that they were careless, incompetent, and dishonest, and there is no finding that such grounds were true. Even if they were true, there would have to be some allegation or finding showing a good and suffi-

cient excuse for not having the amount audited and certified by the architect; if the architects had refused to act in the matter, or if they had acted, but acted fraudulently or corruptly or through mistake, the plaintiff could have alleged and proven such excuse, and thus relieved himself of the condition." Appellant would construe the language of the last sentence as expressing the only methods by which a plaintiff under such circumstances could obtain relief. Such however, is not its meaning. Aside from the circumstance that the language, being addressed to a state of facts not existing in the earlier case, is simply dictum, and therefore not binding, appellant's interpretation distorts its true intent. The language used is by way of illustration. It instances examples of what would be a sufficient excuse for a failure of strict compliance, but by no means undertakes or pretends to set forth all sufficient grounds for such excuse. Thus, for example, if the two architects had died before the possibility of compliance with the terms of the contract, it would not be said that some substituted method of certifying the expense and damage would not have been permissible. It is a reasonable construction of the contract that it contemplated the production of the certificate of the architect or architects actually superintending the work. Such a certificate was actually presented. Moreover, there was the separate certificate of one of the two architects named in the contract, besides evidence of the inability to secure the other because of his absence and unknown whereabouts. Moreover, again, it may be pointed out that, while the evidence of the certificate is declared to be conclusive proof upon the matter of expense and damage, evidence independent of the certificate was offered, showing not only what the expense and damage actually were, but that they were in fact reasonable. This evidence would have supported a judgment had the action been in form for the recovery of the value of the labor which plaintiff's assignor was obliged to employ and the value of the material which he was obliged to purchase. And, finally, the evidence upon all of these matters stands without conflict, defendant resting solely upon the technical proposition of a noncompliance with the terms of the contract. Indeed, had plaintiff pleaded his action in quantum meruit, and relied for his recovery upon the value as distinguished from his cost and outlay, his case would have been full and complete. It is concluded upon this proposition that sufficient excuse has been shown for plaintiff's failure to comply in absolute strictness with the requirements of the contract.

3. The bond sued on covenanted that the contractors should complete the building within the time specified and should deliver it to the owner "free from all liens and claims that may be made or filed against the same, for or in respect of any labor or materials performed or furnished on or for said building." After the completion of the building, certain persons who had performed labor for Parsons in the erection of the building, and others who had furnished him materials therefor, filed claims of liens against the premises and began suits to foreclose the same. It became necessary for Mary A. Tally to employ an attorney to advise her in regard to these suits and make proper defense thereto sufficient to protect her interests, and she did so at an expense of $100. As a result of the suits and of her employment of the attorney, the amount of the liens was ascertained, she paid the amount into court, and secured a discharge of the several liens. The amount paid to the attorney in these suits was claimed in the complaint as special damages and was allowed by the court, after due proof of the facts. We perceive no error in this. It was damages proximately caused by the breach of the agreement to deliver the building free from liens, a covenant for which the bond was security. The liens in question were fairly within the terms of that agreement, the owner was acting in good faith, and the fee was found to be reasonable.

4. One of the conditions of the bond was that the contractor should complete the building on or before November 1, 1897. The finding of the court is that by the default of the contractor the completion of the building was delayed two months and nineteen days after that date, and that for the rent during the period of this delay the owner could have obtained the sum of $131.55. This was alleged as special damage and was included in the judgment. It was directly caused by the breach of the bond and was properly allowed.

5. There was no error in overruling the demurrer to the complaint for nonjoinder of Randall, one of the two joint sureties on the bond sued on. The complaint alleges that at the time it was filed Randall was absent from the state of California and without the jurisdiction of the court. In such cases it is not necessary to make the absent joint contractor a party to a suit on the joint contract to recover a personal judgment. 15 Ency. Pl. & Pr. 550; Merriman v. Barker, 121 Ind. 80, 22 N. E. 994.

No further finding was necessary to justify the allowance of interest. It appeared from the findings that the certificate of the architects, Train and Liddell, showing that the above mentioned sums, amounting to $747.41, were due the owner, was made in writing on June 7, 1901. At that time, if not sooner, this demand became a liquidated and matured debt bearing legal interest. Interest was allowed from that date.

The judgment is affirmed.

(151 Cal. 403)

## KERN ISLAND IRRIGATING CO. v. CITY OF BAKERSFIELD. (L. A. 1,848.)

(Supreme Court of California. June 19, 1907. Rehearing Denied July 18, 1907.)

1. MUNICIPAL CORPORATIONS — STREETS — GRANT OF RIGHT TO USE STREET FOR PURPOSES OTHER THAN HIGHWAY.

An oral agreement by the owners of lots abutting on a street to the construction and maintenance of a larger ditch in the street than had previously existed, and on a new line, not executed until long after the street became a public highway, did not bind the public authorities, and hence the right of way for a new and larger ditch, upon a different line from that of the old one, was not paramount to the right of the public to use the highway, but was an unlawful obstruction thereto.

2. WATERS AND WATER COURSES—EASEMENTS —EXTENT OF RIGHT—LIMITATION BY USE.

Under Civ. Code, § 806, providing that the extent of a servitude is determined by the terms of the grant or the enjoyment by which it was acquired, where the owners of lots abutting on a street before its establishment as a public highway orally granted a right of way for a ditch at some place in the street, and a ditch already in the street was taken possession of and used, the grant as to the size and location of the ditch became fixed and certain, and does not carry any right to enlarge the old ditch, change its course, or make another ditch upon a new line.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 228.]

3. APPEAL — REVIEW — FINDINGS OF COURT—SUFFICIENCY OF EVIDENCE IN SUPPORT.

Where evidence was ambiguous, but capable of the construction given it by the trial court, the findings of the trial court thereon will not be disturbed, though it is capable of a different construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3979.]

4. WATERS AND WATER COURSES—EASEMENTS —CREATION—PRESCRIPTION—ACQUISITION OF RIGHT OF WAY.

Where the construction of a ditch in a street was without right, and so as to create an unlawful obstruction thereto, the user of the ditch for a year, without objection from the public authorities, created no prescriptive rights to continue to maintain the ditch.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 224.]

5. PLEADING — AMENDMENT OF COMPLAINT — NECESSITY FOR AMENDMENT.

Where the right to maintain a new ditch in a street could not be predicated upon a previously acquired right to use an old ditch there, in a suit to enjoin defendant from obstructing the new ditch, the court did not err in refusing leave to amend the complaint by averring the facts concerning the old ditch.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 734.]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by the Kern Island Irrigating Company against the city of Bakersfield to enjoin defendant from obstructing a certain water ditch. From a judgment for defendant and an order denying plaintiff's motion for new trial, plaintiff appeals. Affirmed.

Laird & Packard and H. L. Packard, for appellant. C. C. Cowgill and Geo. Flournoy, Jr., for respondent.

SHAW, J. Appeal by plaintiff from the judgment and from an order denying its motion for a new trial. The object of the action was to enjoin the defendant from obstructing a certain water ditch in the city of Bakersfield and extending along Chester avenue, from Fifth street south to Fourth street. The plaintiff claims to be the owner of the ditch and to be entitled to use it, and that its right is superior to that of the public to use the street as a public highway.

The facts shown by the evidence are as follows: In 1887 the owner of some 400 acres of farming land subdivided it into lots and streets for the purpose of selling the lots for residence purposes, and at the same time made a map of the subdivision, showing Chester avenue as a public street, including the part thereof between Fourth and Fifth streets. There was then, and had been for many years, a small irrigating ditch in and along that part of the avenue. In order to make the lots suitable for residence purposes, and salable, it was necessary that a supply of water for irrigating and domestic use thereon should be available. To secure this, the owners of the tract verbally agreed with the plaintiff to give it a right of way along Chester avenue for a ditch in which to conduct the water to the abutting lots. In consideration thereof, the plaintiff agreed to sell and supply water from the ditch to lot owners. In pursuance of this agreement, which was indefinite as to the exact location and size of the right of way, the plaintiff took possession of the small ditch aforesaid, and for five years thereafter—that is, until some time in the year 1892—used that ditch to supply the water to the persons who bought lots on the avenue. During that period a number of lots abutting on that part of the avenue above mentioned were sold, and the avenue became established as a public highway by the dedication of the original owners of the tract and by the acceptance and user thereof by the public. The court found that it became such highway about January 1, 1888. It is claimed that this finding is not justified by the evidence. The precise time at which it became a public highway is not important to the case, provided it appears that it was prior to the year 1892, when the new ditch, mentioned in the complaint, was made. There is evidence sufficient to justify a finding that it became such public highway in March, 1889. The verbal agreement for the right of way, and the taking of the small ditch, seem to have been prior to the dedication and acceptance of the avenue as a highway, and it does not appear that the plaintiff joined in the dedication. Consequently, the highway was subject to the right of the plaintiff to use this small ditch as a conduit for the water. In 1892 the demand for water had increased, and the small ditch was not large enough to carry the water necessary to supply that demand, which included water for irrigating farming lands below the tract subdivided.

Some time during this latter year the plaintiff made the ditch in controversy. It continued to use this new ditch thereafter until the obstruction complained of, which was in November, 1903. The new ditch had five or six times greater capacity than the old ditch. It was not built on the same ground as the old ditch, but was placed in the avenue on a different line. No consent, or right, for its construction and maintenance in the highway was ever given by the board of supervisors of the county, nor by the city of Bakersfield. The city was incorporated in February, 1898. No objection to this ditch is shown to have been made by the public authorities, until the action of the city in 1903, which is the subject of this complaint.

Upon these facts, the court, in effect, found that the plaintiff had no right to maintain the ditch in a public street and gave judgment for the defendant. We think the judgment is correct. It may be true, as claimed, that the owners of the abutting lots orally agreed to the construction and maintenance of the large ditch in the street. Such an agreement, however, could not bind the public authorities. The agreement was not executed until long after the avenue became a public highway. Therefore the right of way for the new ditch upon a different line from that of the old one was not paramount to the right of the public to use the highway, but was an unlawful obstruction thereto. The right given in 1887 was a general right to make or use a ditch at some place in the street, and was indefinite both as to the size and precise location of such ditch. The size and location of the ditch became fixed and certain when the small ditch was taken and used for the purposes agreed upon. Winslow v. Vallejo, 148 Cal. 725, 84 Pac. 191, 5 L. R. A. (N. S.) 851. The oral grant of a right of way then became fixed and complete. It did not include or carry with it any right to enlarge the old ditch, change its course, or make another ditch upon a new line after it thus became fixed and definite. Civ. Code, § 806; Vestal v. Young, 147 Cal. 715, 82 Pac. 381; Allen v. San Jose L. & W. Co., 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93; Winslow v. Vallejo, 148 Cal. 725, 84 Pac. 191, 5 L. R. A. (N. S.) 851.

There was some evidence tending to show that the general right of way given to plaintiff in 1887 by the owners of the subdivision was the right under which they claimed authority to make the new ditch in 1892. The court below, however, did not give the testimony this construction, and, even if we concede that it is susceptible thereof, it must also be conceded that it is ambiguous in this respect, and is capable of the construction that it carried only the right to appropriate the small ditch, and that it did not confer any right to make the ditch in controversy. In this condition of the evidence we cannot disturb the findings of the court below.

The user of the new ditch from 1892 until 1903, without objection from the public authorities, created no prescriptive right in favor of the plaintiff to continue to maintain the same as a ditch along the highway. Hoadley v. San Francisco, 50 Cal. 275; People v. Gold Run, 66 Cal. 147, 4 Pac. 1152, 56 Am. Rep. 80; Yolo Co. v. Barney, 79 Cal. 378, 21 Pac. 833, 12 Am. St. Rep. 152; Ex parte Taylor, 87 Cal. 95, 25 Pac. 258; Board v. Martin, 92 Cal. 218, 28 Pac. 799; Ames v. San Diego, 101 Cal. 394, 35 Pac. 1005; Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149; Cloverdale v. Smith, 128 Cal. 235, 60 Pac. 851.

The court did not err in refusing leave to amend the complaint by averring the facts concerning the old ditch as above set forth. As above stated, the right to maintain the new ditch could not be predicated upon the previously acquired right to use the old ditch. The proposed amendment, therefore, showed no additional right in plaintiff.

The judgment and order are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

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151 Cal. 425

## COLEGROVE WATER CO. v. CITY OF HOLLYWOOD et al. (L. A. 1,799.)

(Supreme Court of California. June 20, 1907.)

1. Waters and Water Courses—Easements—Extent of Right—Limitations by Use.

Under Civ. Code, § 806, providing that the extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired, where plaintiff acquired the right by user to conduct water across a highway, his right was limited to a continuance of the use in the manner and to the extent which it had been enjoyed.

2. Municipal Corporations—Streets—Privileges of Abutting Owners—Excavation and Other Structures Below Streets.

Where plaintiff was the owner of the fee, or was the licensee of the owners of the fee, of portions of certain public streets, he had the right thereby to lay pipes in those portions of the bed of the street for conducting water across the street, so long as they did not interfere with its use by the public, and to make the necessary excavations in the street to enable him to effect his purpose, where he gave notice of his intention to the city and offered to secure it against any damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1444.]

3. Same—Use of Highway—Ordinances.

A city ordinance, forbidding the laying of any pipe in a public street without first obtaining from the city board of trustees the privilege of using such public street for this purpose, has no application to the rights of the owner of the soil covered by a public street to use it in a manner not in conflict with the public use, since he is merely exercising one of the incidents of the ownership which, in dedicating the highway, he has retained in himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1444.]

4. Appeal — Findings Responsive to the Issues.

Where plaintiff failed to allege that he was the owner of the fee to the east half of a street, but defendants in their answer made averments from which it may be inferred that the land of plaintiff's predecessor in title was bounded on the west by the street, the presumption arises, under the express provisions of Civ.

Code, § 831, that the adjoining proprietor owned to the center of the street, and, the evidence in support of plaintiff's title to this half of the street having been introduced without objection, the defendants cannot on appeal object that the finding that plaintiff owned the fee to the east half of the street was not responsive to any issue made by the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1053, 1054–1057.]

Department 1. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Suit by the Colegrove Water Company against the city of Hollywood, William C. Fry, as superintendent of streets, and Cornelius Cole, to enjoin defendants city of Hollywood and William C. Fry from interfering with plaintiff's laying pipes across certain streets of the city. From a judgment for plaintiff and an order denying a motion for new trial, defendants the city of Hollywood and William C. Fry appeal. Affirmed.

Robert Young, for appellants. Wellington Clark and W. Cole, for respondent. Cornelius Cole, in pro. per.

SLOSS, J. This action brought to obtain an injunction restraining the defendants, the city of Hollywood and its superintendent of streets, from interfering with plaintiff in its efforts to lay pipes across two streets of said city, resulted in a judgment granting to plaintiff the relief sought. A motion for a new trial, made by the defendants enjoined, was denied. Said defendants appeal from the judgment and from the order denying their motion for a new trial.

The general nature of the case is shown by the following facts found by the court: The plaintiff is a corporation organized under the laws of the state of California for the purpose of supplying water for domestic and other purposes. The defendant the city of Hollywood is a municipal corporation of the sixth class, having been organized as such in November, 1903. Prior to 1898, and up to the 5th day of December, 1904, Cornelia Cole McLaughlin was the owner of certain land. On said 5th day of December she sold it to plaintiff, which has since said date been the owner thereof. Said land is bounded on the west by a street known as "Gower Street," covering a strip 50 feet wide, which had been, in 1877, conveyed to the county of Los Angeles, by the then owners of the land, for a road. To the west of Gower street is a piece of land owned by the defendant Cornelius Cole. South of the last-mentioned tract is other land owned by said Cornelius Cole; the two pieces last named being separated by a strip of land dedicated by said Cole, the owner thereof, as a highway, and known as "Wilson Avenue." All of said lands and streets are now within the limits of the city of Hollywood. The fee of said Gower street belongs, as to the east half thereof, to plaintiff, and as to the west half to the defendant Cole. All of the land above described, except that embraced in the streets, is planted to lemon trees and requires irrigation. In the year 1898 said Cornelia Cole McLaughlin sunk a well upon the premises owned by her and established a pumping plant capable of pumping 5,000 gallons of water an hour. The water from said well has been conducted by means of conduits, pipes, and ditches to the orchards above described, and to an additional lemon orchard situated south of the land of Cornelius Cole, and outside of the limits of the city of Hollywood. In order to conduct the water to the lands requiring irrigation, a wooden box or culvert was, in the year 1893, placed beneath the surface of Gower street so as not to obstruct travel thereon, and said box or culvert was maintained therein, and used until about two years before the trial, when it was replaced by an iron pipe, which has since said time been retained therein. In the year 1898, a wooden structure, having a top and sides, was placed across Wilson avenue in order to conduct the water across said avenue to the lands of Cornelius Cole south of said Wilson avenue, and to the other lands irrigated from the well. Where said ditches and conduits were located upon the lands of Cornelius Cole, they were so located and maintained thereon with his knowledge and consent. The plaintiff is the successor to all the interest of Cornelia Cole McLaughlin in said ditches, boxes, pipes, etc., and to the consent of Cole to their location and use upon his land. Paragraph 21 of the findings declares that prior to the commencement of this action the plaintiff, "for the improvement and betterment of its water plant," undertook to lay "iron pipe to take the place of all said ditches, box or culvert, wooden structure, and iron pipe," and while engaged in excavating Gower street and Wilson avenue, for the purposes of laying said iron pipes in said streets, was stopped and prevented from so doing by the city of Hollywood, and the defendant Fry, its superintendent of streets. The plaintiff had, prior to such interference, given the defendants notice of its intention to do the work, and had given the city a bond conditioned for the payment of all damages occasioned by doing such work. From these facts the court drew the conclusion of law that the plaintiff was entitled to a decree enjoining the defendant city, and its superintendent of streets, from in any manner interfering with the plaintiff in excavating Gower street and Wilson avenue for the purpose of laying pipe to conduct water from said well, subject to a provision against unnecessary injury to the street and avenue, and obstruction of travel thereon. A decree in accordance with such conclusion of law followed.

The plaintiff does not claim any right to lay pipes in the streets under the provisions of article 11, § 19, of the Constitution of this state. That section grants the right to lay pipes in the streets of any city for the purpose of supplying such city and its inhabitants with fresh water. By its terms, it applies only to cities in which there are no public works owned and controlled by the municipality for supplying the same with water. It is not alleged in the complaint, nor is it found, that there are no such public works in the city of Hollywood; nor is there any allegation, or finding, that the plaintiff desired to lay the pipes in question for the purpose of supplying the inhabitants of the city of Hollywood with water.

Nor can the plaintiff base a right to lay the pipe upon its prior use of the streets for the purpose of conducting water across them. The defendant is not seeking to interfere with any use which the plaintiff had enjoyed prior to the incorporation of the city, or prior to the interference complained of. Finding 21, from which we have quoted, indicates that what the plaintiff was proposing to do was to install a means of conveying water across the streets beyond and in addition to that which had theretofore existed. If the finding is to be construed to mean merely that the plaintiff was replacing the conduits already existing with others of substantially the same kind and in the same locations, the finding is not sustained by the evidence. which establishes without contradiction that in Gower street the plaintiff was seeking to substitute for a five-inch pipe a six-inch pipe running over a different course, and that in Wilson avenue it was seeking to substitute for ditches, or wooden conduits, running across the street, iron pipe crossing the street at a considerable distance from the earlier crossing. We need not here consider whether a right to use a public highway for private purposes can be acquired as against a municipality by adverse possession or by estoppel. Such right, if it can so originate, must be limited to a continuance of the use in the manner in which it had been enjoyed, and to no greater extent. "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Civ. Code, § 806. Where the right, not definitely limited by grant, has become fixed by the manner of its use, it cannot be enlarged without the consent of the parties who may be affected. Winslow v. Vallejo, 148 Cal. 725, 84 Pac. 191, 5 L. R. A. (N. S.) 851; Vestal v. Young, 147 Cal. 715, 82 Pac. 381; Kern Island Irr. Co. v. City of Bakersfield (decided June 19, 1907), 90 Pac. 1052. The laying of pipe on a new line, or the substitution of pipe for a ditch or wooden conduit, or for pipe of a smaller size, was therefore not authorized by the mere fact that water had already been conducted across the highway in another manner.

But, apart from any prior use, certain rights were vested in plaintiff by reason of the fact that it owned the fee, or was the licensee of those who owned the fee, of the portions of Gower street and Wilson avenue through which it was proposed to lay the pipe. One who grants to the public the right to use a strip of land as a highway, retaining in himself the ownership of the soil, parts with an easement merely. The owner of property subject to an easement may use his property in any manner and for any purpose not inconsistent with the full and free enjoyment of the easement. Hoyt v. Hart (Cal. Sup.) 87 Pac. 569. This rule applies to land devoted to use as a public road or street, as well as to land subject to a private use only. The right of the abutting owner is, of course, always subordinate to the rights of the public. In city streets the easement of the public is, as a result of the conditions of urban life, more extensive than in roads through sparsely inhabited regions. In cities, it is customary to devote not only the surface of the street, and the space above the street, to public use, but the municipality may, and frequently does, occupy the soil beneath the surface for the accommodation of sewers, gas and water pipes, electric wires, and conduits for railroads. Where the city undertakes to occupy the space above or below the surface of the street for any purpose within the scope of the public uses to which highways may be put, the use by the owner of the fee must yield to the public use. Furthermore, the use by the owner of the fee is subject to reasonable regulation in the interest of the comfort and convenience of the community as a whole. "But the owner of the land over which a highway is laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public. This right of the owner may grow less and less as the public needs increase; but at all times he retains all that is not needed for public uses, subject, however, to municipal or police regulations. Allen v. City of Boston, 34 N. E. 519, 159 Mass. 324, 38 Am. St. Rep. 423. See, also, 3 Kent Com. 433; 2 Dill. Mun. Corp. §§ 656, 699, 700; Tucker v. Tower, 9 Pick. 109, 19 Am. Dec. 350; McCarthy v. City of Syracuse, 46 N. Y. 194; Hanbury v. Woodward Lumber Co., 26 S. E. 477, 98 Ga. 54; Farnsworth v. City of Rockland, 22 Atl. 394, 83 Me. 508; Weller v. McCormick, 52 N. J. Law, 470, 19 Atl. 1101, 8 L. R. A. 798; Borough of Brigantine v. Holland Trust Co. (N. J. Ch.) 37 Atl. 438; Ivins v. Inhabitants of Trenton, 53 Atl. 202, 68 N. J. Law, 501; Dell Rapids M. Co. v. City of Dell Rapids, 75 N. W. 898, 11 S. D. 116, 74 Am. St. Rep. 783. And inasmuch as the right to use the soil below the surface is one that can rarely be practically enjoyed without first disturbing the surface temporarily in making the necessary excavations, it must be held that the owner of the soil has the right to make such excavations as will enable him to install the materials or do the work requisite for an enjoyment of his rights in his land. The occupation of the soil by a water pipe, so long as no public use is impeded, is a legitimate use by the owner, and carries with it the right to excavate the soil, subject to such restrictions by the municipality as will insure the least interruption to the public easement. Nothing contrary to these views is to be found in the statutes or decisions cited by appellants. The municipal corporation act gives to boards of trustees of cities of the sixth class "the management and control of * * * highways." St. 1903, p. 93, c. 86. Undoubtedly the municipality may determine the extent and manner of the public use to be made of the streets, and may regulate the use by owners of the soil. But it cannot arbitrarily take away the property rights of such owners. In Montgomery v. Railway Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89, and San Francisco v. Grote, 120 Cal. 61, 52 Pac. 127, 41 L. R. A. 335, 65 Am. St. Rep. 155, relied on by appellants, the court declared principles which have no application whatever to the facts here presented.

It follows that the plaintiff was acting within his rights in attempting to lay its pipes across the streets after giving notice of its intention so to do and offering to secure the city against any damage. It is claimed that there was a failure to comply with the provisions of an ordinance, pleaded in the answer, which forbade the laying of any pipe in a public street "without having first obtained from the board of trustees of said city the franchise or privilege of using such public street * * * for that purpose." The failure to find on the issue so raised is assigned as error. This ordinance does not purport to be a regulation of the manner of doing work. It assumes to require a franchise or privilege as a condition precedent to the occupation of the soil at all. The power to grant a "franchise or privilege" implies the power to withhold it (State v. City of Spokane, 63 Pac. 1116, 24 Wash. 53), and an ordinance which empowers city trustees to refuse to grant, on any terms, the right to occupy the soil covered by a street in a manner not in conflict with the public use, can have no application to the owner of the soil. Such owner is not seeking a privilege, to be granted or withheld by the city. He is merely exercising one of the incidents of the ownership which, in dedicating the highway, he has retained in himself.

It is urged that the complaint fails to allege that the plaintiff owns the fee of the east half of Gower street, and that, consequently, the finding of such ownership must be disregarded. But the appellants, in their answer, allege that the predecessor of plaintiff was the owner of the land in which the well was sunk, and make further averments from which it may be inferred that this land was bounded by Gower street. This raises a presumption that the adjoining proprietor owned to the center of the way. Civ. Code, § 831. The evidence in support of plaintiff's title to the east half of Gower street was introduced without objection. Under these circumstances, we think the appellants cannot now make the point that the finding is not responsive to any issue made by the pleadings. Barbour v. Flick, 126 Cal. 632, 59 Pac. 122; Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434; McDougald v. Hulet, 132 Cal. 154, 64 Pac. 278; Carroll v. Briggs, 138 Cal. 452, 71 Pac. 501.

The findings which are necessary to the support of the judgment are fully sustained by the evidence. The judgment itself is sufficiently clear and definite.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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151 Cal. 436

## HOWE v. SCHMIDT et al.

## MONTGOMERY & MULLIN LUMBER CO. et al. v. SAME. (L. A. 1,846.)

(Supreme Court of California. June 22, 1907.)

1. CONTRACTS—BUILDING CONTRACTS—FORM—EXECUTION.

A building contract, requiring the contractor to construct the building "conformable to the drawings and specifications" by a specified architect, "signed by the parties and hereunto annexed," was fully satisfied by pages of specifications and sheets of drawings fastened together and annexed to the contract, and signed on the last page thereof by the parties; the drawing and specifications so fastened together being in effect one document, fully identified as to signatures by the signatures on the last page.

2. APPEAL FROM ORDER DENYING NEW TRIAL—REVIEW OF FINDINGS.

On appeal from an order denying a motion for a new trial, the sufficiency of the findings to support the judgment cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3480.]

3. MECHANICS' LIENS—MATERIALMEN—RIGHT TO LIEN—NONCOMPLIANCE WITH SPECIFICATIONS—KNOWLEDGE.

Where a materialman furnished lumber to a contractor for the construction of a building of the kind and quality ordered by the contractor, it was no defense to the materialman's right to a lien that he knew that the material furnished did not conform to the specifications in the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 52, 54.]

4. SAME—TRIAL—FINDINGS.

Where, in a suit to foreclose a subcontractor's lien, a finding not sufficiently assailed determined that the claimant's work was improperly done in certain specified particulars, his right to a lien was not affected by a further finding that he knew at the time he constructed the work that he was not complying with the contract between the parties.

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Actions by George F. Howe and by Montgomery & Mullin Lumber Co. and others against Hulda Schmidt and others to foreclose certain mechanics' liens. The court held all the liens invalid, and from an order

**denying a motion for a new trial, certain parties appeal. Affirmed.**

Chas. L. Batcheller, Foster C. Wright, A. P. Thompson, and Davis, Kemp & Post, for appellants. J. L. Murphy and Murphy & Schmidt, for respondents.

ANGELLOTTI, J. These are actions for the foreclosure of mechanics' liens, which were consolidated for the purposes of trial. George F. Howe was the original contractor, and brought his action against defendant Hulda Schmidt, the owner of the property, to foreclose his lien for an alleged balance due upon a contract entered into by him and said Schmidt for the erection of a building upon her land. In this action defendant Wright, a subcontractor, and defendants Dodd, H. Raphael Company, California Hardware Company, and the Montgomery & Mullin Lumber Co., materialmen, set up their claims and sought foreclosure of their liens, while in the second action the three last-named defendants sought the same relief as plaintiffs. The trial court adjudged all of the liens to be void, and gave judgment for the owner and against all the claimants, including the original contractor. This is an appeal from an order denying a motion for a new trial made by the defendants Wright, Dodd, H. Raphael Company, California Hardware Company, and the Montgomery & Mullin Lumber Co.

The principal question presented by appellants is as to the validity of the contract between Howe and Mrs. Schmidt, which the trial court admitted in evidence over the objection of appellants. By the terms of the contract, Howe was to construct the building "conformable to the drawings and specifications made by Edward Kendall and signed by the parties and hereunto annexed." The contract produced from the recorder's office, and offered and received in evidence, consisted of three items or parts fastened together in the following order: (1) The formal contract signed on the last page thereof by both contractor and owner; (2) the specifications, signed only by the owner; and (3) the drawings or plans, the last or bottom sheet of which was signed by the contractor and owner. There was nothing to indicate that the contract, when offered in evidence, was not in the same condition as at the time of its execution. The contention is that the reference in the contract being to drawings and specifications "signed by the parties," as well as annexed, the failure of one of the parties to place his signature somewhere upon the specifications made it impossible to identify the specifications intended, except by the aid of oral evidence, and rendered the contract void. We see no good reason, however, for holding that this reference to the "drawings and specifications, * * * signed by the parties and hereunto annexed," is not fully satisfied by pages of specifications and sheets of drawings fastened together and annexed to the contract, and signed on the last page thereof by the parties. So fastened together and annexed to the contract, the drawings and specifications in fact constituted one document, fully identified as to the signatures of the parties in the manner required by the contract by the signatures on the last page. This being the situation, it is unnecessary to determine what would have been the effect had the drawings and specifications been simply "annexed," without any compliance with the requirement as to signing, and the cases cited by appellants in support of their claim are inapplicable. Worden v. Hammond, 37 Cal. 61, was a case where the agreement was to build according "to the draft, plan, and explanation hereto annexed, marked 'A,'" and no draft, plan, or explanation was attached, and it was sought to show by parol that an original paper produced by plaintiff was the one referred to. It was held that, where the reference is false, it cannot be helped out by oral evidence; the court saying that, if the written contract had contained a reference to the specifications in such a manner that their connection would be apparent upon their production, it would be regarded as a sufficient compliance with the statute. S. F. Lumber Co. v. O'Neill, 120 Cal. 455, 52 Pac. 728, was a case where the contract was held void simply because the entire contract was not filed as required by law; a sun print copy of the plans and drawings having been filed instead of the original. West Coast Lumber Co. v. Knapp, 122 Cal. 79, 54 Pac. 533, was a case where the drawings and specifications were referred to simply as "identified by the signatures of the parties," and no plans and specifications corresponding to this reference were produced. In Donnelly v. Adams, 115 Cal. 129, 46 Pac. 916, the only reference was to "plans, drawings, and specifications, * * * made by C. E. Henriksen * * * and which are signed by the parties hereto, and are to be kept and remain in the office of said architect," and there were no signed plans and specifications. In Willamette, etc., Co. v. College Co., 94 Cal. 229, 29 Pac. 629, the contract provided that the work should be done "conformable to the drawings and specifications made by R. B. Young, architect, and signed by the parties, and hereto annexed," and no plans and specifications were, in fact, annexed. None of these cases lends support to the contention that the plans and specifications annexed to the contract in this case did not fully correspond with the reference.

There was an attempt made on the trial to show that the drawings and specifications had not been annexed to the contract at the time of the execution thereof; but the evidence upon this point was conflicting, and the trial court found, in effect, as we read the findings, that at the time the signatures were affixed to the agreement and the last page of the plans or drawings the various papers had been attached together, and were then in the same condition as when produced at the trial

This portion of the finding is not attacked. The trial court, in the same connection, found that the specifications proper "were not signed by the said Howe by an oversight on his part." Complaint is made that the evidence is insufficient to justify this particular finding. If we concede this finding to be at all material, we are satisfied that it finds sufficient support in the evidence.

No good reason is urged by counsel for holding the contract void. It must be held that the trial court did not err in admitting it in evidence, or in finding it to be a valid contract between the owner and the contractor, fully measuring up to the requirements of the mechanics' lien law. So far as appellants H. R. Dodd and the California Hardware Company are concerned, no other point is made in the brief that is avaliable on motion for new trial. No finding of fact affecting the claim of either is attacked, and no error in law occurring at the trial which could have operated to their prejudice, other than the ruling admitting the contract in evidence, is suggested. Nor is there any intimation of any respect in which the decision is "against law." There being no appeal from the judgment, we cannot here consider any question as to the sufficiency of the findings to support the judgment against these defendants.

The case of the appellants Montgomery & Mullin Lumber Co. and the H. Raphael Company is in the same condition as that of appellants Dodd and the California Hardware Company except in one respect. As to the Montgomery & Mullin Lumber Co., there is a finding to the effect that the claimant, in furnishing some of the lumber to the contractor for the construction of the building, furnished No. 2 lumber instead of No. 1 lumber, knowing that No. 1 lumber was required by the terms of the building contract between Howe and Schmidt; and as to the H. Raphael Company, there was a finding that the claimant knew that certain doors furnished by it to the contractor were not in compliance with the terms of the said building contract as to size. These findings are attacked as being unsupported by the evidence. There was no evidence that either of these claimants had any actual knowledge in this behalf, their only knowledge as to the requirements of the contract being such constructive knowledge as the contract filed for record imputed to them, and we take the findings as meaning no more than that the claimant knew that the materials did not comply with the requirements of the filed contract in the respects stated. There is no intimation in these findings that either of the claimants did not fully comply with the direction of the contractor as to size and quality of the materials furnished. These findings are clearly as to matters that were not embraced within the issues made by the pleadings, and, so far as the record shows, there was no evidence introduced by any party on the trial in regard thereto. On an appeal from the judgment, they, therefore, could not be considered in support of the judgment. Rudel v. County of Los Angeles, 118 Cal. 281, 286, 50 Pac. 400. See, also, Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299. Whether or not they were supported by sufficient evidence would therefore appear to be immaterial on motion for a new trial.

Regardless of this, however, the findings appear to us to be as to matters entirely immaterial to the controversy between the parties to this action. The fact found is simply that these claimants knew that certain materials furnished by them to the contractor in full accord with his directions, to be used in the building, did not in all respects comply with the requirements of the original agreement between the contractor and Mrs. Schmidt, filed in the recorder's office. A materialman is not required to concern himself with the question as to whether or not material ordered by a building contractor for use in a building measures up to the requirement of the agreement between the contractor and the owner. His contractual relations are solely with the contractor dealing with him, and he simply furnishes material as directed by the party with whom he contracts. He is under no legal obligation to the owner to see that the contractor complies with his contract, and, so far as his right to a lien is concerned, is warranted in assuming that the contractor is fulfilling his contract with the owner. This is true, notwithstanding he may know that material ordered may not be in all respects as provided by the written contract on file. That contract is subject to change and modification in such matters by the parties thereto, the owner and the contractor, without notice to other parties, and the materialman has the right to assume that no fraud is being perpetrated by the contractor upon the owner in the use of the materials ordered. We do not mean to intimate that the materialman could enforce a claim of lien where the circumstances showed him to be a participant in a conspiracy to defraud the owner, but mere knowledge that materials ordered are not in full accord with the requirements of the contract on file does not create the slightest presumption of fraud. This being so, the findings in question are absolutely immaterial, and their presence could not affect the judgment to be given. Whether or not a judgment given against such claimants was correct would be determined without regard to the presence of such finding. It is clear, then, that it is immaterial whether these findings are sustained by the evidence. If such findings had been that the claimants possessed no such knowledge, their right to a judgment would have been no greater than under the present findings. The case of these appellants, then, is precisely the same as that of the appellants

Dodd and the California Hardware Company. The real question as to them appears to be one as to the sufficiency of the findings to support the judgment; a question not determinable on motion for a new trial.

As to the appellant Wright, who was the subcontractor for the plumbing, gas fitting, and sewering, and who, according to the allegations of his own pleading, had agreed to do the same according to the plans and specifications contained in the contract between Mrs. Schmidt and Howe, the findings of fact attacked by the brief are findings 12, 17, and a portion of 8. Finding 12, which does not appear to be within the issues made by the pleadings, was that said Wright, as subcontractor for the plumbing work, "knew at the time he constructed the same that he was not complying with the contract between said parties, or supplying said vents and brackets. Finding 17 was not assailed in the statement on motion for new trial by specification of insufficiency. The same is true as to the portion of finding 8 complained of, which is that "the plumbing provided in said contract was improperly done, as follows—no vents were placed either in the closets or the kitchen, and the N. P. brackets for the wash basins were omitted altogether." It is manifest that finding 12, the only one of these findings assailed by specification of insufficiency, was entirely immaterial, and could not affect the rights of the claimant. That the plumbing contract was not complied with by him must be taken as conclusively established here by the unassailed portion of finding 8, already set forth. Whatever effect this failure to comply should legally have had on his claim of lien, a matter we are precluded from considering on this appeal, that effect could not be changed in the slightest degree by the further finding that he knew he was not complying with his contract. As in the case of the other claimants, if the judgment given upon these findings was erroneous, the error is one that cannot be reviewed on motion for new trial.

The order denying a new trial must be affirmed, and is so ordered.

We concur: SHAW, J.; SLOSS, J.

151 Cal. 443

## ARELLANES v. ARELLANES. (L. A. 1,929.)

(Supreme Court of California. June 22, 1907.)

1. Deeds — Voluntary Conveyance—Validity—Burden of Proof.

Where plaintiff was 64 years of age and unable to read, write, or understand the English language at the time she conveyed her property to defendant, her son, for a nominal consideration, the burden was on defendant to show that the gift was made freely and voluntarily, and that plaintiff had full knowledge of all the facts and a perfect understanding of the effect of the transfer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 587, 588.]

2. Appeal—Review—Weight of Evidence.

The credit to be given to the positive testimony of a witness cannot be determined on appeal, except where the testimony, in the light of the undisputed facts, is inherently so improbable and impossible of belief as to in effect constitute no evidence at all.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3901, 3938.]

3. Parent and Child—Voluntary Conveyance—Gifts—Validity—Evidence.

In a suit to cancel a voluntary deed executed by a mother to her son, evidence *held* to sustain a finding that the deed was made with the intent on plaintiff's behalf to transfer her title to defendant, and constituted a valid gift.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 637, 645.]

4. Equity — Equitable Issues — Submission to Jury.

In a suit to set aside a deed, the parties not being entitled to a jury as a matter of right, the court, having called in a jury to try certain questions of fact, was entitled to reject the jury's findings and make such findings of its own as it deemed required by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 816.]

5. Cancellation of Instruments—Evidence—Materiality.

Where, in a suit by a mother to cancel a deed to her son, it was undisputed that the father had previously conveyed practically all his property to the son and had not died until some years after the execution of the deed in controversy by the mother, questions asked of two of the other children as to whether their father had left any estate to them were inadmissible.

6. Appeal — Review—Harmless Error—Exclusion of Evidence.

Where, in a suit to set aside a deed by a mother to her son, it was undisputed that by the deed she gave practically all her property to the son, the exclusion of a question asked a daughter as to whether the mother gave her any portion of her land at any time was not prejudicial error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4164.]

7. Evidence—Materiality.

In a suit by a mother to set aside a deed to her son, questions asked of a daughter as to her financial condition since the execution of the deed were immaterial.

8. Appeal—Exclusion of Evidence—Prejudice.

In a suit by a mother to set aside a deed to her son, the exclusion of a question asked of another son concerning what property he owned at the time the deed was executed was not prejudicial to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4153.]

9. Evidence—Opinions—Mental Capacity.

A witness who drew and witnessed the execution of a deed by plaintiff was competent to testify that plaintiff then appeared in a perfectly rational condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2242.]

10. Depositions — Interrogatories—Objections—Waiver.

Where plaintiff interposed no objection to a responsive answer to one of the settled interrogatories in a deposition before the answer was read, plaintiff waived a right to have the answer stricken after the reading.

Department 1. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Suit by Josefa Ruiz De Arellanes against Juan B. Arellanes. From a judgment for defendant and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

J. L. Murphy and S. E. Crow, for appellant. H. C. Booth and W. H. Chapman, for respondent.

ANGELLOTTI, J. This action was commenced on March 23, 1903, to obtain a decree setting aside a deed made by plaintiff to defendant on March 21, 1881, adjudging plaintiff to be the owner of the land described in such deed, and requiring defendant to account for the rents, issues, and profits thereof which had come into his hands. Judgment went for the defendant, and plaintiff appeals therefrom and from an order denying her motion for a new trial.

The land involved in this action is a tract known as subdivision 12 of the Rancho Punta De La Laguna, in Santa Barbara county, containing 2,042.45 acres or thereabouts. On March 21, 1881, plaintiff owned this land as her separate property, and had been such owner for several years. Its value was then about $20,500. Her husband, Luis Arellanes, owned subdivision No. 11 of the same rancho, which contained 2,554.59 acres and was of about the same value. The only other property owned by plaintiff was some live stock, consisting of about 25 head of cattle, and the undivided one-half of a lot in Santa Barbara worth from $800 to $1,000. At that time there were six living children of plaintiff and said Luis, four married daughters and two grown sons, one being the defendant. Plaintiff was then about 64 years of age, and was unable to read, write, or understand the English language. Defendant was the only child remaining with his parents, who lived on one of the two tracts above named. Plaintiff reposed implicit trust and confidence in defendant, and had several years before given him a general power of attorney, which was not revoked until shortly before the commencement of this action. On March 21, 1881, Luis Arellanes, in consideration of $3,000 to be paid, conveyed subdivision 11 of said rancho to the defendant, and at the same time plaintiff executed a grant, bargain, and sale deed purporting to convey to defendant, for the express consideration of $1, subdivision 12 of said rancho. This deed was recorded in the county recorder's office of Santa Barbara county on March 23, 1881. In the year 1884, Luis Arellanes died, having first conveyed to plaintiff the remaining one-half of the Santa Barbara lot. Since that time plaintiff has resided in the city of Santa Barbara on said lot, and defendant has been in possession of the land here involved, residing thereon with his family. The defendant kept his mother's stock on the ranch for her, and managed such stock for her as he had been doing for years before the execution of the deed. The theory of plaintiff's case, as disclosed by the amended complaint upon which the action was tried, was that defendant procured the execution of the deed by her by falsely and fraudulently representing to her that the same was the conveyance from Luis Arellanes of his portion of the rancho, which it was necessary for her to sign as the wife of said Luis, and that she did not discover the contrary until about February 20, 1903, when she was informed thereof by one Quintero in the city of Santa Barbara.

Defendant by his answer denied the allegation of said complaint in this behalf, alleging that by such deed plaintiff intended to give, grant, and convey her said property to him. Various questions relating to the issue thus made were submitted to an advisory jury. Although the jury found that the plaintiff understood what land she owned in the rancho, and that the attorney who drew the deed and witnessed its execution translated and explained the contents thereof to plaintiff before it was signed, it answered the other questions favorably to plaintiff's contention. The trial court refused to adopt these findings of the jury, and found explicitly that defendant had never taken advantage of the trust and confidence reposed in him by plaintiff, had never made any such representation as was alleged, or any false or fraudulent representation, or any request, that plaintiff sign any paper as the wife of Luis Arellanes; that plaintiff, after consultation with her husband regarding his proposed conveyance, voluntarily offered to give her portion of the rancho to defendant, and requested him to consult with an attorney regarding the making of the transfer; that it was upon the advice of said attorney that the nominal consideration of $1 was stated in plaintiff's deed; that said attorney, having prepared the respective deeds for the plaintiff and her husband to execute, plaintiff, her husband, and defendant went to the office of the attorney, whereupon the two deeds were fully translated and explained to both plaintiff and her husband; that the husband alone executed the deed to his portion, and that thereupon the plaintiff, with full knowledge of its contents, signed, executed, and delivered to defendant the deed of her portion, having, prior to delivery, duly acknowledged such execution before a notary public. It was further found that the plaintiff well knew and understood that she was executing to defendant a deed conveying her portion of the ranch, and intended thereby to give, grant, and convey to him all her interest therein, and that defendant thereupon entered into possession of the same under said deed, and has ever since continued in such possession, claiming to own the same under the deed, paying all taxes thereon, and exercising all the ordinary acts of ownership. There was no intimation in the complaint of any undue influence exerted by defendant in the matter of the execution of the deed, plaintiff's case being based upon the alleged false representations and lack of knowledge as to the nature of the instrument executed by her.

We take the findings as establishing an absolute gift of this land by plaintiff to her son, made freely and voluntarily in the execution of a purpose conceived by her to so dispose of the property, without the exercise of any fraud on the part of the son, and with full understanding on her part of all the facts and the effect of such a transfer. It is unnecessary to cite authorities to the proposition that such a gift so made cannot be set aside at the instance of the donor, and we do not understand counsel for plaintiff to claim otherwise. Their claim necessarily is that the findings in this respect are not sustained by the evidence.

As appears from the opinion of the trial court filed in rendering the decision in this case, the learned judge in his consideration of the evidence was guided by the views declared in Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910, in the following language: "Transactions like the one under consideration are watched by courts of equity with the most scrutinizing jealousy, and are generally held to be presumptively void. They will be set aside upon the discovery of the least fraud, and every presumption ought to be indulged against them. The person who makes the donation and bestows the confidence is not bound to show that any imposition has been practiced upon him. It is sufficient for him to establish intimate and confidential relations with the donee. * * * Where the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily, and with full knowledge of all the facts, and with perfect understanding of the effect of the transfer." This states the law as favorably for plaintiff as is possible under the authorities. After quoting this language from the opinion in Soberanes v. Soberanes, supra, the learned judge said: "In this case, the relation of mother and son under the circumstances of that case created such a confidential relation, independent of the power of attorney; and the latter, in itself, created such a relation between plaintiff and defendant. My decision in this case is based upon the opinion that the defendant has met the foregoing burden on the question of the execution and delivery of the deed here in question." We have carefully examined the record, and are unable to see any ground for here holding that the trial court was not warranted by the evidence in so concluding, and in making the findings assailed.

As is frequently done by the party assailing the findings of a trial court, the attempt is made to dispose of certain evidence supporting the findings by stating reasons why it should not have been accepted by the court as true. The reasons so stated as to the positive evidence given by the defendant relating to the transaction assailed in this case may have been worthy of, and doubtless received, serious consideration at the hands of the trial court. It should not, however, be necessary to here state that the amount of credit to be given to the positive testimony of any witness is solely a question for the trial tribunal, except perhaps, where the testimony, in the light of the undisputed facts, is inherently so improbable and impossible of belief as to, in effect, constitute no evidence at all. See Fowden v. Pacific Coast S. S. Co. (Cal. Sup.) 86 Pac. 178, 182. It certainly cannot be said that defendant's testimony was of such a nature as to be placed in the category last mentioned. Much reliance is placed, in this connection, upon letters written by plaintiff to defendant, and by defendant to plaintiff, which, it is asserted, show claims by plaintiff, and admissions by defendant, to the effect that he was simply holding this land for her, and was accountable to her for the profits. We do not so read this correspondence. There is nothing therein which to our minds is inconsistent with the claim made by defendant. It is true that she frequently asked him for small amounts of money to meet her needs as they arose, but there was nothing in her letters to indicate that she did this other than as a mother who had the right to expect that a dutiful and affectionate son, to whom she had given so much, would desire to make her comfortable in her old age. He frequently complied with her requests, always apparently to the best of his ability, and his letters indicated a commendable desire on his part to keep her from want, but we cannot construe them as showing any admission on his part to the effect that plaintiff had any interest in the land.

There is much in the record, including the evidence of disinterested witnesses as to statements made by plaintiff shortly after the execution of the deed, to corroborate the defendant's testimony. It would, however, unnecessarily extend this opinion to set forth the various facts and circumstances shown by the record tending to that end, and it must suffice to state, as has already been said, that the case made was such as to fully support the conclusions of the trial court evidenced by the findings under consideration.

Certain evidence of defendant, relied on by plaintiff as showing that defendant held the land upon some understanding that he would give to plaintiff the profits thereof, referred to a time anterior to the execution of the deed, and other evidence given by him as to what plaintiff said in proposing to give him the land fails to show any understanding on the part of either that plaintiff was to be supported therefrom. The trial court, in deciding the case, undoubtedly had the right to find contrary to answers given by the jury to certain questions submitted to it. In actions of this character, a party is not entitled to a jury as a matter of right, and, if a jury be called in, it simply acts in an advisory capacity, the court being compelled to make findings of its own, and, in so doing, it is free to adopt or reject the findings of the jury as it deems proper. In determining whether the findings of the trial court are sustained by the evidence, it is immaterial that such findings are contrary to the findings of the jury.

Of the many alleged errors in the matters of the reception and rejection of evidence, but few require mention. The objections to questions asked two of the other children of plaintiff as to whether their father had left any estate to them when he died were properly sustained. The father did not die until some years after the execution of the deed by plaintiff. It was undisputed that the father conveyed practically all his property to defendant in 1881 in consideration of $3,000. There was no prejudicial error in sustaining the objection to the question asked a daughter as to whether her mother gave her any portion of her land at any time, for there was no dispute whatever as to the fact that, by the deed here assailed, she gave practically all her property to the defendant. The objection on the ground of immateriality to the questions asked the same daughter as to her financial condition since the year 1881 was properly sustained.

The other son, Guillermo, was asked as to what property he owned at the time of the execution of the deed by plaintiff to defendant, and an objection thereto was sustained. Assuming this to have been a proper question, we cannot conceive that defendant's right was prejudicially affected by the ruling under the circumstances of this case. The matter was one of very little importance, and we think the record otherwise shows that this brother had little, if any property.

A witness who drew and witnessed the execution of a deed by plaintiff in 1895, which contained a recital to the effect that the only property she then owned was the property thereby granted, being the Santa Barbara lot, over objection that he had not shown himself competent to testify on this point, stated that he then found her to be in a perfectly rational condition, and that her mind was clear. This answer was substantially simply that she then appeared to be rational, a matter as to which any witness to a transaction is competent to testify. People v. Manoogian, 141 Cal. 592, 595, 75 Pac. 177. The question asked the witness Eduardo Arellanes upon the same subject was substantially only a question as to her appearance at this time.

We cannot hold that the court erred in refusing to strike out the answer to one of the settled interrogatories in the deposition of the witness Kaiser. The answer was strictly responsive to the question, and no objection had been interposed before the reading of the answer. Plaintiff, by allowing the answer to be read without objection, waived the right to object after the reading of the answer.

We have examined each of the other alleged errors in rulings on evidence, but find nothing of sufficient importance to warrant discussion. There was no failure to find upon any material issue. The case appears to us to have been fairly tried, and the record shows no prejudicial error.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

151 Cal. 432

## WELDON v. ROGERS. (L. A. 1,800.)

(Supreme Court of California. June 22, 1907. Rehearing Denied July 22, 1907.)

1. JUDGMENT — ENFORCEMENT — STATUTES — AMENDMENT.

Code Civ. Proc. § 685, prior to April 9, 1895, provided that in all cases other than for the recovery of money the judgment may be enforced after five years from its entry by leave of the court on motion or by judgment for that purpose, founded on supplemental pleadings. On that date the section was amended by omitting the words "other than for the recovery of money," and by adding a provision that the section should not revive a judgment for the recovery of money which should have been barred by the statute of limitations at the time of the passage of the act. *Held*, that the amendment was applicable by its terms to a money judgment recovered April 2, 1891, which was not barred on the date the amendment took effect.

2. LIMITATION OF ACTIONS — EXTENSION — STATUTES.

Act April 9, 1895 (St. 1895, p. 38, c. 33), amending Code Civ. Proc. § 685, so as to authorize the enforcement of all judgments after five years by leave of court on motion or by judgment for that purpose, founded on supplemental pleadings, was in the nature of an extension of the period of limitation and a proper exercise of legislative power, so far as it applied to all judgments as to which limitations had not already run.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 10, 11.]

3. JUDGMENT—ENFORCEMENT—STATUTES.

Code Civ. Proc. § 686, declares that, notwithstanding the death of a party after judgment, execution may issue, in case of the death of the judgment creditor, on the application of his executor, administrator, or successor in interest, and section 685, as amended by Act April 9, 1895 (St. 1895, p. 38, c. 33) declares that judgment may be enforced after five years from the date of its entry by leave of the court "on motion." *Held*, that the words "motion" and "application" had the same signification, and that on the death of a judgment creditor his administratrix was not required to institute an action at law to enforce the judgment, but was entitled to an execution on motion.

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by T. J. Weldon against Ralph Rogers. From a judgment for plaintiff, defendant appeals. Affirmed.

See 82 Pac. 352.

McNutt & Hannon, Will D. Gould, and Jas. H. Blanchard, for appellant. Louis Luckel, for respondent.

McFARLAND, J. On April 2, 1891, plaintiff recovered a money judgment against defendant for $3,960, with interest and costs. Nothing was done with respect to said judgment for several years after its entry. In

August, 1894, the plaintiff died, and afterwards Sophie B. Weldon was duly appointed his administratrix. On April 10, 1905, which, of course, was more than five years after the entry of the judgment, the administratrix moved the court that an order of execution issue on said judgment under sections 685 and 686 of the Code of Civil Procedure, and on the same day such order was made by the court. The order was made without notice to defendant, who thereafter moved to set the order aside. The motion was denied by the court, and from the order denying it the defendant appeals.

Down to April 9, 1895, section 685 was as follows: "In all cases, other than for the recovery of money, the judgment may be enforced or carried into execution after five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings." On April 9, 1895, the section was amended by omitting the words "other than for the recovery of money," and leaving the section to apply to all cases; and it was also further amended by adding the following: "But nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by the statute of limitations at the time of the passage of this act." Now, appellant contends that this amendment is not applicable to the judgment involved in the case at bar, because to so apply it would be to hold it to be retroactive, and a statute is not to be construed as retroactive unless that meaning clearly appears upon its face. But, really, we do not see how any question arises here as to the retroactive operation of said amendment of April 9, 1895, to section 685. At the time of that amendment the said judgment in Weldon v. Rogers was an existing judgment not barred by the statute of limitations, and in full force and effect. The amendment was not in the nature of a revival of that judgment; it did not need revival. The applicability of the amendment to that judgment, as well as to all other live judgments existing at that time, is not, therefore, of retroactive applicability. However, the provision in the amended act that "nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by the statute of limitations at the time of the passage of this act" clearly shows that the intent of the Legislature was that it should apply to all judgments which had not been barred by the statute of limitations at the time of said amendment. And there is no doubt of the constitutional power of the Legislature to make the amendment. It was, in principle and effect, in the nature of an extension of the period of limitation of an action, and such extension is always valid when made before the former period of limitation had expired. A judgment debtor, or one against whom any cause of action exists, is subject to any change of the statute of limitations touching such judgment or other cause of action, if made before the action shall have been barred under the former law. In Swamp Land District v. Glide, 112 Cal. 90, 44 Pac. 452, this court said: "But a man has no vested right in the running of the statute of limitations until it has completely run and barred the action. And when a change in the statute is made during the time of its running, that time is not a credit to the defendant under the new law. The whole period contemplated by the new law must lapse to bar the action. Such are the general rules applicable alike to criminal and civil actions, unless the new act itself expresses a contrary intent." (Citing cases.)

2. Appellant also makes the point that the administratrix could procure the allowance of the issuance of the execution only by means of a regular action at law. This contention is mainly founded on the early case of Humiston v. Smith, 21 Cal. 130, where it was held that the old writ of scire facias was not recognized in this country, and that, as there was then no other procedure for the enforcement of a judgment after five years, it could be done only by a civil action. But afterwards section 686 of the Code of Civil Procedure was enacted, which provides that: "Notwithstanding the death of a party after judgment, execution thereon may be issued, or it may be enforced as follows: (1) In case of the death of the judgment creditor, upon the application of his executor, or administrator, or successor in interest." This provision was intended to afford, and does afford, a simple and summary mode of enforcing a judgment, and avoids the unnecessary delay and expense consequent upon using the machinery and formalities of a regular civil action. In section 685, which apparently applies to the original judgment debtors, it is provided that execution may issue after five years by leave of court "on motion"; while in section 686, which applies to administrators or successors in interest, the word used is "application" of plaintiff's successor. The words "motion" and "application" are really the same thing; "an application for an order is a motion." Code Civ. Proc. § 1003. In our opinion, the administratrix in the case at bar properly followed the procedure prescribed in section 686.

The order appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

5 Cal. App. 596

## Ex parte MOGENSEN. (Cr. 77.)

(Court of Appeal. First District, California. May 27, 1907.)

1. Intoxicating Liquors — Prohibition Ordinance—Authority.

An ordinance prohibiting saloons, etc., is authorized by Const. art. 11, § 11, authorizing towns to enforce within their limits police regulations not conflicting with general laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 21.]

2. Municipal Corporations—Power to Prohibit Business—Statutes.

So far as concerns towns of the sixth class, Pol. Code, § 3366, restricting the power of municipalities over lines of business not forbidden by law, it was repealed by implication by the amendment of the municipal incorporation act of March 9, 1903, re-enacting the municipal corporation act of 1883 (Laws 1883, p. 270, c. 49, § 862, subd. 10, authorizing the passage of ordinances not in conflict with the Constitution and laws of the state, etc.

3. Habeas Corpus—Grounds for Relief—Irregularities.

A complaint charging conjunctively, in the language of an ordinance prohibiting the keeping of saloons, etc., that defendant unlawfully and willfully did all the things prohibited by the ordinance, was sufficient on habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 25.]

4. Criminal Law—Judgment—Sufficiency.

A judgment, reciting that one was duly convicted of the crime of violating Ordinance No. 130 of the town of L., entitled "an ordinance relative to the alcoholic liquor traffic in the said town of L.," and adjudging "as punishment for the offense of violating Ordinance No. 130 of said town of L., committed as charged in the complaint as aforesaid, that defendant pay a fine of $300," sufficiently designated the offense charged.

Petition of J. P. Mogensen for a writ of habeas corpus. Petitioner remanded.

A. H. Jarman and R. F. Robertson, for petitioner. James H. Campbell, for respondent.

KERRIGAN, J. The petitioner was convicted upon a charge of violating an ordinance of the town of Los Gatos, prohibiting the alcoholic liquor traffic. He seeks, by writ of habeas corpus, discharge from the custody of the sheriff of the county of Santa Clara.

This proceeding, among other things, involves an inquiry into the validity of that ordinance. It was passed June 28, 1906, and is called "Ordinance No. 130." The part germane to this examination is as follows: "Section 1. It shall be and is hereby made unlawful for any person or persons either as owner, principal, agent, servant, employé or otherwise, to establish, open, keep, maintain, or carry on, or assist in establishing, opening, keeping, maintaining, or carrying on, within the corporate limits of the town of Los Gatos, any tippling house, dram-shop, cellar, saloon, bar, sample room, hotel or other place where spiritous, vinous, malt or mixed liquors are sold, given away, handed out, purveyed or furnished." Section 2 provides that such liquors may be sold for medicinal, chemical, and mechanical purposes as provided therein. Section 3 declares violations of the ordinance to be misdemeanors, and fixes a punishment therefor. The power to pass such an ordinance is granted in section 11 of article 11 of the state Constitution. Ex parte Campbell, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418; Ex parte Noble, 96 Cal. 362, 31 Pac. 224; Ex parte Christensen, 85 Cal. 208, 24 Pac. 747. It can only be invalidated by some general law of the state with which it is in conflict.

Petitioner contends that since the cases just cited were decided the general law has been changed by section 3366 of the Political Code, which, he argues, empowers legislative bodies of incorporated cities and towns to regulate by licensing, but not to prohibit, a business not forbidden by law. So far as towns of the sixth class are concerned, of which Los Gatos is one, this section of the Political Code was repealed by implication by the amendment of the municipal incorporation act of March 9, 1903. Ex parte Jackson, 143 Cal. 566, 77 Pac. 457. This amendment re-enacted subdivision 10 of section 862 of the municipal incorporation act of 1883 (Laws 1883, p. 270, c. 49), under which the Campbell and Noble Cases, supra, were decided. Those cases, then, are decisive of the validity of the ordinance questioned in this proceeding.

The sufficiency of the complaint is challenged on the ground that it does not state a public offense. The complaint charges conjunctively, in the language of the ordinance, that petitioner unlawfully and willfully, on or about the 18th day of September, 1906, did all the things prohibited by the ordinance. This would seem to be good even on demurrer. People v. Leyshon, 108 Cal. 442, 41 Pac. 480; People v. Ward, 110 Cal. 373, 42 Pac. 894. However, on habeas corpus this is certainly a sufficient statement of the offense intended to be charged. Ex parte Ruef (Cal.) 89 Pac. 605. In that case it is said: "On habeas corpus the inquiry into the sufficiency of an indictment is limited. We think the true rule is that, where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus."

The validity of the judgment is also challenged. It is asserted that it fails to state the offense of which the petitioner was convicted. The judgment recites that the petitioner was duly convicted of the crime of violating Ordinance No. 130 of the town of Los Gatos, entitled, "An ordinance relative to the alcoholic liquor traffic in the said town of Los Gatos," and adjudges "as punishment for the offense of violating Ordinance No. 130 of said town of Los Gatos, committed as charged in the complaint as aforesaid, that defendant Mogensen pay a fine of $300. * * *" This judgment contains a sufficient designation of the offense charged. Ex parte Patrick Murray, 43 Cal. 455.

The petitioner is therefore remanded.

We concur: COOPER, P. J.; HALL, J.

5 Cal. App. 562

## VISHER v. WILBUR. (Civ. 317.)

(Court of Appeal, Third District, California. May 21, 1907. Rehearing Denied June 20, 1907; Denied by Supreme Court July 18, 1907.)

1. Limitation of Actions—Account Stated.

When an account ceases to be open, and the balance is ascertained and assented to, it becomes a stated account, and the balance is at once subject to the operation of the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 285–298; vol. 1, Account Stated, §§ 2–8.]

2. Account Stated—Mode of Stating.

An account becomes stated when furnished to another, and he retains it for a long time without objection, as well as where the parties mutually agree upon the balance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account Stated, §§ 30–40.]

3. Limitation of Actions—New Promise—Person to Whom Made.

A letter by a decedent's debtor to plaintiff, before plaintiff became decedent's administrator, could not revive a right of action barred by limitations; plaintiff at that time, though an heir, being no representative of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 575.]

4. Same—Sufficiency of Acknowledgment.

Under the express terms of Code Civ. Proc. § 360, to revive a barred cause of action, the party to be charged must sign a writing, and, where there is no express promise to pay, the writing must contain an acknowledgment from which a promise may be implied, and such acknowledgment must be a direct and unqualified admission of an existing debt the party is willing to pay; and hence a letter, stating, "if the V. estate has any valid claim against me, I will pay it if I ever get enough money to do so," was insufficient to revive a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 593–609.]

5. Same.

A claim filed against decedent's estate, consisting of a statement of expenditures made by defendant for decedent and a balance due after deducting a sum in favor of decedent, was not an acknowledgment of indebtedness to decedent reviving a barred cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 593–609.]

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by Putnam Visher, administrator of Sebastian Visher's estate, against I. R. Wilbur. Plaintiff appeals from a judgment for defendant. Affirmed.

A. H. Carpenter, for appellant. S. D. Woods, for respondent.

HART, J. The complaint in this action alleges: "* * * That on or about the 1st day of January, 1894, one Sebastian Visher deposited and left with the defendant, I. R. Wilbur, the sum of $1,722.77, lawful money of the United States, upon the express agreement and condition that the same should be held by the said I. R. Wilbur in trust for the said Sebastian Visher and should draw interest from the time of such deposit to the time of payment at the rate of 7 per cent. per annum, and that the same should be paid to the said Sebastian Visher upon his demand therefor." Following this allegation is an averment that on the 1st day of April 1896, the defendant rendered to the deceased an itemized statement, showing the original balance due from said defendant to said Sebastian to be the sum of $1,993.95, and also showing various items of expenditure made by defendant for and on account of said intestate of plaintiff, aggregating the sum of $1,309.60, leaving, at the time of the rendering of said statement, the sum of $684.35 still due and unpaid. It is this last-mentioned sum which the plaintiff in his complaint alleges to be the money held by defendant in trust for the benefit and use of his intestate during the lifetime of the latter. By the complaint we are informed that Sebastian Visher died intestate on the 15th day of November, 1898, in San Joaquin county, and that on the 28th day of December, 1903, the plaintiff, having previously made due application therefor, was granted, by the superior court of San Joaquin county, letters of administration upon the estate of said deceased. It is alleged that, after his appointment as such administrator, the plaintiff made demand upon the defendant for payment to and settlement with him as such representative of the estate of the deceased, of the amount shown to be the balance due said estate by the statement rendered to deceased in his lifetime by said defendant. The answer denies that the defendant is or was indebted to the deceased at the time of his death, or at any other time, or to the estate of said deceased, in the sum mentioned in the complaint, or in any other amount. It is alleged that the defendant, prior to the death of said Sebastian Visher, paid to the latter all moneys due said Visher from defendant. There are other allegations in the answer directly declaring that certain specified sums of money were expended by the defendant for and on behalf of the deceased previous to his death, at the latter's request, and that, in addition to such expenditures, the defendant permitted the deceased, during his life, and for a long time prior to his death, to collect and appropriate to his own use the rents of a certain house in the city of Stockton, of which defendant was the owner; the total sum of said rents so collected by deceased being $465. That it was at all times understood between them that the rents so collected "should be applied in payment on account, or in full as the case might be, of any moneys on any account whatever due from the said defendant to the said Sebastian Visher." The answer also pleads the statute of limitations, in "that said action is barred by the provisions of section 337 of the Code of Civil Procedure. The defendant had judgment, from which, upon a bill of exceptions, plaintiff presents this appeal.

The evidence taken consisted mainly of the testimony given by the defendant. The court found: "That it is not true that on or about the 1st day of January, 1894, Sebastian Visher deposited and left with the defendant the sum of $1,722.77, * * * or any other sum upon any agreement or condition that the same should be held by the defendant in trust for said Sebastian Visher. That it is not true that on or about the 1st day of April, 1896, or at any other time, the said defendant made or gave to said Sebastian Visher a statement in writing of the amount of moneys held by him in trust for said Sebastian Visher as set forth and alleged in said complaint or otherwise." The third finding of the court is as follows: "It is true that on or about the 1st day of April, 1896, the said defendant made and gave to Sebastian Visher the written statement of account in the words and figures as set forth in said complaint, and that said written statement of account was made and given by the said defendant to said Sebastian Visher as the written statement of account of the amount then due from the said defendant to said Sebastian Visher on account of moneys theretofore due to said Sebastian Visher from said defendant as the interest remaining unpaid upon a certain promissory note theretofore existing between the said defendant and said Sebastian Visher for the sum of $12,000. That the said written statement of account was made and given by said defendant to said Sebastian Visher notwithstanding the fact that on the 9th day of August, 1890, the said defendant paid said Sebastian Visher the sum of $7,475 as the balance on said promissory note, less the said sum of $1,722.-77, and received from the said Sebastian Visher a receipt in the words and figures as follows: 'Stockton, August 9th, 1890. Rec'd of I. R. Wilbur the sum of seven thousand and four hundred and seventy-five dollars in full of all demands to date. S. Visher.'—and received from said Sebastian Visher the said promissory note." Findings 4 and 5 are to the effect that, subsequent to the making and giving of said written statement of account, the defendant paid to said Sebastian or for and on his account various sums of money, amounting in the aggregate to the sum of $329.84, and that said Visher collected and kept for his own use rents for the house of defendant in the total sum of $465, and that, in addition thereto, the defendant gave to and paid out on account of said Visher other sums of money, aggregating in amount between $2,000 and $3,000. It is found by the court that the expenditures by defendant to and for the deceased involved in the last-mentioned sum "were not given or paid out on account of the said written statement of account, but were gifts made by the said defendant to the said Sebastian Visher and not otherwise." The court also finds "that the said cause of action set forth in said complaint is barred by the provision of section 337 of the Code of Civil Procedure of this state."

It would serve no useful purpose to present or attempt an elaborate review of the facts established by the evidence contained in the record. It may, however, be well to remark, as affording some explanation of the reason for the gifts found by the court to have been made by the defendant to the deceased, in the latter's lifetime, that the defendant was the son-in-law of the deceased; that the most amiable and cordial personal relations appeared to have always existed between them —in fact, their personal relations seem to have been marked by unusual filial affection for and toward each other. There had been carried on by and between them business dealings for many years, and the evidence indicates that it was the desire of the defendant at all times to aid and assist his father-in-law to prosper in business. We have closely examined the record and think the findings of the trial court are abundantly supported by the evidence. That the cause of action set forth in the complaint is barred by the provisions of section 337 of the Code of Civil Procedure we think the evidence clearly establishes. The language of that section is to the effect that the time within which an action may be commenced "upon any contract, obligation, or liability founded upon an instrument in writing executed in this state," shall be four years after such cause of action shall have accrued.

Counsel for appellant alleges in his complaint, and he argues in his briefs, the case principally from that standpoint, that the relations existing between the defendant and the deceased in the latter's lifetime were, as to the money to recover which this action is brought, those of trustee and cestui que trust; or, in other words, that said money was deposited by the deceased with the defendant upon the express understanding and condition that the same should be held in trust by defendant for the benefit and use of said Sebastian Visher. There is much force in the suggestion of counsel for the respondent that, upon the theory that the object of the action is the enforcement of a trust, there results such a wide variance between the allegations of the complaint and the proofs that a judgment responding to that issue would find exceedingly frail, if any, support from findings founded upon the evidence presented by the record. The evidence indisputably shows the relations of the parties to have been at all times nothing more than the ordinary relations of debtor and creditor, and that the particular transaction from which the alleged indebtedness arose was in no manner impressed with the qualities of a trust. There is nothing in the written statement of account, as pleaded in the complaint, from which it may be inferred that the moneys to which it relates were deposited with the defendant to be by him held in trust for the deceased. On the contrary, the statement, upon its face, is of a character to indicate that it was only intended as an adjustment of certain accounts between the parties. The prayer of the complaint, while, of course, not the test for the determination of the appropriate relief demanded by the allegations of the complaint, in effect asks for a judgment for money had and received on an account stated. The evidence, the court finds, shows that the transaction involving the execution of the promissory note by the defendant to the deceased was closed on the 9th of August, 1890, on which day the defendant paid to Visher the sum of $7,475, and received from the latter the note and a receipt acknowledging payment "in full of all demands to date." The defendant testified that, about two years after the circumstance of the payment by him to Visher of the sum of $7,475, the latter visited him at his office in San Francisco, and declared that he had spent all his money and was therefore without means; that he was apprehensive that he would not leave, upon his death, sufficient means with which to defray his funeral expenses, etc. The defendant thereupon assured Visher that he (defendant) would attend to the matter of funeral expenses, and that he (Visher) would never want for the necessities of life while he lived so long as defendant had means. The latter then said to Visher that there was still due him (Visher) from defendant on the note surrendered on the 9th of August, 1890, by Visher to defendant, interest amounting approximately to the sum of $1,700, and that he (defendant) would pay such interest, and render to him (Visher) a written statement to that effect. Visher insisted that defendant owed him nothing, and declared that defendant had already done too much for him. The deceased said, however, that if the defendant would send him a statement, pretending to show sufficient money due him from defendant to meet his funeral expenses, he might, by being able to exhibit such statement, receive better treatment at home. Thereafter, and in pursuance of that understanding, the defendant prepared and sent the deceased the written statement set out in the complaint. It is thus apparent that, whatever might have been the reason or motive of defendant in sending to deceased the statement in question, the document constituted, if anything, an adjustment of the accounts between the parties. And "as soon as an account ceases to be open, and the balance is ascertained and assented to, it becomes a stated account, and the balance is at once subject to the operation of the statute; and an account becomes a stated account when it is furnished to another and he retains it for a long time without objection, as well as where the parties mutually agree upon a balance. Wood on Limitations (3d Ed.) § 280; Angell on Limitations, § 150; Auzerais v. Naglee, 74 Cal. 68, 15 Pac. 371.

But counsel for appellant, evidently persuaded that the trust theory of his complaint is utterly untenable under the evidence adduced, contends that several letters written by the defendant and a claim filed by him against the estate of the deceased, which were received in evidence, amount to such an acknowledgment in writing of the proscribed liability as to warrant the implication of a new promise, and thus the right of action thereon has been revived. These letters were, with one exception, written prior to the appointment of plaintiff as administrator of the estate of the deceased, and all of them, with the exception of one, which was written to plaintiff's wife, were addressed to the plaintiff. Assuming that those written prior to appellant's appointment as administrator contain language which would constitute, if written to the creditor or his agent duly authorized to act for him with reference to the particular matter, a sufficient acknowledgment to take the debt out of the operation of the statute, we cannot see how such letters, having been addressed to persons between whom and the defendant there was no privity of contract, could in any view have the effect of reviving the right of action upon the indebtedness pleaded and to which it is claimed they refer. The plaintiff, at the time of the receipt of the letters, while interested as an heir in whatever estate the deceased might have left, was not an agent or representative of or otherwise duly authorized to act for and in behalf of the estate. The test would be, it seems to us: Was the party to whom the acknowledgment, if any, was made, legally competent to make a contract with respect to the subject as to which the statute had run? Could the plaintiff, before appointment as administrator, have legally negotiated and consummated a binding contract in behalf of the estate? "Under the modern rule," says Wood on Limitations (3d Ed.) § 79, "that an acknowledgment or promise must be such as fairly raises an implied promise to pay the debt, it follows as a matter of course that the acknowledgment or promise must not only be made by a person legally competent to contract, but must also be made to the creditor himself, or some person duly authorized to act for him in that regard, so that a new contract, resting upon the old one for its consideration, may be set up in reply to the statute, if it is pleaded by the defendant; and if it is made to an agent of the creditor, in order to make it operative it must appear that the debtor at the time knew that the person to whom the acknowledgment or promise was made was acting as the agent of the creditor." See, also, Farrell v. Palmer, 36 Cal. 189, and Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609.

But, even if these letters, so addressed to plaintiff before he became vested with any legal power over the estate and its affairs, could properly be construed to have been addressed to one having the authority to contract for the estate (and it seems that upon principle they cannot be so construed), it is clear that their language cannot be construed either into an express promise to pay, or an acknowledgment from which a promise to pay the old debt can be implied by the law. There is nothing in the language of the letters which indicates that they refer to the particular claim upon which plaintiff declares with that clearness, directness, and distinctness made requisite in such a case by the law; nor, in fact, is it even of that direct, distinct, and unequivocal nature as to any pre-existing liability which is essential to an acknowledgment from which the law may imply a promise. It is, of course, well understood that, in order to resuscitate a cause of action which has once been relegated to a state of repose by the operation of the statute of limitations, it is necessary under the law (section 360, Code Civ. Proc.) that there must have been executed, as to the debt, obligation, or liability originally giving rise to such cause of action, an instrument in writing, signed by the party to be charged. This is not only true, but where there is no express promise such instrument must contain an acknowledgment from which the law may imply a promise to pay. Biddel v. Brizzolara, 56 Cal. 382. And such acknowledgment must be a direct and unqualified admission of an existing debt which the party is willing to pay. Biddel v. Brizzolara, supra; McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Farrell v. Palmer, 36 Cal. 187. "If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the promise or intention to pay, if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action." Mr. Justice Story, in Bell v. Morrison, 1 Pet. (U. S.) 362, 7 L. Ed. 174.

The first letter addressed to the plaintiff by the defendant upon the subject of the alleged debt due the estate from defendant was written under date of May 18, 1903, over seven months prior to plaintiff's appointment as administrator, etc., and was evidently occasioned by a demand made upon defendant for a settlement of the balance which appeared to be due the deceased from the statement referred to. This letter, which is of considerable length (and which was admitted in evidence upon the offer of the defendant), from its beginning to its conclusion, repeatedly declares that at the time of the death of plaintiff's intestate the latter was indebted to the defendant in a large sum of money, and that the defendant owed the deceased nothing at the time of his death. This statement, he asserts, he could establish to the satisfaction of plaintiff if the latter would call at his office and inspect his books and papers showing the accounts between the deceased and the defendant. A garbled quotation from this letter by appellant in his brief, embracing only a part of the only sentence in the letter upon which he could place any construction favorable to his contention, can afford him no comfort, because there is nothing in the quoted language from which any sort of an acknowledgment of the old debt may be drawn. The second letter, under date of June 12, 1903, written, it will be noticed, over six months before plaintiff was appointed administrator of the estate, reiterates the denial that defendant was in any way or to any extent indebted to Visher at his death. The letter dated March 15, 1904, addressed to plaintiff, is brief, and reads as follows: "Dear Sir and Brother: Your favor of the 14th is just received and noted. In answer will say that if the Visher estate has any valid claim against me I will pay it, if I ever get money enough to do so. Please send me the claim." There was also received in evidence a letter dated October 14, 1900, signed by the defendant, and addressed to the wife of plaintiff, which letter, even if it were material to the issue here, does not refer, either directly or indirectly so far as it may be determined from the language of the letter itself, to the claim relied upon in the complaint. It is thus to be observed that the only one of the mentioned letters, upon which appellant can by any possibility rest the contention that the defendant has acknowledged the claim relied upon in this action, is the one dated March 15, 1904, written after letters of administration had been issued to plaintiff. This letter, it must be apparent, from an inspection thereof, is not an unqualified and unconditional acknowledgment by defendant of any claim or debt which might have existed against him in favor of the deceased or his estate. Construed, as it should be, in connection with the defendant's letters of May 18, 1903, and June 12, 1903, in which, as seen, he made an unqualified denial of any indebtedness of whatsoever nature, and particularly of the debt in dispute, this letter plainly means that, while denying, because not aware of, the existence of any claim upon him by the Visher estate, the defendant would be willing to pay any valid claim which he might be convinced said estate held against him. There is nothing in the letter from which it can, with any show of reason, be implied that the defendant admitted the validity of or promised to pay the claim sued upon, or any part thereof. As we have seen, and as is obvious, the letter neither in terms nor by reasonable implication refers to the specific claim upon which the action is brought. The language of the letter constitutes neither an express promise nor an acknowledgment from which the law could imply a promise. It is a vague, indeterminate, and conditional declaration that if the estate has any valid claim against the defendant he "will pay it if I ever get money enough to do so." The letter in question does not, in fact, contain an acknowledgment from which even a conditional promise to pay the specific debt declared upon could be implied; but, if the letter could be so construed, such conditional promise is not the promise pleaded. "In an action brought upon one promise a plaintiff cannot recover upon proof of another." Curtis v. City of Sacramento, 70 Cal. 416, 11 Pac. 748; Rodgers v. Byers, 127 Cal. 531, 60 Pac. 42, and cases therein cited.

There is no merit in the point that the claim filed by the defendant against the estate of the deceased after the appointment and qualification of the administrator carries with it an acknowledgment of the old debt. The claim consists of an itemized statement of expenditures made by the defendant for and on account of the deceased in his lifetime and a balance due defendant of $209.84 after deducting the sum of $684.35 in favor of the deceased from the total amount of $894.19, claimed to have been so expended for deceased by the defendant. The claim does not, it is readily seen, acknowledge any indebtedness to the deceased or the estate; but, on the contrary, negatives such inference, and would not, of course, have been filed but for the claim of the defendant that the estate was indebted to him and not he to the estate.

Complaint is made that the court erred in a number of rulings upon the admissibility of evidence to the prejudice of appellant's rights. We have examined the record with care, and have found no errors prejudicial to appellant, either in the rulings or the findings of the court. The evidence, as previously stated, fully supports the findings, and from every standpoint from which the record may be viewed, we think the judgment is in perfect harmony with the facts and the law.

The judgment appealed from will therefore be affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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5 Cal. App. 577

## Ex parte SWEETMAN. (Cr. 84.)

(Court of Appeal, First District, California. May 24, 1907.)

1. Licenses—Failure to Obtain—Criminal Responsibility — Ordinances — Laws of the State.

Municipal ordinances are laws of the state within the provisions of Pen. Code, § 435, making it a misdemeanor for a person to carry on any calling, for the transaction of which a license is required by any law of the state, without taking out or procuring the prescribed license.

2. Intoxicating Liquors—Licenses—Municipal Corporations — Ordinances — Conflict with Statutes.

An ordinance of a city, whose freeholders' charter was adopted prior to the constitutional amendment of 1896, relieving the provisions of such charters in municipal affairs from the control of general laws, which provides a penalty for selling intoxicating liquors without a license, in conflict with the penalty prescribed by Pen. Code, §§ 435, 19, making the offense a misdemeanor, and providing for its punishment, is to that extent void.

3. Municipal Corporations—Charter—Conflict with General Law.

A city charter adopted prior to the constitutional amendment of 1896, relieving the provisions of such charters in municipal affairs from the control of general laws, which authorizes the municipality to fix the penalty for carrying on without a license a business for which a license is required, conflicts with Pen. Code, §§ 435, 19, defining the offense, and prescribing its punishment, and was, to that extent, void at the time of its adoption.

4. Same.

So far as a city charter was void when adopted because fixing a penalty for carrying on a business for which a license is required, without a license, in conflict with the general law of the state, it was not validated by the subsequent amendment of the Constitution relieving the provisions of such charters from the control of general laws.

5. Criminal Law—Judgment—Validity.

Where a person was convicted under an ordinance which was void as providing a penalty for selling intoxicating liquors without a license, in conflict with the general law of the state, but the judgment was in terms authorized by the general law, it is valid.

Application by Walter Sweetman for a writ of habeas corpus. Petitioner remanded to custody.

Brewton A. Hayne and Roland C. Becsey, for petitioner. Redmond C. Staats, for respondent.

HALL, J. Petitioner asks to be discharged from custody under a judgment rendered by the justice court of the town of Berkeley, upon his conviction of a misdemeanor for maintaining a place where alcoholic liquors were sold, without having a license therefor as required by the ordinance of the town of Berkeley. The judgment imposes a fine of $500 upon petitioner, with the usual alternative of imprisonment not exceeding six months in default of payment.

It is insisted by petitioner that both the charter of the town of Berkeley and the ordinance under which petitioner was prosecuted limit the fine that may be imposed to the sum of $300, and that therefore the judgment being for a greater sum, is void. On the other hand, respondent insists that the offense committed by petitioner is made punishable by the general law of the state, to wit, sections 435 and 19 of the Penal Code, and that said sections are controlling, and as the judgment is in terms authorized by said sections it is valid. No point is made by petitioner that the complaint does not charge petitioner with carrying on a business without having a license therefor, or that the ordinance does not require a person conducting such business to have a license therefor. We have therefore not critically examined the ordinance or the complaint in this respect. But see Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775.

The charter of the town of Berkeley is a "freeholders' charter adopted in 1895, and therefore antedates the amendment to the Constitution of 1896, relieving provisions of such charters in municipal affairs" from the control of general laws. The charter of the town of Berkeley provides as follows: "Sec. 50. The board of trustees shall have power: (1) * * * (5) To license for purposes of regulation and revenue all and every kind of business not prohibited by law to be transacted or carried on in said town, and all shows, exhibitions and lawful games carried on therein; to fix the rates of license upon the same, and to provide for the collection of the same by suit or otherwise. * * * (21) To impose fines, penalties and forfeitures for any and all violations of ordinances, and for breach or violation of any ordinance, to fix the penalty by fine or imprisonment, or both, but no such fine shall exceed three hundred dollars, or such imprisonment exceed three months. * * * (24) To do and perform any and all other acts and things necessary and proper to carry out the provisions of this charter, and to enact and enforce within the limits of the town all other local, police and other regulations as do not conflict with the general laws." The penal clause of the ordinance violated by petitioner conforms to subdivision 21 of section 50, and provides for a fine of not less than $50 nor more than $300, or imprisonment of not less than 30 days nor more than 90 days, or both such fine and imprisonment. At the time of the adoption of the charter of the town of Berkeley, and ever since such time, the general law of the state made it a misdemeanor, punishable by fine not exceeding $500, or imprisonment not exceeding six months, or both, for any person to commence or carry on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law. Sections 435, 19, Pen. Code. And municipal ordinances are laws of this state within the meaning of section 435, Pen. Code. In re Lawrence, 69 Cal. 611, 11 Pac. 217; Ex parte Christensen, 85 Cal. 208, 24 Pac. 747.

The language of subdivision 21 of section 50 of the Berkeley charter is broad enough, standing alone, to authorize the town trustees to prescribe that for carrying on a business for which a license is required, without first obtaining such license, a fine not exceeding $300, or imprisonment not exceeding three months, shall be imposed. That a municipal ordinance that should prescribe that for a given offense a fine not exceeding $300 may be imposed is contrary to a general law providing that for the same offense a fine not exceeding $500 may be imposed, seems to us too clear for serious argument. Indeed, it has been held in this state that a conflict exists where an ordinance provides a penalty for the same acts that are punishable under the general law, and that the penal clause of such an ordinance is void. In re Sic, 73 Cal. 142, 14 Pac. 405; Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775; Ex parte Stephen, 114 Cal. 278, 46 Pac. 86. In Ex parte Mansfield, supra, the penal clause of a license ordinance prescribed a fine of not less than $150, and not more than $500, for carrying on the business of selling liquor without procuring a license therefor; and it was held that such penal clause conflicted with section 435 of the Penal Code, and was for that reason void, but that the judgment in the case was valid under the provisions of the Penal Code. In Ex parte Stephen, supra, the ordinance provided that any one carrying on the liquor business without first procuring a license shall be guilty of a misdemeanor, and punishable by fine of not less than $50 nor more than $200, or by imprisonment for not less than 100 days. The petitioner was fined $250 with the usual alternative of imprisonment. It was held that the judgment was good under sections 435 and 19 of the Penal Code, and that the penal clause of the ordinance was void. The court said: "For that portion of section 1 prescribing the punishment must be held void as in contravention of the general law of the state. It undertakes to punish the same act—carrying on a business without having a license therefor—which is punishable under section 435 of the Penal Code."

If an ordinance that attempts to fix the penalty for carrying on a business, for which a license is required, is to that extent in conflict with sections 435 and 19 of the Penal Code, and therefore to that extent void, it seems to us clear that any provision of a municipal charter, which authorizes the municipality to fix the penalty for carrying on such business without a license therefor, conflicts with the same sections, and for that reason, if adopted prior to the amendment to the Constitution of 1896, void at the time of its adoption. The language of subdivision 21 of section 50 of the Berkeley charter must be limited in its effect to giving to the board of trustees power to fix penalties for such violation of ordinances as are not covered by the general law of the state. So far as the said section attempts to authorize the board of trustees to fix any penalty for carrying on a business without procuring a license therefor, it was at the time of its adoption in conflict with sections 435 and 19 of the Penal Code, and therefore to that extent void. Ex parte Sic, supra; Ex parte Mansfield, supra; Ex parte Stephen, 114 Cal. 278, 46 Pac. 86. So far as a charter was void at the time of its adoption it is still void, notwithstanding the amendment to the Constitution of 1896. This principle is established by Banaz v. Smith, 133 Cal. 102, 65 Pac. 309.

It thus follows, from what we have said, that there is not now, and never has been, any authority in the board of trustees of the town of Berkeley to fix a penalty for carrying on a business without procuring a license therefor. Under subdivision 5 of section 50 of the charter of Berkeley, the trustees may require a license to be paid for the carrying on of any lawful business, but when it has done that the general law of the state (sections 435 and 19, Pen. Code) makes the carrying on such business without procuring such license a misdemeanor, and fixes the penalty therefor. The fact that the ordinance in this case was passed subsequent to the adoption of the amendment to the Constitution of 1896 makes no difference. The validity of the ordinance depends upon the power of the board of trustees, which, as we have seen, does not exist to fix any penalty for the offense provided for by sections 435 and 19 of the Penal Code.

The judgment against the petitioner is valid under sections 435 and 19 of the Penal Code, and he must be remanded to the custody of the sheriff of Alameda county, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

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### Ex parte HUILLADE. (Cr. 85.)

(Court of Appeal, First District, California. May 24, 1907.)

Application by August Huillade for a writ of habeas corpus. Petitioner remanded to custody.

Brewton A. Hayne and Roland C. Becsey, for petitioner. Redmond C. Staats, for respondent.

HALL, J. This case involves precisely the same points as are involved in Ex parte Sweetman (this day decided) 90 Pac. 1069, and for the same reasons as are set forth in the latter case it is ordered that petitioner be remanded to the custody of the sheriff of the county of Alameda.

We concur: COOPER, P. J.; KERRIGAN, J.

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5 Cal. App. 581

### TOWNSEND v. DRIVER et al. (Civ. 325.)

(Court of Appeal, Second District, California. May 24, 1907.)

1. QUIETING TITLE—NATURE OF ACTION.

An action to quiet title is one for the recovery of real property, which is the subject-matter thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 1-4.]

2. PARTIES—INTERVENERS—ORDER OF INTERVENTION—EFFECT.

An order granting leave to intervene in a suit to quiet title is a determination that intervener has an interest in the matter in litigation, and under Code Civ. Proc. § 387, he is entitled as a party to avail himself of the procedure and remedy to which defendant is entitled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 74.]

3. PARTIES—INTERVENERS—RIGHTS.

Where the only relief sought by interveners in a suit to quiet title was that plaintiff should take nothing and that the interveners should recover costs, the position of the interveners was that of plaintiff in intervention uniting with defendant in resisting the demands of plaintiff in the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 74.]

4. SAME.

The inaction of a defendant in a suit to quiet title, resulting in a default judgment against him, does not preclude an intervener from obtaining relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 74.]

5. SAME—DISMISSAL AS TO INTERVENERS.

A plaintiff in a suit to quiet title may dismiss the same as to interveners, where the relief sought by them is that plaintiff take nothing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 75.]

6. SAME.

Where the court, in a suit to quiet title, has determined by its order that a party has an interest in the subject-matter of the suit and should be permitted to litigate such interest therein, plaintiff cannot, either under Code Civ. Proc. § 581, relating to dismissals of actions, etc., or independent thereof, annul the order by dismissing the action as to the intervener; and, unless the court vacates the order of intervention, plaintiff, seeking relief under the action, must meet the issues raised by the complaint in intervention.

7. DISMISSAL—RIGHT TO DISMISS.

The court, in a suit to quiet title, after granting leave for one to intervene therein, cannot dismiss the action, either as an entirety or as against parties, except as authorized by Code Civ. Proc. § 581; and any judgment not authorized by that section must, under section 582, be on the merits.

8. PARTIES—INTERVENTION—PROCEEDINGS IN CAUSE AFTER INTERVENTION.

Where, in a suit to quiet title, the court granted leave for one to intervene, and the issues of fact tendered by the complaint in intervention were undetermined, the determination of such issues could not be had, in the absence of the parties in intervention, without previous service of the notice prescribed in Code Civ. Proc. § 594, unless notice was waived.

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Charles Z. S. Townsend against Philip S. Driver and others, in which the San Diego Realty Company and others intervened. From a judgment quieting title, and from an order denying a motion to vacate the judgment, the interveners appeal. Reversed and remanded.

Smith & Holcomb, for appellants. Mills & Hizar, for respondent.

ALLEN, P. J. Appeal from a judgment quieting title and from an order denying motion to vacate such judgment. Plaintiff filed his complaint under section 738, Code Civ. Proc., for the purpose of determining adverse claims to certain described real estate. To this complaint appellants were not made parties; but the court by its order, good cause appearing, granted appellants leave to intervene, which they did by filing their several complaints in intervention, denying plaintiff's ownership of the premises, or that he was in possession or entitled to possession thereof, and each complaint in intervention alleging further that interveners were the owners and entitled to possession of specified portions of the lands described in the complaint. Thereupon the attorneys for plaintiff filed in the clerk's office a written direction to the clerk to enter a dismissal of the action as to certain named defendants, in which appear the names of interveners. Afterwards, and without notice of any character to interveners, the court ordered the default of certain defendants not included in the order of dismissal to be entered, and gave judgment against such defendants, wherein the court decreed that plaintiff was the owner and in possession, and entitled to the possession, of all the premises in the complaint described, and quieted plaintiff's title therein, in which judgment it is recited that plaintiff, appearing by his attorneys, dismissed as to defendants (naming those mentioned in the direction to the clerk). But in neither the order to the clerk nor the judgment are interveners designated as such; nor does it appear that any order was made by the court vacating its order granting leave to intervene, unless the recital in the judgment of the action of the attorneys be construed as such order. Interveners, within due time, moved the court to vacate and set aside its judgment, because no notice of the trial of the action was given interveners or their attorneys, which motion was denied, and said judgment duly entered in the judgment book, from which judgment, and from the order refusing to vacate the same, appellants duly appeal upon a bill of exceptions.

The action to quiet title is one for the recovery of real property. South Tule, etc., Ditch Co. v. King, 144 Cal. 455, 77 Pac. 1032. The real property so sought to be recovered is, therefore, the subject-matter of such action. The order of the superior court granting leave to intervene determined that interveners had an interest in the matter in litigation, and under section 387, Code of Civil Procedure, were entitled as parties to avail themselves of all of the procedure and remedies to which the defendants were entitled for the purpose of defeating the action or resisting plaintiff's claim. People v. Perris Irr. Dist., 132 Cal. 290, 64 Pac. 399, 773. It appears from the bill of exceptions that interveners served and filed their complaints, setting forth the grounds upon which their intervention rested, due service of which is certified in the bill, which must be accepted as service upon all parties to the action, as required by section 387, Code of Civil Procedure, and the claim to the subject-matter is an interest adverse to both plaintiff and defendants. The only relief sought, however, by these complaints in intervention, was that plaintiff take nothing and that interveners recover costs. Under the law, their position was thereafter that of "plaintiff in intervention, uniting with the defendant in the cause in resisting the demands of plaintiff in the cause." St. Charles R. R. Co. v. Fidelity, etc., Co., 33 South. 574, 109 La. 491. The inaction of the defendants in permitting their default does not preclude intervener from his relief. People v. Perris Irr. Dist., supra. That plaintiff in such action may dismiss the same, where the relief sought by interveners is only "that plaintiff take nothing," is determined in Henry v. Vineland Irr. Dist., 140 Cal. 377, 73 Pac. 1061. The reason assigned is that "by a complete dismissal of the action plaintiff has consented to take nothing, and thereby the ends of the intervention are accomplished."

But in this case plaintiff does not so elect, but seeks to maintain his action against certain defendants, and proceeds to judgment against them, and by such judgment takes the relief sought. After the court has determined by its order that a party has an interest in the subject-matter of a suit and should be permitted to litigate such interest therein, it is not within the power of the plaintiff, either under the provisions of section 581, Code of Civil Procedure, or otherwise, to annul such order of the court by dismissing the action as to such parties; and, unless the court vacates the order permitting intervention, the plaintiff, so long as he seeks relief under the action, must meet such issues raised by the complaints in intervention. There is nothing in the record to justify the conclusion that the court vacated its original order permitting intervention. The dismissal was directed by the plaintiff, and the judgment only purports to recite such action on the plaintiff's part, and does not purport to make any order or direction upon the part of the court. The doctrine of intendment in favor of a judgment cannot be carried to the extent of presuming that done by the court which it directly declares to have been done by a party to the action. Nor could the court under our practice, dismiss an action, either as an entirety or as against parties, except as authorized by section 581, Code of Civil Procedure. Any judgment of the court not authorized by that section must be upon merits. Section 582, Code Civ. Proc. Hence, were we to construe the language of the recital in the judgment as an attempt upon the part of the court to order a dismissal as to the interveners, it would be unauthorized. There is nothing in Alpers v. Bliss, 145 Cal. 571, 79 Pac. 171, establishing a different proposition.

Interveners, then, being parties by authority, and the action still pending, and no order of the court being entered vacating the former ex parte order permitting intervention, and the issues of fact tendered by the complaints in intervention being still undetermined, the court could not hear and determine such issues in the absence of the adverse parties without the five days' notice prescribed by section 594, Code of Civil Procedure, unless such notice was waived by the interveners directly, or some act amounting to a waiver is made to appear. There is nothing in the record indicating notice or waiver thereof upon the part of the interveners. The court erred in refusing to vacate said judgment so rendered, and in entering a judgment granting the relief to plaintiff, before the issues of fact were heard and determined.

It is ordered that the order refusing to vacate the judgment, and the judgment so entered, be reversed, and the cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

5 Cal. App. 626

DONEGAN v. HOUSTON et al. (Civ. 342.)

(Court of Appeal, Second District, California. May 28, 1907.)

1. WORK AND LABOR—DECLARATION—SUFFICIENCY.

In an action for an agreed price for doing certain grading, etc., where the complaint was in effect an indebitatus assumpsit count at common law and declared upon an executed contract, but it lacked the ordinary allegations of indebtedness and that the services were rendered at defendant's request, those averments were not necessary, since the consideration, as well as the promise, were implied from the nature of the transaction declared on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, § 41.]

2. SAME.

Though the complaint did not contain a count on a quantum meruit, but there was testimony to show that the work agreed upon was done, as well as the extra work, and there was no attack made upon the pleading, nor objection to the testimony, the action in one count for the total sum due was sufficient to support a judgment for plaintiff.

3. CONTRACTS—CERTIFICATE OF ENGINEER—FAILURE TO OBTAIN—EXCUSE—SUFFICIENCY OF EVIDENCE.

Where the defense was that the work was done under a written contract by the terms of which the work was to be done to the satisfaction of a certain engineer and testified to by his certificate, and that the certificate was not furnished, evidence as to the work being done and the reason for the engineer withholding his certificate considered, and *held* sufficient to sustain a verdict for plaintiff.

4. SAME—SUFFICIENCY OF COMPLAINT.

The evidence showed that the work was done and that the engineer's certificate was withheld without proper grounds. *Held*, that the complaint was sufficient to sustain a judgment for plaintiff, without specifically pleading the fraud or excuse for withholding the certificate, especially in view of the issues tendered by the answer.

5. PLEADING—COMPLAINT—LACK OF NECESSARY AVERMENTS CURED BY ANSWER.

A complaint which lacks the averment of a fact essential to a cause of action may be so aided by the averment or express denial of that fact in the answer as to uphold a judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1343.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by D. F. Donegan against H. R. Houston and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Russ Avery, for appellants. H. L. Dunnigan, Haas, Garrett & Dunnigan, and Charles H. McFarland, for respondent.

TAGGART, J. This is an action to recover for grading and excavating done by plaintiff for defendants on 15 acres of land in the city of Los Angeles. Judgment was for plaintiff, and defendants appeal from the judgment and order denying a new trial.

The complaint alleges the cause of action in the following language: "Now comes the plaintiff, and says that within the last two years past he did grading and excavating for the defendants, for which they agreed to pay him the sum of $6,173." By answer, counterclaim, and cross-complaint defendants set out a special contract in writing between plaintiff and defendants, under which, it is alleged, all the grading and excavating involved in this action was done by plaintiff. By the terms of this contract the grading was to be done to the satisfaction of one S. O. Wood, civil engineer, and be testified to by his certificate in writing. It is alleged that plaintiff failed to perform his part of the contract in time, or at all, was unable to procure the certificate of the engineer, and abandoned the work and failed to complete it; that defendants were compelled to expend certain sums in finishing portions of the work and suffered certain alleged damages by reason of the delay and failure of plaintiff to complete the grading according to contract. The plaintiff's answer to the latter pleadings denies each and all the allegations mentioned, and the findings of the court expressly, or in effect, negative them all. The court also finds that plaintiff performed work in grading and excavating for the defendants and that they agreed to pay him therefor as alleged in the complaint; that all the work done by plaintiff was done on the property described in defendants' pleadings, but that it was not all done under the contract pleaded therein. The court does not segregate the amount due for work under the contract from that due for other work, but finds there is now due to plaintiff from defendants $2,019, with interest, and the judgment is for that amount.

Appellants present their case on appeal as if the plaintiff had brought his action on the contract and attempted to introduce evidence to excuse his failure to secure the certificate from the engineer without an allegation in his pleading to support it. They also contend that for this same reason the pleading does not support the finding of the court that "it is not true that the grading was not done in a workmanlike manner and to the satisfaction of the engineer or defendants or either of them" (following the language of the allegation in defendants' pleadings). It is further contended that the extra work testified to by plaintiff should have been excluded from the judgment, because it could only be supported by a pleading counting on a quantum meruit, and there was, and is, no such count in the complaint. No attack is made upon the sufficiency of the complaint, by demurrer or otherwise, and no objections were taken to the testimony introduced, and no exceptions preserved to the improper admission or exclusion of evidence. There are 17 specifications of insufficiency of the evidence to justify the decision, 9 of errors of law occurring during the trial assigned (all of which relate to the findings of the court), and 8 particulars in which the decision is said to be against law. Most, if not all, these specifications, errors, and particulars pass out of consideration upon ascertaining and determining the character of plaintiff's action and applying the rule that this court will not look into the weight of the evidence supporting a finding, if there be a substantial conflict in the evidence.

The complaint here is, in effect, an indebitatus assumpsit count at common law, and declares upon an executed contract. While it lacks the ordinary allegations of indebtedness and that the services were rendered at defendants' request (Estee's Pleadings [Boone's 4th Ed.] §§ 905, 912), these averments are unnecessary, when the consideration as well as the promise are implied from the nature of the transaction declared on (McFarland v. Holcomb, 123 Cal. 86, 55 Pac. 761). Such pleading is allowable under our Code (Farwell v. Murray, 104 Cal. 464, 38 Pac. 199; Pleasant v. Samuels, 114 Cal. 37, 45 Pac. 998), and its use carries with it the general rule applicable to such counts (Castagnino v. Balletta, 82 Cal. 258, 23 Pac. 127). It is said in Chitty on Pleading, *p. 343 et seq.: "Several distinct debts due in respect of different contracts not under seal, of the same or a different nature, as demands for work, and debts for goods, moneys lent, etc., might always be included in one count of this description; and the plaintiff would succeed pro tanto, though he only prove one of such contracts. * * * Under an indebitatus count the plaintiff may recover what may be due to him, although no specific price or sum was agreed upon (the promise being implied); and therefore it has been observed that the quantum meruit and quantum valebant counts are in no case necessary, and should in many cases be omitted to prevent unnecessary prolixity and expense. * * * However special the agreement was, * * * and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, it is not necessary to declare specially. The common indebitatus count is sufficient." Id. *p. 348. The plaintiff testified, and he is corroborated by his foreman, that he fully completed the grading and excavating according to his contract, the court so finds, and a case was made that justified such a pleading. Had he failed to sustain the burden of proving a completed contract, his case must have failed as to any work done under the contract; and, without a quantum meruit or other count to support a judgment upon a part performance, he could have recovered nothing. The express promise as to the work done under the executed special contract and the implied promise as to the extra work could be declared on in the one count, since they together constituted the indebtedness due from defendants to plaintiff upon contracts that were fully executed. The indebtedness had become a single claim for money due for grading and excavating. The rule here is similar to the one applied to the more familiar form of common count, an account stated. All the items and transactions preceding the stating of the account become merged in the one account stated. The law implies a promise to pay this, and permits an action to be brought upon the single sum ascertained to be due, without pleading any of the items or transactions from which the result was obtained. If defendants had desired to ascertain the items of the claim, they could have obtained them under the provisions of section 454 of the Code of Civil Procedure. Farwell v. Murray, 104 Cal. 464, 38 Pac. 199.

The issue as to whether or not there was a waiver of the engineer's certificate was properly tried by the court under the implied allegation of the complaint that the contract had been fully executed and performed by the plaintiff, and that nothing remained to be done but to pay the money agreed to be paid. Minor v. Baldridge, 123 Cal. 190, 55 Pac. 783. The special contract was admissible in evidence to establish the measure of compensation for the labor performed under it. Hermann v. Littlefield, 109 Cal. 430, 42 Pac. 443. Whether a demurrer for uncertainty would lie to such a complaint appears to be in doubt. Pleasant v. Samuels, 114 Cal. 37, 45 Pac. 998; Shade v. Sisson, 115 Cal. 357, 47 Pac. 135; McFarland v. Holcomb, supra; Minor v. Baldridge, supra. In the last cited case, while the mode of pleading here followed is criticised as inconsistent with the code provisions requiring the party to state the facts constituting his cause of action, it is expressly held that it is too well established to be declared improper.

The action, then, is neither on the special contract nor on a quantum meruit. The findings are within the pleadings, and there is evidence to sustain them all. Plaintiff testified that he completed the work under his contract according to the specifications thereof. In this he was corroborated by his foreman. As to the certificate from the engineer, he testified that it was unjustly and fraudulently detained from him by the engineer because of a personal quarrel. The testimony of the defendant Houston and his witness Gibson corroborate this in part, to the extent of establishing that they quarreled over the setting of stakes on the job. Plaintiff testified that the engineer withheld the certificate to compel the payment of a personal debt for these stakes, claimed to be due from plaintiff to the engineer. While the letter was not in evidence and cannot be considered here, this statement is corroborated by the letter of Mr. Wood which is made a part of the showing on the motion for a new trial. If the trial court accepted the explanation of plaintiff, which it had a right to do, and found the withholding of the certificate was a fraud upon plaintiff and without warrant, there was evidence to sustain it and the complaint was sufficient to support the finding, without the fraud or excuse being specifically pleaded or set out. Minor v. Baldridge, supra.

Conceding the complaint to be insufficient for the reasons claimed by appellant, there is another rule of pleading applicable here which would still require that the findings and decision of the trial court be sustained. All the issues which it is contended the complaint should have tendered were set forth by the answer, counterclaim, and cross-complaint of defendants, and issue thereon joined by plaintiff's answer to the two latter pleadings. The rule is well settled that a complaint which lacks the averment of a fact essential to a cause of action may be so aided by the averment, or express denial, of that fact in the answer, as to uphold a judgment thereon. Vance v. Anderson, 113 Cal. 537, 45 Pac. 816. The omission will also be cured by its averment in a cross-complaint of the defendant; and this, although a demurrer to the complaint for the want of the fact has been erroneously overruled. Cohen v. Knox, 90 Cal. 266, 275, 276, 27 Pac. 215, 13 L. R. A. 711; Daggett v. Gray, 110 Cal. 172, 42 Pac. 568. The case was tried and findings made upon the issues tendered by defendants' pleadings, and it would be a vain thing to reverse the judgment, to direct the plaintiff to amend his complaint by averring facts already averred in the cross-complaint, and to again, in that form, present issues which have already been raised and determined. Cohen v. Knox, supra; Antonelle v. Lumber Co., 140 Cal. 320, 73 Pac. 966.

We have accepted the statement in appellant's reply brief in regard to the extension of time given on the service of statement on motion for a new trial and considered the appeal on its merits. We find no error in denying the motion for a new trial. The affidavit filed with the motion presenting the subsequently discovered letter of the engineer does not present any new evidence that would, if admitted, be sufficient to justify a change in the decision to the advantage of the defendants.

No error appearing from the record, judgment and order of the trial court are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

# MEMORANDUM DECISIONS.

151 Cal. 198

JUNIPERO LAND & WATER CO. v. CORNELL et al. FIDELITY TRUST CO. v. SAME. TERRENO CO. v. SAME. SAN DIEGO INV. CO. v. SAME. CITIZENS' BANK OF LOS ANGELES v. SAME. CARLSON INV. CO. v. SAME. (L. A. 1,823–1,828.) (Supreme Court of California. May 13, 1907.) Department 2. Appeals from Superior Court, San Diego County; E. S. Torrance, Judge. Six separate actions by the Junipero Land & Water Company, by the Fidelity Trust Company, by the Terreno Company, by the San Diego Investment Company, by the Citizens' Bank of Los Angeles, and by the Carlson Investment Company against A. F. Cornell and others. From judgments for the plaintiffs in each action, defendants appeal. Modified and affirmed. Cassius Carter, Dist. Atty., and Albert Schoonover, Deputy Dist. Atty., for appellants. Collier, Smith & Holcomb, for respondent.

PER CURIAM. The judgments herein are ordered modified, in accordance with San Diego Realty Co. v. Cornell (L. A. No. 1,805) infra, wherein an opinion is this day filed.

151 Cal. 197

SAN DIEGO REALTY CO. v. CORNELL et al. (L. A. 1,805.) (Supreme Court of California. May 13, 1907.) Department 2. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge. Action by the San Diego Realty Company against F. Cornell and others. From a judgment for plaintiff, defendants appeal. Modified and affirmed. Cassius Carter, Dist. Atty., and Albert Schoonover, for appellants. Collier, Smith & Holcomb, for respondent.

HENSHAW, J. This case is in all respects identical with that of San Diego Realty Co. v. Cornell (L. A. No. 1,709, decided March 8, 1907) 89 Pac. 603. There was the same tender of the amount due, the same refusal to accept, and an offer by plaintiff to pay the amount found justly due. The court's findings were in accordance with the complaint, but in its decree (seemingly doubting its power to accept the tender, as was done in L. A. No. 1,709) it decreed an injunction and a reassessment of the property. It should have granted the relief plaintiff prayed for upon payment of the amount which it found to be justly due. As this may be done upon the findings actually made, there is no occasion for a reversal of the judgment; and it is ordered that the judgment be modified in this respect.

We concur: McFARLAND, J.; LORIGAN, J.

151 Cal. 200

SAN DIEGO REALTY CO. v. CORNELL et al. (L. A. 1,822.) (Supreme Court of California. May 13, 1907.) Department 2. Action by the San Diego Realty Company against A. F. Cornell and others. From a judgment for plaintiff, defendants appeal. Reversed, with directions to allow amendment to complaint.

PER CURIAM. This case is in all respects like Couts v. Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168. There was no offer or tender of the amount of taxes justly due. It differs in this respect from the cases numbered L. A. 1,805 (supra) and L. A. 1,709 (89 Pac. 603), and the other cases decided upon their authority. The judgment in this case must be reversed, with directions to the trial court to permit a proper amendment to plaintiff's complaint, if plaintiff should be so advised.

151 Cal. 399

SMITH v. PELTON WATER WHEEL CO.
(L. A. 1,609.) (Supreme Court of California. July 23, 1907.) For majority opinion, see 90 Pac. 932.

BEATTY, C. J. I dissent from the order denying a rehearing and from the judgment. I entertain no doubt that the superior court had power to allow the motion to be renewed, and the fact that it did allow it to be renewed excludes the presumption that it was denied upon the ground of laches. It seems much more probable, in view of all the circumstances, that it was allowed for the purpose of enabling the defendant to make a full presentation of the merits of its demand in case of an appeal. The motion was denied in the first instance without prejudice, and was promptly renewed. It was again denied, as the record shows, for reasons stated in a written opinion. That opinion is not set out in the bill of exceptions, but is quoted in appellant's brief. It shows that the motion was denied for the sole reason that defendant's affidavits did not contain a specific denial of the allegation in the complaint that the contract price was made payable "whenever and wherever demanded." The application for leave to renew the motion was based upon the ground that it had not been heard upon its merits, and was supported by affidavits denying in terms the allegation as to the time and place of payment. No counter affidavits were filed in support of the complaint (which in this particular could be held to state merely a legal conclusion). If the allegation of the complaint was true in fact, as contradistinguished from a legal conclusion, the plaintiff was called upon to show by affidavit that the contract contained those express terms—a conclusion that did not necessarily follow from the allegation in the complaint. If this view is correct, the only ground upon which the motion could be denied was disproved, and the order of the court can be sustained only upon the supposition that the defendant was held guilty of laches. But there was no laches unless injury had resulted to the plaintiff, or would result from the delay, and there was neither showing nor suggestion of any possible injury. A serious consequence of the ruling denying defendant's motion is that, owing to the mistake of counsel in supposing that their appeal would stay proceedings in the action, a default judgment was taken, and all opportunity of presenting the meritorious defense alleged has been cut off. (See opinion affirming default judgment.) I cannot regard with favor technical rulings upon questions of procedure, which result in condemning a party without a hearing, even when they are imperatively required by the terms of some law. In this case I think the ruling—so far from being necessary—was erroneous.

# CALIFORNIA REPORTER

## 91 PACIFIC REPORTER

151 Cal. 407

## COSGRIFF v. BOARD OF ELECTION COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al.

(L. A. 1,982.)

(Supreme Court of California. June 19, 1907.)

1. Time—Computation—Excluding First or Last Day—Elections—Filing Certificate of Nomination.

Pol. Code, § 1192, as amended in 1901, provides that certificates of party nominations may be filed not less than 20 days before the day of election. *Held*, that a certificate of party nominations offered for filing on October 17th, containing the names of persons to be voted for at an election on November 6th, was in time.

2. Elections—Acceptance of Certificate for Filing.

Where a certificate of party nominations was presented to the registrar of voters after the hour prescribed by law for closing his office, but before it was closed, it was his duty to receive and file it.

In Bank. Application for a writ of mandamus by E. H. Cosgriff, to compel the board of election commissioners of the city and county of San Francisco and G. P. Adams, registrar of said city and county, to receive and file in the registrar's office a certificate of nominations. Granted.

Page, McCutchen & Knight, for petitioner. Thos. V. Cator, for respondents.

SHAW, J. This is an original proceeding in mandamus to compel the board of election commissioners of the city and county of San Francisco, and G. P. Adams, as registrar of voters of said city and county, to receive and file in the registrar's office a certificate of nominations of certain persons as candidates of a political party, styling itself in said certificate the "Nonpartisan Judicial Party," to be voted for at the election in November, 1906, for the offices of justices of the superior court and justices of the peace of said city and county, and to compel said board and registrar to place the names of said candidates upon the official ballots to be used at said election, as party candidates, in a party column under said party name. The cause was decided for the petitioner by this court in October, 1906, and a peremptory writ was issued at that time, as prayed for.

The certificate of nomination, duly verified, with the requisite number of signatures of electors thereto, was duly presented to the registrar for filing on October 16, 1906, after 5 o'clock in the evening. It was again duly presented on October 17, 1906, during the usual and lawful business hours. The offer of October 16th was refused, because it was made after 5 o'clock in the afternoon, and that of October 17th, because, as it is claimed, it was not made within the time limited by law. It is provided in section 1192 of the Political Code, as amended in 1901, that being the law in force in 1906, that certificates of party nominations not made by a party convention, but by electors signing the same and designating themselves as a political party with a specified party name, may be filed "not more than 50 days nor less than 20 days before the day of election."

The word "days," as here used, refers to a day as a unit of time, and not as an aggregation of a certain number of hours, minutes, or seconds. In this sense, and for the purpose thus used, a day is not capable of subdivision into hours, minutes, or seconds, but is to be taken as a whole. In such computations the hours are not counted to ascertain whether a period of 24 hours, or a given number of such periods, have elapsed between the act to be done and the day from which the time is to begin running. The fractions of the days are no more taken into consideration than are the fractions of the seconds. The consequence is that every day, and every part of that day, is, by this rule, one day before every part of the succeeding day. The last moment of any day is, in contemplation of law in such cases, one day before the first moment of the next day, although the elapsed time is infinitesimal. The rule is strictly one of convenience. Any other method of computation would require an accurate account to be kept of the exact hour, minute, and second of the occurrence of the act to be timed, would produce endless confusion and strife, and would prove impolitic, if not wholly impracticable. By the method stated, it is clear that the offer of October 17th was in time. Manifestly, on that theory, the 5th day of November would be one day before the 6th day of that month, and not less than one day before, since the number 5 is one less than 6. So, by counting the consecutive days backward from November 6th, it will be found that October 17th was 20 days, and if 20 days, then not less than 20 days before November 6th. This is what is contemplated by section 12 of the Political Code, declaring that in computing time by days the first day is to be excluded and the last day included. Excluding November 6th, the first day, we find October 17th, to be the twentieth day, or the last day of the period, and as it is to be included in the count, it must be counted as part of the period. Thus, it makes the full number of 20 days before the day of the election, and it cannot be "less than 20 days before" that day. This application of the rule is well established. Misch v. Mayhew, 51 Cal. 514; Hagenmeyer v. Mendocino Co., 82 Cal. 217, 23 Pac. 14; Derby v. Modesto, 104 Cal. 522, 38 Pac. 900; Bates v. Howard, 105 Cal. 182, 38 Pac. 715; Bellmer v. Blessington, 136 Cal. 4, 68 Pac. 111; Hannah v. Green, 143 Cal. 21, 76 Pac. 708.

The petition is in two counts. The first count presents the single question whether or not the offer of the certificate after 5 o'clock in the afternoon of October 16th was a lawful offer with respect to the time of the day at which it was made. A separate general demurrer to this count was filed, and the disposal of this demurrer renders it necessary to decide the question. While we do not hold that the registrar would be required to keep his office open for such business after the hours prescribed by law, yet we have no doubt that, in cases like this, where the political rights of citizens are involved, if he does keep his office open after those hours, it is his duty to receive and file such a document, though presented after the lawful hours. The certificate should have been received and filed when offered, and the names of the candidates should have been placed on the ballots as party nominations, in a party column, under the designated party name.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.; SLOSS, J.; HENSHAW, J.; ANGELLOTTI, J.

151 Cal. 458

## LAMBERSON v. SUPERIOR COURT OF TULARE COUNTY et al. (L. A. 2,013.)

(Supreme Court of California. June 25, 1907.)

1. CONTEMPT—MISCONDUCT IN PRESENCE OF COURT.

An attorney, presenting to the judge in open court a scandalous affidavit in support of an application for a change of judges, commits contempt in the presence of the court, within Code Civ. Proc. § 1211, providing that, where a contempt is committed in the presence of the court, it may be punished summarily, etc., notwithstanding section 1209, subd. 12, defining contempt, so that the court may proceed summarily or by citation to show cause, and may allow a showing in defense, extenuation, or mitigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 142.]

2. JUDGES — DISQUALIFICATION — BIAS — AFFIDAVIT FOR CHANGE—CONTEMPT—PROCEEDINGS TO PUNISH.

A judge is not disqualified from sitting in proceedings to punish an attorney for contempt, based on his presenting to the judge in open court an affidavit attacking the judge's integrity and containing imputations on his motives.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, § 187.]

3. SAME—MISCONDUCT CONSTITUTING CONTEMPT.

A party after obtaining a new trial on appeal for error in rulings at the trial presented an affidavit in support of an application to change judges. The affidavit declared that the party believed that the judge's rulings were made willfully and corruptly, and that the party believed that the judge knew that such rulings were erroneous, etc. *Held*, that the affidavit constituted contempt of court on the part of affiant, notwithstanding Code Civ. Proc. § 170, subd. 4, authorizing the filing of affidavits in support of a motion for a change of judges on the ground that the party cannot have a fair and impartial trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 9.]

4. SAME—MISCONDUCT AS OFFICER OF COURT.

An attorney, who knowingly presents on behalf of his client an affidavit containing averments attacking the integrity of the judge and containing defamatory matter, is guilty of contempt.

In Bank. Application for a writ of prohibition by Charles G. Lamberson against the superior court of the county of Tulare and another. On disagreement of the judges of the District Court of Appeal, the proceedings were certified to the Supreme Court. Writ discharged.

Alfred Daggett, for petitioner. W. B. Wallace, in pro. per.

HENSHAW, J. Petitioner was and is the attorney at law of John Bashore, who is plaintiff in two actions pending before the superior court of Tulare county. John Bashore made application for a change of judges in these actions, supporting his application by his own affidavits, verified before petitioner as notary public, and by petitioner filed with and presented to the court. Two of these affidavits were filed in connection with separate applications for change of judges in one of the cases, while the third was presented in support of the application for a change of judges in the other case. Both actions are still pending. The first two applications were met with counter affidavits and denied. The third affidavit contained substantially all of the alleged defamatory and contemptuous matter embodied in the preceding affidavits, and went even further in attacking the integrity of the judge. Upon presentation of this last affidavit, the judge, believing that he could not with self-respect longer sit at the hearing of these causes, announced that John Bashore could have a change of judges in any case pending in his court, whether theretofore denied or not, upon application, and without the filing of any affidavit. He then issued a citation to petitioner to show cause why he should not, as the attorney for John Bashore, and as an officer of the court who had presented these scandalous affidavits, be punished for contempt in so doing. This citation to show cause set forth at length the proceedings had in the matter and the language of the affidavits which the court regarded as unwarranted, contemptuous, and deliberately designed to bring into disrepute himself, as judge, and the court over which he presided. Petitioner then applied for and obtained from the district court of appeal an alternative writ of prohibition. The questions involved were considered by that tribunal, and, upon disagreement of the judges, the proceedings were certified to this court.

Dealing first with the questions of procedure which petitioner presents, this contempt (assuming for the moment that a contempt was actually committed) was one which took place in the immediate view and presence of the court, and the citation to show cause, which was timely made, did not require an affidavit to support it. The second and third affidavits were filed and presented to the judge in open court. In McCormick v. Sheridan (Cal.) 20 Pac. 24, an attorney had presented to this court a petition for a rehearing, whose language reflected upon an opinion written by one of the commissioners. Some days thereafter, when the matter of the petition had come under review, an order was issued from this court, which order was in fact a citation directed to the offending attorney, and commanding his presence to show cause why he should not be punished for contempt. A hearing was had, and this court declared: "Upon the facts contained in the petition for rehearing, and quoted above, we adjudge the respondent Waterman guilty of contempt, committed in the face of the court." In re Foote, 76 Cal. 543, 18 Pac. 678, declares merely that in contempt proceedings, which contempt consisted of contumelious language addressed to the judge in the trial of a cause, an order adjudging an attorney in contempt made 50 days thereafter and in his absence, and without citation or notice to him of any kind, was improper, upon the ground that by its laches the court had lost jurisdiction. It is not in conflict with the rule and procedure applied in McCormick v. Sheridan, and, if it were, McCormick v. Sheridan is the latest expression of this court upon the matter. McCormick v. Sheridan, moreover, is in full accord with the views of the Supreme Court of the United States expressed in Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405, where it is said: "Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court, and was neither surrendered nor lost by delay on the part of the circuit court in exercising its power to proceed. It was within the discretion of the court whose dignity he had insulted, and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed at once to punish him, or postpone action until he was arrested upon process, brought back into its presence, and permitted to make defense." In People v. Barrett, 121 N. Y. 678, 24 N. E. 1095, the respondent had secreted himself in the jury room while the jury were deliberating, and had taken notes of their proceedings. He was discovered and afterwards charged with having committed a contempt of court. By the Supreme Court (People v. Barrett, 56 Hun, 351, 9 N. Y. Supp. 321) it was held that it was a contempt committed in the immediate view and presence of the court, and the Court of Appeals affirmed this determination. In Hughes v. People, 5 Colo. 436, an affidavit for a change of judges was presented to the court while in session by respondent's attorney, respondent, himself an attorney, being absent. The affiant was brought before the court by attachment, and the Supreme Court declared: "It was in the face of the court, and warranted the judge in taking cognizance of it summarily as though the words, instead of being written or read in court, had been spoken in facie curiæ." The contempt being one committed in the presence of the court required no supporting affidavit. Code Civ. Proc. § 1211. The could could have proceeded upon it summarily, or by citation to show cause—the course here adopted—and could have allowed a showing in defense, extenuation, or mitigation. Nor is this matter in any wise controlled by subdivision 12 of section 1209, Code of Civil Procedure. While conceding to the Legislature the fullest power in the matter of contempts to lay down rules of procedure, we repeat what was said in Re Shortridge, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78: "No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act, whether committed in or out of its presence, which tends to impede, embarrass, or obstruct the court in the discharge of its duties. It is a doctrine which is admitted in all its rigor by American courts everywhere, and does not need the support of foreign authorities, based upon the fiction that the majesty of the King, represented in the persons of the judges, is always present in the court. It is founded upon the principle, which is coeval with the existence of the courts, and as necessary as the right of self-protection, that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence. It exists independent of statute. The legislative department may regulate the procedure and enlarge the power, but it cannot, without trenching upon the constitutional powers of the court, * * * fetter the power itself."

Nor is the judge disqualified from sitting in the contempt proceedings. Petitioner's theory in this regard, if we understand it, is that the judge is disqualified from hearing the proceedings in contempt, because the contempt itself consists in imputations upon his motives, and attacks upon his integrity. Such is not and never has been the law. The position of a judge in such a case is undoubtedly a most delicate one, but his duty is none the less plain, and that duty commands that he shall proceed. However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides. As was said by the Chief Justice of this court in Re Philbrook, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. Rep. 59: "The law which in such cases makes us the judges of offenses against the court places us in an extremely delicate and invidious position, but it leaves us no alternative except to allow the court and the people of the state, in whose name and by whose authority it acts, to be insulted with impunity, or to exercise the authority conferred by law for the purpose of compelling attorneys to maintain the respect due to courts of justice and judicial officers." Were the rule otherwise so that it was required that another judge should be called in to sit in the proceeding, the recalcitrant and offending party would need only to insult each judicial officer in turn until the list was exhausted, and thus, by making a farce of legal procedure, go scathless and unpunished.

Coming, now, to the facts constituting the alleged contempt, it appears that John Bashore is a man about 70 years of age, who has been an invalid for more than 20 years, has been partially deaf for several years, and whose wife attended to and conducted all of his business transactions, while he remained upon the ranch where they lived, some miles from Visalia; that he prosecuted an action to recover certain properties which had been sold under execution. The cause was tried before a jury, resulting in a verdict and judgment adverse to him, and upon his appeal to this court a new trial was ordered for certain errors in the admission of evidence and in the giving of instructions. Bashore v. Parker, 146 Cal. 525, 80 Pac. 707. The affidavit in support of the application for a change of judges, with other impertinent and defamatory matter, declares as follows: "Which said rulings upon the admission of such evidence this affiant believes and alleges was done willfully and corruptly and for the purpose of preventing this affiant from having a fair and impartial trial of said action; and affiant believes that said Hon. W. B. Wallace is a sufficiently good judge of law to know that the said rulings so made by him, and such instructions given to said jury in said action, were erroneous, and such rulings and instructions were not the law of said case; and this affiant believes that said instructions were so given and such rulings made with a full knowledge on the part of said judge that they were erroneous at the time they were given and made. And this affiant believes that the dislike and hatred of said W. B. Wallace, judge, as aforesaid, is so great that he would willfully make unlawful rulings in the trial of this action against this affiant, and that he would find all matters of fact against this affiant, whether there was any evidence to sustain such findings or not, and that he would not give the testimony of this affiant, or the witnesses produced by him upon the trial of said action, any credit whatever as against any witness of any kind or character that might be produced upon the side of the defendant in said action." This application for change of judges is founded upon subdivision 4 of section 170 of the Code of Civil Procedure, the provision of which is simply that, "when it appears from the affidavits on file that either party cannot have a fair and impartial trial before any judge or court of record about to try the case by reason of the prejudice or bias of such judge, said judge shall forthwith secure the services of some other judge of the same or some other county." It must need little consideration to show that the language above quoted, as addressed to the law, is flagrantly and willfully contemptuous. It states the mere belief of Bashore, without any supporting fact, as in Morehouse v. Morehouse, 136 Cal. 332, 68 Pac. 976, unless it can be said that the fact that the judge fell into error upon the first trial of the case is sufficient to justify the imputation of a corrupt intent—an argument too preposterous to merit even enunciation. But, outside of this circumstance, the whole declaration is but the purported belief of this aged invalid, with no attempt to state even the source of his information or origin of that belief. It cannot impress the unprejudiced mind as being other than a deliberate intent to insult and defame the judge. Let it be understood that we are not here declaring that if a judge has in fact indulged in corrupt practices, or has in fact given a ruling or decision through a corrupt motive, that those facts may not be stated. They may be. And they would be prepotent evidence of bias and prejudice. But it may not for one moment be countenanced that, without supporting facts, lawyer or litigant may wantonly charged a judge with corrupt and improper motives, and seek protection from the just consequences of such outrage under the shield of the Code provision. McCormick v. Sheridan (Cal.) 20 Pac. 24; In re Philbrook, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. Rep. 59; People v. Brown, 30 Pac. 338, 17 Colo. 431; In re Mains, 80 N. W. 714, 121 Mich. 603; Hughes v. People, 5 Colo. 436; In re Snow, 75 Pac. 741, 27 Utah, 265; Harrison v. State, 35 Ark. 458; In re Pryor, 18 Kan. 72, 26 Am. Rep. 747. So, while it is true that matters which are pertinent to the consideration and which are charged as facts are admissible, without reference to their effect upon the reputation of the judge, or of any one else, it is equally true that neither attorney nor litigant has any right to present such degrading accusations under the guise of mere belief, without the aid of a single supporting fact. May v. Ball (Ky.) 67 S. W. 257.

Indisputably, therefore, John Bashore, upon the face of this record, was guilty of contempt committed in the immediate presence of the court. Is his attorney, who presumptively prepared, and who certainly presented to the court, this affidavit, any less guilty? As the case now stands, we think not. Under his oath to maintain the respect due to courts, every attorney stands responsible, not only for his own individual conduct in court, but for every paper which, knowingly, he presents on behalf of his client. As the matter is here before us, the petitioner knowingly presented this affidavit on behalf of his client, and for this he is equally culpable with his client. Defenses are open to him, and he may exonerate himself upon the hearing from intentional wrongdoing, if the facts warrant, but no doubt can be entertained of the jurisdiction of the court, under the circumstances shown, to proceed with that hearing.

The writ is discharged.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.

(151 Cal. 451)

## LAMB v. WEBB, Atty. Gen., et al. (L. A. 1,864.)[*]

(Supreme Court of California. June 24, 1907. Rehearing Denied July 24, 1907.)

1. Mandamus—Subjects of Relief—Acts of Public Officers—Matters of Discretion.

The power of a court to compel the Attorney General to grant leave to commence a suit against his conscientious belief that such leave should not be given, should be exercised only where the abuse of discretion in refusing leave, is extreme and clearly indefensible.

2. Same—Leave to Bring Quo Warranto Proceedings.

Code Civ. Proc. § 1111, provides that any elector may contest the right of any person to an office to which he has been declared elected, and the procedure described includes a recount, but there is no provision for a recount where no one is declared elected. Pol. Code, § 1067, provides that a special election must be ordered in case of a tie between those receiving the highest number of votes. Code Civ. Proc. § 803, provides that an action may be brought by the Attorney General in the name of the people upon the complaint of a private party against any person who usurps, intrudes into, or unlawfully holds or exercises any public office or franchise in the state, and that he must bring the action whenever he has reason to believe that any such office has been usurped, etc. At a general election plaintiff and defendant, G., were the only candidates for a certain office. The election returns showed a tie as to them, and the canvassing board declared the vote a tie, and ordered a special election at which G. was elected and was so declared. A certificate of election was issued to G., who assumed and has since held the office. The regularity of the special election was not objected to, nor its legality assailed, but plaintiff applied to the Attorney General for leave to bring quo warranto proceedings against G. under Code Civ. Proc. § 803, proposing to show that by a recounting of the ballots plaintiff was elected at the first election. The only showing made to the Attorney General was a verified complaint which plaintiff proposed to file, which on information and belief alleged generally that four nonresidents had been allowed to vote, and their ballots had been counted for G.; that ballots bearing marks of identification were counted for G. and unobjectionable ballots for plaintiff had been rejected. *Held*, that the showing was not sufficient to justify compelling the Attorney General by mandamus to grant leave to sue.

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[*] For dissenting opinion on rehearing, see 91 Pac. 646

Department 2. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Cyril G. Lamb against Ulysses S. Webb, Attorney General, and another, for a writ of mandamus. From orders overruling a demurrer to the complaint and granting the writ, defendants appeal. Reversed, with directions to sustain the demurrer.

Rehearing denied; Beatty, C. J., dissenting.

U. S. Webb, Atty. Gen., Geo. A. Sturtevant, B. F. Thomas, and Henley C. Booth, for appellants. Canfield & Starbuck, for respondent.

McFARLAND, J. At the general election held throughout the state on November 8, 1904, the plaintiff, Lamb, and the defendant Glass were the only candidates for the office of supervisor of the third supervisorial district of the county of Santa Barbara. The board of supervisors, sitting as a canvassing board, declared the vote for this office to be a tie between said two persons, and thereupon the board ordered a special election to be held in said district to elect a supervisor therefor as provided in section 1067 of the Political Code. It is admitted that the election returns showed a tie. Lamb and Glass were both candidates at the special election which resulted in Glass receiving a majority of 11 of the votes cast thereat. The board declared the result accordingly, and a certificate of election was issued to Glass, who entered upon the duties of the office on the first Monday of July, 1905, and has ever since been and now is the acting supervisor of said district. On June 9, 1905, plaintiff, Lamb, made application to defendant Webb, as Attorney General, for leave to sue defendant Glass under section 803, Code of Civil Procedure, on the ground that Glass was "usurping," etc., the franchises of said office of supervisor. The purpose of the proposed action was to show that by a recounting of the ballots cast at the said general election on November 8, 1904, there was not actually a tie, but that by a legal count of said ballots plaintiff had a majority of the votes. The Attorney General, after a hearing, refused to grant the leave, whereupon the plaintiff applied to the Governor of the state for an order directing the Attorney General to grant said leave for suit, but the Governor refused to make such order. Thereupon plaintiff brought this present proceeding to have the Attorney General compelled by mandamus to grant the leave to sue. The defendant demurred to the complaint. The court overruled the demurrer, and gave judgment ordering a peremptory writ to issue as prayed for, and from this judgment the defendant appeals.

The application to the Attorney General for leave to sue was accompanied by a document in the form of a complaint, which plaintiff intended to file in the action which he proposed to bring against Glass if permitted to do so. This "complaint" was verified in the usual form adopted in this state for the verification of a pleading, and it constituted the only showing under oath made to the Attorney General. Section 803, Code Civ. Proc., under which the application was made, is as follows: "An action may be brought by the Attorney General, in the name of the people of this state, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state. And the Attorney General must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the Governor." Section 1111, Code Civ. Proc., declares that any elector may contest the right of any person to an office to which he has been "declared elected." And the procedure is prescribed for such contest including a recounting of the ballots. There is no provision for a contest for a recounting of the ballots where no one has been "declared elected," but section 1067 of the Political Code provides that, "if at any election two or more persons * * * receive an equal and the highest number of votes, there is no choice, and a special election to fill such office must be ordered by the proper board or officer." As the board of supervisors has no power to open and count the ballots, the above provision evidently means that the board must act upon the only evidence before it, to wit, the returns of the election officers.

Under our views of the case, we do not deem it necessary to decide a number of questions discussed in the briefs, as, for instance, whether or not the discretion of the Attorney General under section 803 to grant or refuse leave to commence a quo warranto proceeding is limited only by the control of the Governor as expressly prescribed in said section; whether the provision that in case of a tie (which necessarily means a tie appearing upon the returns) there shall be a special election is not exclusive of any other proceeding in the premises; whether the submission by respondent of his claims to the voters at the special election did not estop him from objecting to such special election as a final conclusion of the whole matter. These and certain other questions we shall not discuss because, assuming for the purposes of this appeal that the Attorney General's discretion under the said section is not entirely beyond the control of the court, and that the other points discussed should be determined in favor of respondent, still it is clear that the power of a court to compel him to violate his own judgment by ordering him to grant leave to commence a suit against his own conviction and conscientious belief that such leave should not be given should be exercised only where the abuse of discretion by the Attorney General in refusing the leave is extreme and clearly indefensible. When such an extreme case does not appear, a decree of a court compelling him to act against his judgment is erroneous, and is itself an abuse of discretion.

Now, if we apply the above principles to the case at bar, we find that in refusing leave to plaintiff to commence his proceeding in quo warranto the Attorney General was not only not guilty of a violation of his discretion in any extreme sense, but was not guilty of any want of discretion. What was the case presented to him upon the application of plaintiff for leave to sue? In the first place, it appeared that there had beeen a tie between the parties at the general election; that in pursuance of the provisions prescribed for such an emergency a special election was ordered; that at such election the defendant Glass received a majority of the votes cast at said election and received his certificate of election; that by virtue of such election and certificate he entered upon the possession of the office and was discharging its duties; and that no objection to the regularity and legality of the said special election had ever been made, and no proceeding had ever been instituted to assail it. Here, then, was a perfect prima facie case showing that Glass had not usurped the said office, but was rightfully in its possession. And it must be remembered that the question with an Attorney General always is: Has any person usurped the franchises of the office? Did plaintiff overthrow or undermine this prima facie case by any showing which he made to the Attorney General? The only showing which he made was this: He presented to the Attorney General a document in the form of a verified complaint which he intended to file in his proposed suit. In the complaint there were only two statements made, which, if supported by evidence of their truth, should have had any effect on the Attorney General. The first was that at the said general election four named persons were allowed to vote who were not residents of the precincts in which they were so allowed to vote, and that these votes were counted for Glass. But this statement was made wholly and expressly "upon information and belief," and therefore was of no value to the Attorney General as the presentation of any fact. The other statement was that the election officers had counted for Glass votes which were cast upon ballots that had distinguishing marks placed there for the purpose of identifying them, and rejecting the ballots for plaintiff which were unobjectionable. The character of the distinguishing marks is not given. The plaintiff says in the said complaint that he does not know the number of ballots with such distinguishing marks which were allowed by the election board, or the number with plaintiff's name on which were rejected. He does not positively identify even one. But these statements are also made upon "information and belief." Outside of this "complaint" there was no attempt at any showing whatever. No affidavit or oral testimony of any person as to any fact within his knowledge touching such election was offered. The only showing made by plaintiff before the Attorney General was therefore that he had been informed that certain things had occurred before the election board at the general election; and upon no further evidence he asked the Attorney General to allow him to introduce litigation and confusion into the county affairs by permitting him to use the former's name to commence a suit for the purpose of discovering by a recounting of the votes whether there might not have been some error committed by said board of election. Clearly, to our minds, this was not a sufficient showing to warrant a court in holding that the Attorney General ought to have been convinced that he had "reason to believe" that Glass had unlawfully intruded into and usurped said office of supervisor. The true rule on the subject is, in our opinion, expressed by the court in Lamoreaux v. Ellis, 50 N. W. 814, 89 Mich. 146, as follows: "It has been held by the King's Bench that a chief object in requiring leave is to prevent vexatious prosecutions, and the rule is inflexible that there must be affidavits so full and positive from persons knowing the facts as to make out a clear case of right in such a way that perjury may be brought if any material allegation is false" —citing many authorities.

For the reasons above given, the judgment appealed from is reversed, with directions to the court below to sustain the demurrer to the complaint.

We concur: LORIGAN, J.; HENSHAW, J.

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5 Cal. App. 586

## BEKINS v. DIETERLE et al. (Civ. 372.)

(Court of Appeal, Second District, California. May 25, 1907.)

APPEAL—TIME OF TAKING—STATUTORY PROVISIONS.

A judgment "that the temporary injunction heretofore issued herein to the sheriff of said county be and the same is hereby dissolved and vacated" is not an order, within the meaning of Code Civ. Proc. § 939, providing that appeals from certain orders and interlocutory judgments may be taken within 60 days from their entry.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Kate Bekins against Minnie Dieterle and another. On motion to dismiss appeal. Motion denied.

J. Marion Brooks (Henry E. Willis, of counsel), for appellant. E. W. Freeman and A. D. Laughlin, for respondents.

SHAW, J. Motion to dismiss an appeal from that portion of the judgment wherein it was adjudged "that the temporary injunction heretofore issued herein to the sheriff of said county be and the same is hereby dissolved and vacated." The appeal was not taken within 60 days from the entry of this judgment, and upon this ground respondent insists that the same should be dismissed.

The judgment was not an order, within the meaning of section 939 of the Code of Civil Procedure, and the motion to dismiss is denied.

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 587

## PEOPLE v. FONG CHUNG, alias FAT JIM. (Cr. 74.)

(Court of Appeal, First District, California. May 27, 1907.)

1. CRIMINAL LAW — CONTINUANCE — ABSENT TESTIMONY.

A continuance was improperly refused defendant, where he offered an affidavit that a material witness, without whose testimony he could not safely proceed to trial, had been subpœnaed several days before the trial, but was seriously ill; that defendant could prove by the witness an alibi, a good reputation for truth, etc., and could not prove those facts by any other witness; the attending physician corroborating the defendant as to the witness' inability to attend court, and defendant's counsel having apprised the district attorney before the trial and upon hearing of the witness' illness that defendant could not go to trial on the day set, and the necessity for granting a continuance was not obviated by the district attorney stating, "We will concede that this Chinaman [the absent witness] will testify to anything in that affidavit."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1321, 1342–1347.]

2. RAPE—EVIDENCE—ADMISSIBILITY.

In a rape trial, it was error to exclude testimony that the prosecutrix had a venereal disease when the rape is alleged to have occurred; it appearing she had such disease shortly thereafter, and that defendant had never had it, though it is contagious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 62.]

3. SAME.

In a trial for raping a girl under age, it was error to exclude testimony that she had had intercourse with Chinamen other than defendant prior to the alleged offense; the evidence being admissible to repel an inference that he had conveyed a loathsome disease to her, to show that perhaps she was mistaken in defendant's identity, and as tending to affect her credibility.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 59.]

4. SAME—EVIDENCE AFFECTING CREDIBILITY.

In a trial for raping a child under age, it was error to exclude testimony that she made no outcry, and that no one was permitted to see her except the authorities after she was placed in jail, since it affected her credibility.

5. CRIMINAL LAW — APPEAL — PREJUDICIAL ERROR.

In a rape trial, error in allowing a witness to be asked if he had not heard in Chinatown that defendant was taking little white girls there and was warned he would get into trouble if he continued it, and if witness had not heard that members of the Hop Sing Tong accused defendant of producing white girls there, was not cured by negative answers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3130, 3131.]

6. SAME—APPEAL—PREJUDICIAL ERROR.

In a rape trial, error in allowing a witness to be asked if he had not conducted a lottery and a poker game until a grand jury investigation was not cured by negative answers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3130, 3131.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Fong Chung, alias Fat Jim, was convicted of rape, and he appeals. Reversed.

John W. Sullivan, for appellant. U. S Webb and James H. Campbell, for the People.

COOPER, P. J. The defendant is charged in the indictment with the crime of rape, in having had sexual intercourse on the 26th day of September, 1905, with Lillie Ida Davis, an unmarried female under the age of 16 years. After trial the jury returned a verdict of guilty, and judgment was thereupon entered, sentencing defendant to a term of 10 years in the state prison.

The facts disclosed by this record are revolting. The party upon whom the rape is alleged to have been committed was just 13 years of age, and had an elder sister Eliza who was 15. It seems, with the apparent knowledge and consent of the father and mother, that these two young girls were and had been in the habit of having sexual intercourse with Chinamen and other parties at their home, in which the father and mother and the smaller children of the family resided. For this they received small sums of money and presents. There were six other cases of alleged rape upon these sisters, charged to have been committed by different individuals, pending, and set for hearing at the time this case was called. Three of these were apparently against Chinamen, and three of them against white men or boys. The sisters were each suffering from venereal disease. While it is not clear that such disease existed at the time of the alleged crime by this defendant, it is clear that it existed, and both sisters were afflicted with it, when examined a short time afterwards. The offense is statutory, and no matter how depraved was the girl upon whom the act is alleged to have been committed, nor how many others were equally guilty, the defendant would be held none the less amenable to the law for his acts, if the evidence supported the verdict, and no error appeared of record; but, as the offense charged is one that of itself creates a feeling of prejudice and hostility in the minds of the jury, particularly in the case of a Chinaman, the court will look carefully into the record to see that all the substantial rights of the defendant were given him by the trial court. In this class of cases, as well as in all others, a defendant should be fully protected during the trial in all his rights, and, if he cannot thus be convicted, he should not be convicted at all.

The first contention made by defendant is that the court erred in refusing to postpone the trial for a reasonable time on account of the absence of a material witness, and the contention must be sustained. When the case was called for trial the defendant's counsel answered that he was not ready, and moved for a continuance on account of the absence of Charlie Yan Tie, a material witness for defendant. In support of the motion counsel for defendant offered and read the affidavit of defendant, which stated in substance that Charlie Yan Tie was a material witness, without whose testimony he could not safely proceed to trial; that a subpœna had been duly issued and served upon the said witness several days before the day set for trial; that the witness was seriously ill, under the care of a physician, and unable to appear in court; that the defendant could prove by said witness, if present, and expected to prove by him, that defendant was not in the presence of said Lillie Ida Davis at the time of the commission of the alleged crime; that the defendant bought from said witness two dress skirts and sold the same at a profit to the two Davis sisters, and that the defendant's reputation for truth, veracity, peace, and quietude is good; that defendant could not prove the said facts by any other witness. In support of said motion defendant's counsel testified that before the trial, and immediately upon learning of the illness of the said witness, he notified the district attorney that the witness was ill, and that defendant could not safely go to trial on the day set. Dr. Trueman testified that he was attending the witness Charlie Yan Tie, and that the witness was in bed very ill with a high fever, suffering from blood poisoning, and would not be out of bed for at least three weeks, and that it would be dangerous for said witness to attend court. Upon the above showing the judge remarked to the district attorney that in his opinion the continuance would have to be granted. The district attorney thereupon remarked, "We will concede that this Chinaman will testify to anything in that affidavit —everything that is material." Thereupon the court denied the continuance, and to this ruling the defendant duly excepted.

It must be borne in mind that no question was raised as to the sufficiency of the facts as stated in the affidavit. The ruling of the court was based squarely upon the theory that the admission of the district attorney to the effect that the absent witness, if present, would testify to anything in the affidavit, answered the purpose and obviated the necessity of a continuance; that the statements in the affidavit could be taken in lieu of the evidence of the witness. Such is not the law. The Constitution of the state (article 1, § 13) gives a defendant the right to have the process of the court to compel the attendance of witnesses in his behalf. It is the duty of the court, when due diligence has been used, and it appears that the application is made in good faith, and the evidence is material, to continue the case for a reasonable time so that the case may be fairly tried on its merits. In the early case of People v. Diaz, 6 Cal. 248, it was held that the admission of the district attorney that the witness, if present, would have testified as set forth in defendant's affidavit, was not sufficient, but that, in order to obviate the necessity of a continuance, the district attorney should have admitted the truth of the facts set forth in the affidavit. The court said: "The materiality of the evidence having been shown, it was the duty of the court, in the absence of evidence tending to discredit or throw suspicion on the application to postpone the cause, to afford the prisoner reasonable time to secure the attendance of his witness. It was not sufficient that the district attorney agreed that the witness would have deposed to certain facts, if present. He should have admitted the truth of the facts absolutely. it was the right of the accused to have his witnesses orally examined in court, and this right could not be frittered away by compelling him to go to trial in their absence without the benefit of their testimony upon a statement of what the evidence would be, subject to impeachment. The value of oral testimony over all other is too well understood to suppose for a moment that such declarations will have the same weight on the minds of the jury as the testimony of the witness if he had been examined before them in open court." The above case has never been overruled or modified by any case to which our attention has been called. It has been followed in Graham v. State, 50 Ark. 167, 6 S. W. 721, and in Newton v. State, 21 Fla. 70. Its reasoning is logical. The district attorney could not by a concession as to "this Chinaman" deprive the defendant of the benefit of a substantial right. It was the time and the occasion when his each and every right should have been guarded both by the district attorney and the court. It was the first continuance asked. There was no question raised as to the good faith of the defendant in making the application. If the question as to the good faith of the application, or the sufficiency of the matters and things stated in the affidavit, had been raised, and sufficient showing made so as to appeal to the discretion of the court, the question would be different; but here we have squarely presented the ruling of the court based upon the statement of the district attorney quoted above. The court not only proceeded upon such theory, but instructed the jury to regard the statement in the affidavit as part of the evidence in the case, "as though Charlie Yan Tie had in open court as a witness so testified."

The evidence on the part of the prosecution tended to show that the alleged act of sexual intercourse took place about 7 o'clock of the evening of September 26, 1905. Lillie Ida Davis so testified. In cross-examination the defendant's counsel asked her the following question: "Q. Now, is it not a fact that on the 26th day of September last at 7 o'clock in the evening you had venereal and running sores on your private parts, in your vagina, and on the lips thereof?" The district attorney objected to the question as irrelevant, immaterial, incompetent, and not proper cross-examination. The court sustained the objection, to which ruling defendant duly excepted. The ruling of the court was erroneous. Dr. McMahon, a witness for the prosecution, testified that he examined the girl in October, 1905, and that she was then suffering from venereal disease. In fact, the evidence shows without contradiction that she had such disease early in October, 1905. Defendant testified that he never at any time had sexual intercourse with Lillie Ida Davis, and that he had never had any kind of venereal disease in his life. Dr. Cothran, a graduate of the medical department of the University of California, testified that he examined defendant about two weeks before the trial for any evidence of any variety of venereal disease; that he examined physically all the parts affected in such cases; and that defendant had never had chancroids (the disease from which the girl was suffering). The evidence shows that in most cases a male having sexual intercourse with a female suffering from venereal chancroids would contract the disease. Now, if defendant had no venereal disease, and never had chancroids, it seems to us that it was very material as to whether or not the girl, with whom he is alleged to have had sexual intercourse, was suffering from venereal disease on the day of such alleged intercourse. What reason was there for excluding the evidence? The prosecution apparently desired to prove that in October, 1905, the girl was suffering from chancroids. This might, and was probably intended to, carry with it the inference that she contracted the disease from the defendant on the 26th day of September. Defendant had the right to meet this inference by showing that she had such disease on the 26th day of September. He further had the right to prove, and did prove, that he had never had such disease. Upon all the facts thus proven the jury had the right to determine the guilt or innocence of defendant. The court refused to allow any evidence as to whether or not the girl was suffering from the disease on the 26th day of September. The objection of the district attorney was sustained to a similar question asked of Eliza, the sister of the girl. Eliza was asked the direct question as to whether or not Lillie had chancroids, or running sores, on her private parts on the 26th day of September, 1905, but under the objection of the district attorney she was not permitted to answer it. The mother of the girl testified that she had chancroids on the 26th day of September, 1905; but, it appearing on cross-examination that the mother only knew it by Eliza telling her, the court, on the motion of the district attorney, struck out the testimony. The rulings of the court in this regard were highly prejudicial to defendant.

Other rulings are complained of which appear to be erroneous, but which it is not necessary to discuss in detail. The defendant's attorney asked Lillie Ida Davis in cross-examination if she had had intercourse with any one else in the past year. Upon objection of the district attorney the court refused to allow the question to be answered. She was further asked by defendant's attorney if she had not had sexual intercourse with a great number of Chinamen in her bedroom at her home during the past year. The court sustained the objections of the district attorney to this line of questions. The defendant's attorney then asked questions as to particular named Chinamen, and as to dates prior to September 26, 1905; but the court made the same ruling excluding the evidence. While the facts sought to be elicited by these questions would not justify the defendant in having sexual intercourse with a girl under 16 years of age as a matter of law, yet they were competent for the purpose of aiding the jury in arriving at the main facts. If the fact that the girl was suffering from a venereal disease a short time after the alleged act of intercourse was a circumstance tending to corroborate the girl's testimony as to the act with defendant, by raising an inference that the venereal disease was communicated by defendant, the defendant, in that spirit of fairness which should prevail in all trials, should have been permitted to show that the girl might have been diseased by sexual intercourse with others. Or it might be that defendant could have shown that the girl was mistaken in his identity, and that it might have been some other Chinaman. The evidence sought to be elicited by the questions would have tended to show the credibility of the girl. If she had been having promiscuous sexual intercourse with Chinamen, or if she had been diseased by sexual intercourse with others prior to the date when it was shown that she had such disease, the jury had the right to consider these matters. We do not think the conviction of the defendant, under the circumstances of this case, was so important that everything else except the single fact should have been excluded from the jury. The district attorney in his zeal desired the case to be presented to the jury upon evidence as to the one act with defendant, and the corroborating fact of the girl having a venereal disease. Such facts alone would give him a beautiful theory as to the defendant's outrage upon an innocent girl of tender years, and his giving her a venereal disease; but the defendant had some rights. If she was suffering from a venereal disease on September 26th, and defendant never had such disease, it is a strong circumstance in favor of the testimony of defendant. If the girl was entertaining a great number of Chinamen in the same manner, it was very important for defendant to show that she may have been mistaken as to his identity.

It was said, in People v. Howard, 143 Cal. 316, 76 Pac. 1116 (a similar charge to this): "The light of investigation should have been permitted to fall upon the witness, her statement and her conduct. If she was testifying to the truth, such investigation would not have injured the cause of the prosecution. If she was testifying to a falsehood, the defendant should have been allowed in every reasonable way to show it." In a concurring opinion by the Chief Justice it was said that, if the prosecuting witness made no outcry, or complaint to others, or if she was induced by threats of imprisonment to make the accusation, the jury had the right to take these facts into consideration in determining her credibility. The court in the case at bar refused to hear evidence that the witness made no outcry. The defendant's counsel endeavored to prove by cross-examination of the prosecuting witness that ever since she was placed in jail, October 16, 1905, no one was permitted to see her except the sheriff and his deputies, the district attorney and his deputies and detectives. The court, under the objection of the district attorney, would not allow the testimony. It seems to us that such testimony should have been allowed, and would affect the credibility of the witness. That a prosecuting witness of tender years was in a case like this kept in the sole custody and control of the officers of the law, and permitted to see no one else, is a circumstance that the jury should have known. Every lawyer and every judge under such circumstances would at once infer that the witness was testifying under the influences that had been surrounding her.

Sam Chew was called, and testified for the defendant. Under defendant's express objection and protest the district attorney was allowed to ask the witness many insulting and immaterial questions on cross-examination. Among these the district attorney asked the witness if he had not heard in Chinatown that the defendant was taking little white girls down there, and was warned that he would get into trouble if he continued it; if he had not heard that the members of the Hop Sing Tong accused defendant of producing white girls there; if it was not a fact that witness was conducting a lottery on First street back of Bachigalupi's cigar store; if witness was not selling lottery tickets at such place; if he was not running a poker game at the same place; if witness was not selling lottery tickets and running a poker game up to the time the grand jury before last began to investigate those things. We can conceive of no reason why such questions should have been allowed. It is true that the witness denied that any of the matters were true that were implied by the questions, but that does not cure the error. The district attorney did not attempt to prove the truth of any of the many things implied by the questions. They may have entirely destroyed the effect of the testimony of the witness, and, more than that, they may have created the belief that defendant was in the habit of seducing young girls. A witness cannot be impeached by evidence of particular wrongful acts, except it may be shown that he has been convicted of a felony. Code Civ. Proc. § 2051. A witness need not give an answer which will have a tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. Id. § 2065. Not only this, but a witness has the right to be protected from irrelevant, improper, or insulting questions. Id. § 2066. The above provisions of the Code apply alike to all witnesses, whether the witness be a Chinaman, a negro, one in the most humble walks of life, or one in high position, the rule is the same.

It is not necessary to consider other questions raised in the briefs.

The judgment and order are reversed.

I concur: KERRIGAN, J.

I concur in the judgment: HALL, J.

5 Cal. App. 614

## HURWITZ v. GROSS. (Civ. 309.)

(Court of Appeal, Second District, California. May 29, 1907. Rehearing Denied by Supreme Court July 27, 1907.)

1. ACTION—JOINDER OF CAUSES—COMPLAINT.
A complaint for breach of agreement to pay mortgages, alleging that by reason thereof the mortgagee applied to the indebtedness the proceeds of plaintiff's property held as security, and plaintiff was obliged to pay the balance, while alleging two elements of damages, states but one cause of action.

2. CONTRACTS—ACTION FOR BREACH—PARTIES.
To an action for breach of contract to pay mortgages, by reason of which the mortgagee applied to the indebtedness the proceeds of plaintiff's property held as security, and plaintiff was obliged to pay the balance of the indebtedness, the mortgagee is neither a necessary nor proper party.

3. SAME—ACTION FOR BREACH—DEFENSES.
Defendant having as part consideration of a conveyance from plaintiff agreed to pay a mortgage on plaintiff's property, and having failed to pay, but directed the mortgagee to apply to its payment the proceeds of plaintiff's property held as security thereof, and plaintiff having paid the balance, defendant may not question the validity and enforceability of plaintiff's obligation to pay.

4. EVIDENCE—BOOKS OF ACCOUNT—PRELIMINARY PROOF.
The regularly kept and original books of a corporation identified as such by the proper custodians, and constituting the records of the business transactions of the corporation, required by Civ. Code, § 377, to be kept by all corporations for profit, are admissible in an action between other parties without further preliminary proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1628-1646.]

5. APPEAL—HARMLESS ERROR.
Any error in allowing witnesses to testify to what books in evidence contain and do not contain is harmless, the statements being correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

6. SAME.
Where plaintiff's measure of damages is the amount of the mortgage obligation which defendant agreed to, but did not, pay, any error in showing the amount of it which plaintiff paid in one way, the balance being paid in cash, is harmless.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Morris Hurwitz against S. L. Gross. Judgment for plaintiff. Defendant appeals. Affirmed.

Herbert Cutler Brown and George H. Moore, for appellant. Charles L. Batcheller and Thomas C. Ridgway, for respondent.

TAGGART, J. This is an action to recover damages for failure to perform an agreement to assume payment of two certain chattel mortgages. Judgment was for plaintiff, and defendant appeals from the judgment and an order denying his motion for a new trial.

Plaintiff on the 19th day of January, 1905, was the owner of four parcels of land (designated in his complaint as 1, 2, 3, and 4, respectively), located in Los Angeles county, upon which, or portions of which, there were growing crops. Against these lands and the crops thereon there subsisted four mortgages; two against the lands for $13,000 and $5,000, respectively, and two against the growing crops, dated April 29, 1904, and August 15, 1904, given to secure the payment of promissory notes for the sum of $2,000 and $700, respectively, and each due one day after date. These crop mortgages were held by the California Citrus Union, which, at the request of plaintiff, picked and removed of said mortgaged crops, before January 19, 1905, oranges belonging to plaintiff of the net value of $1,004.47, as determined by the subsequent sales thereof made by said Citrus Union. On January 19, 1905, plaintiff sold to defendant parcels designated as 1 and 2, for a consideration expressed in the "escrow instructions" as follows: "We are to pay Mr. Hurwitz $2300 twenty-three hundred for above property and assume $13000.00 Mtg. or Tr. deed & all Int. due, & assume $5000 Mtg. or Tr. deed & Int. from Jan. 20, '05 & assume $2700 Chat. Mtg. & all Int. from Jan. 20, '05. Hurwitz to show statements from last 2 mtgee's that said int. is paid to said date." On the same day plaintiff, in execution of said agreement, made a conveyance to defendant of parcels 1 and 2, wherein was contained the following clause: "Subject to all incumbrances now of record against said property, all of which incumbrances the parties of the second part assume and agree to pay." Defendant complied with the other terms of the "escrow," but failed to pay the chattel mortgages and free parcels 3 and 4 from the lien thereof, and notified the Citrus Union to apply the proceeds of sales of said oranges, picked prior to January 19th, to the payment of the indebtedness secured by said mortgages, which was done. The complaint counts on a cause of action for damages for breach of contract, and fixes the amount of such damages at $2,700—the aggregate of the principal sums of said two chattel mortgages, which damages are divided into two elements: The first ($1,213) for partial failure of consideration for the conveyance made by plaintiff to defendant being measured by the proceeds of sales of oranges belonging to plaintiff, applied to the payment of the chattel mortgages by the Citrus Union after defendant had assumed the same; and, second ($1,487) the unpaid balance necessary to clear said third and fourth parcels of land, retained by plaintiff, from the lien of said chattel mortgages. By answer and cross-complaint defendant claimed that plaintiff agreed that the entire orange crop for the year 1904 should pass by the conveyance mentioned in the complaint, and that plaintiff removed the portion of said orange crop so taken by the Citrus Union without defendant's knowledge or consent. No evidence was introduced on this issue, and the court properly found against the contention of defendant in this regard. The burden was upon defendant to establish his allegations.

While there are two elements of damage specially alleged in the complaint, it states but one breach of contract, and but one cause of action. This is sufficiently stated. It appears from the allegations of the complaint that defendant agreed to clear parcels 3 and 4 from the liens of the chattel mortgages and to assume the payment thereof, that there was a sufficient consideration for such promise or agreement, that he failed to perform his agreement, and that plaintiff was injured by reason of such failure. The cause of action must not be confused with the remedy or relief sought. Frost v. Witter, 132 Cal. 426, 64 Pac. 705, 84 Am. St. Rep. 53. This view of the complaint disposes of the errors complained of in the rulings of the trial court upon defendant's demurrer to the complaint on the ground of misjoinder and the motions to strike out and to sever and separately state the two alleged causes of action which it was contended were misjoined in the complaint. The special demurrers based upon alleged uncertainty of statement of ownership and other allegations as to the oranges taken by the Citrus Union and applied to the payment of the indebtedness secured by the chattel mortgages were properly overruled. There was unnecessary detail, perhaps, in the allegations relating to this element of damage, but no uncertainty or ambiguity that could mislead the defendant in pleading to the complaint. The Citrus Union was neither a necessary nor proper party to the action. It had a right under its contract to apply the proceeds of the orange sales to the indebtedness due it, and plaintiff could not recover the money back merely because he had contracted with defendant to pay the whole of the mortgages and the latter had failed to do so. Plaintiff's only right of action was against defendant for the breach of his contract. The crop mortgage for $2,000 given by Gore constituted a lien upon all of plaintiff's crops, and its assumption by defendant was made a part of the consideration for the conveyance to him. He cannot now question whether plaintiff's obligation to pay it was a legal or moral one. Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149. Plaintiff treated it as a binding obligation and so did defendant when he directed the Citrus Union to apply the proceeds of sales of plaintiff's oranges to its payment, and also later when he paid the balance due thereon to the Citrus Union. Having directed the application of plaintiff's money to its payment, he is estopped to deny the validity and enforceability of the obligation against plaintiff's demand for a repayment of the money so applied.

The construction of the contract by the trial court was correct. In ascertaining what is meant by the language used in a written instrument, the object in view and the circumstances surrounding its execution must be taken into consideration. Neale v. Morrow (Cal. App.) 88 Pac. 815. Taking the contract here under consideration by the four corners, and reading it with the eyes of those who made it, by the light and under the circumstances which surrounded its execution (Walsh v. Hill, 38 Cal. 487), we see that plaintiff had four parcels of land incumbered with mortgages; that defendant agreed in consideration of the conveyance to him of two of the parcels to assume the payment of all the liens on the four parcels and pay the plaintiff $2,300. The consideration to plaintiff then was the clearing of parcels 3 and 4 from the mortgage liens and the $2,300 cash in hand. The oranges severed from the land prior to the sale were the property of plaintiff. The amount of the crop mortgages, ascertained on the face of the agreement, was $2,700. This amount was fixed as the liability of defendant by the contract, and the plaintiff was required to pay the interest thereon to the date of sale. This construction of the "escrow" and the clause in the conveyance justifies the conclusions reached by the trial court. The evidence introduced warrants the findings of the court, and justified it in denying the defendant's motion for a nonsuit.

A careful consideration of the errors assigned in connection with the admission of evidence discloses no prejudicial error. A number of exhibits, copies of account sales, check sheets of the California Citrus Union showing particulars of oranges received from, and sold for and on account of, M. Hurwitz, were admitted in evidence over the objections of defendant. These were identified by the employés of the company in whose custody they were, who testified that they were the original sheets received from the district agent at the Covina office, the place at which the oranges were received and from which the shipments purported to have been made; that the witness did not make the entries; they were not made in his presence; and that he had no information as to the knowledge of the district agent who made them. The district agent at Covina testified that the transactions took place during his predecessor's incumbency; that he knew nothing of the transactions to which they referred except as to the custom of making such records; that he received them from his predecessor as records of the office; that he was acquainted with the agent in whose handwriting they were and with his handwriting; and that they were in his handwriting. A "ledger sheet" and "weigher's receiving account slip" were also admitted in evidence over the objections of defendant. These were identified by the chief clerk in the office of the Citrus Union as original records from that office. He also stated that the bookkeeper who kept the book showing the account of Mr. Hurwitz was no longer in the employ of the company, and when last heard from was in Arizona. The witness testified that the "ledger sheet" introduced was the original card showing the only account kept with the chattel mortgages in question, and showed all the entries in relation thereto and all the credits given thereon. A number of questions were asked of these witnesses as to the matters displayed upon the records so introduced, all of which were objected to by defendant, and his objections were overruled; the trial judge stating in explanation of his rulings in this regard at one time that it might be understood that the witness made none of the entries, had no knowledge of the facts about which he was testifying, but that he had received the instruments, whose contents he was repeating, as records of the office which it was the custom of the company to keep, in the custody of the employé filling the position which the testifying witness did. The court by its remarks in some instances expressly distinguished between the statement of a fact known to the witness and the statement of matters appearing on the records introduced, and permitted the witness to state the latter. In one instance, at least, where the question called for that which it was apparent from the question the witness could only answer from the record, the court directed the witness: "He can state whether there is any record of any such payment, regardless of whether they existed in fact."

Questions relating to the correctness and accuracy of books sought to be introduced in evidence have generally arisen in cases where the books are introduced on behalf of the party keeping them, and are in the nature of self-prepared and self-serving declarations. They were permitted to be introduced at common law only because the party could not testify in his own behalf, and, when parties to an action were first permitted to testify, it was held by some of the courts that the books of a party could no longer be admitted in evidence. Roche v. Ware, 71 Cal. 377, 12 Pac. 284, 60 Am. Rep. 539. Books of account so belonging to the parties to the litigation are said to be in the nature of secondary or supplementary evidence of the facts therein stated (Bushnell v. Simpson, 119 Cal. 661, 51 Pac. 1080), but have been held admissible, when preliminary proof has been made, to support a claim against the estate of a deceased person, where the claimant cannot be a witness to testify to his own claim. Cowdery v. McChesney, 124 Cal. 363, 57 Pac. 221; City Sav. Bank v. Enos, 135 Cal. 172, 67 Pac. 52. The question of who may make the preliminary proof and the limitations upon the parties' testimony in such cases appears to be still open to discussion in this state. Stuart v. Lord, 138 Cal. 677, 72 Pac. 142. In White v. Whitney, 82 Cal. 166, 22 Pac. 1138, the rule is adopted from Wharton on Evidence that "a tradesman's book of original entries is, in most jurisdictions, received in evidence as prima facie proof, when supported by the tradesman's oath," and cases in this state are cited which, it is said, sanction, although they do not expressly declare, this rule.

We think, however, that a different rule should be applied to the books here under consideration from that which is applied to the books of a party to the litigation producing them to serve his own purposes and aid his own claim. The exhibits here admitted are the records of the business transactions of a corporation required by law to be kept by all corporations for profit. Civ. Code, § 377. They constitute the "memory" of the transactions of the corporation. Having been produced as the regularly kept and original books of the corporation, identified as such by their proper custodians, they are admissible in evidence. City Sav. Bank v. Enos, 135 Cal. 172, 67 Pac. 52. The exhibits were therefore entitled to be admitted upon the preliminary proof given. The practice followed by the trial judge in permitting the witnesses who were merely custodians of the record, without pretense of knowledge as to the transactions recorded, to read from the record in response to direct questions as to the fact, is one much pursued by some trial judges where the case is tried without a jury. Such a practice is open to abuse, and should be pursued with great caution. Deductions made by bookkeepers greatly aid the court and materially reduce its labors, but in the statement of the record as a fact, if not confined to a literal reading of the record, the witness' own inferences are liable to creep in and a wrong interpretation of the writing be thus had.

A careful examination of the record discloses no statements of witnesses so testifying to what the record contained which do not appear in the exhibits, except, perhaps, one or two answers to questions as to what the books did not show which were competent and relevant questions in themselves. The exhibits being prima facie evidence, and no attack being made upon their correctness, we cannot see that appellant was prejudiced by the rulings of the court in permitting these questions to be asked and answers to be given. All the evidence relating to the Citrus Union's books merely tended to increase or diminish one branch of the damage alleged by a corresponding decrease or increase of the other branch. Twenty-seven hundred dollars were necessary to release tracts 3 and 4 from the lien of the chattel mortgages. To the extent that plaintiff's oranges were used to pay this sum he was entitled to recover from defendant, and to the extent that the defendant failed to pay the mortgages plaintiff was entitled to compel him to do so or pay the amount necessary for this purpose. It was immaterial to defendant upon which branch he was required to pay, and the books of the Citrus Union only determined into which pocket of plaintiff the money should go, to reimburse him for his oranges taken or to clear his land from the lien against it. Conceding that some, or all, of the evidence relating to the books of the Citrus Union was improperly admitted, the defendant was not prejudiced thereby.

No error appearing in the record, the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 633

## PEOPLE v. BIANCHINO. (Cr. 35.)

(Court of Appeal, Third District, California. May 28, 1907. Rehearing Denied by Supreme Court, July 27, 1907.)

1. CRIMINAL LAW—ORDER OF COMMITMENT—SUFFICIENCY.

Under Pen. Code, § 872, providing that the magistrate must in a criminal case indorse on the complaint an order signed by him that it appearing that the offense in the complaint mentioned had been committed, and that there was sufficient cause to believe the within-named A. was guilty thereof, etc., an order in the statutory form designating the offense as "felony, rape, in the within complaint mentioned" was sufficient.

2. INFORMATION — VARIANCE FROM COMMITMENT.

A variance between the commitment and the information, relating to the particular date of the commission of the crime, is unimportant, when it appears that only one offense was committed.

3. RAPE—EVIDENCE—COMPLAINT OF FEMALE.

In a prosecution for rape of a five year old child, committed towards the latter part of January, it appeared that prosecutrix was examined on the 5th of February by a physician, who a few days later discovered that prosecutrix was infected with a venereal disease. *Held*, that evidence of complaints of the injury made by prosecutrix shortly before and after February 5th was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 67.]

4. SAME—FAILURE OF PROSECUTRIX TO TESTIFY.

In a prosecution for rape, the failure of prosecutrix to testify is not ground for excluding evidence of complaints made by her, where she is too young to testify.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 69.]

5. CRIMINAL LAW — APPEAL — HARMLESS ERROR.

Where, in a prosecution for rape of a child, the family physician testified as to an examination made by him of prosecutrix, the denial of defendant's motion for the appointment of a physician to examine prosecutrix was not prejudicial, since the result of another examination might have been unfavorable to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3085, 3088, 3089.]

6. SAME—TRIAL—ORDER OF PROOF.

While the corpus delicti should ordinarily first be shown, a ruling permitting evidence before the corpus delicti is established is not ground for reversal, unless it clearly appears that defendant was prejudiced thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3136.]

7. SAME—FAILURE TO TAKE EXCEPTIONS.

Rulings complained of will not be considered on appeal, where no exceptions thereto were taken at the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2665.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Amadeo Bianchino was convicted of rape, and appeals from the judgment and from an order denying his motion for a new trial. Judgment and order affirmed.

J. C. Webster, for appellant. U. S. Webb, Atty. Gen., for the State.

BURNETT, J. Defendant was convicted of the crime of rape alleged to have been committed on the person of Annie Lertora, a child of the age of five years, and was sentenced to a term in the state prison at Folsom. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

1. It is contended that the court erred in denying the motion of defendant to set aside the information. The motion was as follows: "Now comes the defendant in the above-entitled action, and moves the court to set aside the information on file herein, on the ground that before the filing thereof he, the said defendant, had not been legally committed by a magistrate." The evidence, however, introduced in support of the motion proves to the contrary that the defendant was legally committed by the magistrate. The order indorsed on the complaint or deposition and signed by the committing magistrate is as follows: "It appearing to me that the offense, to wit, felony, rape, in the within complaint mentioned, has been committed, and there is sufficient cause to believe the within Amadeo Bianchino guilty thereof, I order that he be held to answer the same," etc. The foregoing order seems to be in strict accord with the requirement of section 872 of the Penal Code, which provides that: "The magistrate must make or indorse on the complaint an order signed by him to the following effect: It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer to the same."

It will be observed that the magistrate designated the offense as "felony, rape," thereby describing it generally as he is permitted to do, under the statute. He made it more definite, however, by stating that it was the "rape mentioned in the within complaint." It was such an order as the statute contemplates, and it afforded authority for the district attorney to file an information in the superior court. But it is contended that the district attorney filed an information charging a different offense from that for which defendant was held to answer, and therefore the motion should have been granted. The motion, as we have seen, did not raise the point, as it was based upon the ground that the defendant had not been legally committed at all and not that he had not been committed for the offense charged in the information. A defendant should be required, in a technical matter of this character, to stand or fall upon the ground that he has deliberately chosen, and the law should impose upon him also the duty of pointing out in his motion the particular defect upon which he relies in order that the district attorney, if he deems it advisable, may amend the information and thereby avoid the danger and expense of a mistrial. If he fails to do so in a case like the one at bar, where the only point involved in the motion is an apparent variance between the date of the offense as it appears in the order and as shown by the information, he should be precluded from raising the question in any subsequent proceeding. However, assuming that the issue is properly before us, it must be held that the information does not charge a different offense from that recited in the order of commitment. There can be no pretense that the investigation before the committing magistrate and in the superior court concerned more than one offense. The evidence disclosed only one act of criminal intercourse, and the only variance between the commitment and the information relates to the particular date of the commission of the crime. This variance, however, is unimportant when it is apparent that only one offense was committed. The same rule should apply here as in the case of a variance between the evidence at the trial and the allegations of the information, as indicated by section 955 of the Penal Code, which provides that: "The precise time at which the offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense."

If the contention of appellant should prevail, we would have this singular situation: The district attorney will be required to file another information alleging that the offense was committed on or about the 9th day of March, when he knows that the evidence will disclose that it was committed on or about the 1st day of February. In other words, because the magistrate has committed a mistake in the date of the offense, the district attorney must allege an error before he can be permitted to establish the true date. This, of course, is unreasonable. There is nothing in any of the cases cited opposed to our view. In People v. Lee Look, 143 Cal. 216, 76 Pac. 1028, it is held, as stated in the syllabus: "An information is based on the commitment and not on the complaint for arrest, and it is the duty of the committing magistrate to hold the defendant for the offense proved whatever might have been the offense charged." People v. Warner, 147 Cal. 546, 82 Pac. 196, is to the same effect, and cites with approval the Lee Look Case. In People v. Nogiri, 142 Cal. 596, 76 Pac. 490, it was held that the motion to set aside the information should have been granted; but the magistrate held the defendant for assault with a deadly weapon, and the district attorney charged the defendant with the crime of assault with intent to commit murder—a totally distinct offense.

2. It is complained that the testimony of witnesses for the prosecution was allowed, over defendant's objection, to the effect that the child, Annie Lertora, made complaint some time after the injury to her. Two grounds for this objection were urged—first, that the complaint was too remote from the time of the occurrence; and, second, that as the child did not testify it was error to allow any testimony as to a complaint made by her. The date of the alleged injury is not definitely fixed, but was, according to the evidence and defendant's admission, some time in January, 1906, towards the latter part of the month. Witness Stratton, the family physician, was called to treat the child on February 5, 1906, and found the involved parts much inflamed and somewhat lacerated, and a few days later discovered that the child was infected with a venereal disease. It was shortly before and after February 5th that the complaints referred to were made, some of which were voluntary and others after the child was questioned by the witnesses. The court seems to have been careful to keep within the rule in this class of cases, and, so far as we can discover, the complaints were not too remote under the circumstances. The child was too young to be fully conscious of anything wrong in the act, or to experience any sense of shame, and, considering the relations of defendant to the family and his familiarity with the child, she may not have comprehended the nature of the act, or thought of complaining earlier than she did. When the disease developed, and she found herself suffering additional pain, the complaint was naturally renewed. The more serious question is as to the admissibility of the complaint, inasmuch as the child did not testify at all in the case. The evidence is admissible as corroborative of the testimony of the prosecuting witness, and the authorities generally hold that, unless the prosecuting witness testifies, her complaint is mere hearsay and inadmissible. Our Supreme Court seems to have considered that the rule does not apply where the child is of too tender an age to testify People v. Figueroa, 134 Cal. 159, 66 Pac 202. We feel bound by this decision to sustain the ruling of the lower court.

3. Defendant moved the court for the appointment of a physician to examine the child. The motion was denied, and defendant excepted. If the court had made the order, it is difficult to see how it could have compelled an examination if the mother or child had objected. But, assuming that authority existed to make the order and that it could have been rendered effective, we

cannot say that the denial of the application resulted in prejudice, as the result of another examination might have been unfavorable to defendant. Besides, there is nothing to show that the defendant could not have had the child examined by any physician that he might select.

4. The testimony of the witness Stratton as to the physical condition of the child was objected to on the ground that the corpus delicti had not been shown. The order of proof is largely within the discretion of the court. The corpus delicti should first be shown ordinarily, but, unless it clearly appears that the defendant was prejudiced thereby, a ruling permitting evidence before the corpus delicti is established will not justify a reversal of the judgment. People v. Jones, 123 Cal. 65, 55 Pac. 698.

Some other alleged errors are assigned, but we find nothing in any of them to demand a reversal of the judgment. No exception was taken to certain rulings of which complaint is made, and they therefore cannot be considered.

We cannot say as a matter of law that the evidence is insufficient to support the judgment.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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5 Cal. App. 599

## BRYAN v. GRAHAM. (Civ. 310.)

(Court of Appeal, Second District, California. May 27, 1907.)

1. Appeal — Review — Findings of Fact — Conclusiveness.

In a proceeding to determine the rights of parties to purchase certain land, where there was a conflict of testimony upon the issue as to whether or not defendant at the time he made the application to purchase did so for his own use and benefit, the finding of the court therein cannot be disturbed.

2. Public Lands—Conveyances—Statutes.

Under the lake land act of 1893 (St. 1893, p. 341, c. 229), as amended by St. 1899, p. 182, c. 149, regulating the sale of lands uncovered by the recession or drainage of the waters of inland lakes, one who agreed to sell after filing his application and before the issuance of his certificate to purchase did not thereby lose his right to purchase; there being nothing in the law prohibiting such an agreement to sell.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Proceedings by B. L. Bryan against J. A. Graham to determine the rights of the parties to purchase certain land. From a judgment for defendant, plaintiff appeals. Affirmed.

Letus N. Crowell, for appellant. J. L. C. Irwin, for respondent.

SHAW, J. Appeal from judgment and order denying motion for new trial.

This proceeding arises out of conflicting claims of the parties due to the fact that both were applicants to purchase a quarter section of land under "An act regulating the sale of the lands uncovered by the recession or drainage of the waters of inland lakes," etc., as enacted in 1893 (St. 1893, p. 341, c. 229), and amended in 1899 (St. 1899, p. 182, c. 149). The land in question is a part of the territory uncovered by the receding waters of Tulare Lake in Kings county. The application of the respondent was made December 14, 1904, and that of appellant made January 31, 1905. Both applications were in due form and accompanied by the required affidavits. Upon the filing of appellant's application the state surveyor general declared a contest to exist between said parties concerning the right to purchase the land, and made his order referring such contest to the superior court of Kings county for adjudication as to the respective rights of said parties in the premises. Plaintiff alleged that the affidavit of defendant was false, in that said defendant did not at the time of making said application and affidavit desire to purchase said land for his own use and benefit, but for the use and benefit of another; and that at the time of making the application and affidavit defendant had made a contract to sell the same. These allegations are denied by the answer, and upon the trial the court found said allegations of the complaint to be untrue and rendered judgment for defendant. Section 1 of said act, under which these applications were made, requires that the applicant shall, among other facts, state in his affidavit "that he desires to purchase the same [the land] for his own use and benefit, and for the use and benefit of no other person or persons whomsoever, and that he has made no contract or agreement to sell the same." It is admitted that the provisions of section 3500, Pol. Code, which provides that "any false statement contained in the affidavit provided for in section 3495, defeats the right of the applicant to purchase the land, or to receive any evidence of title thereto," likewise defeats the right of any applicant to purchase the land under section 1 of said act of 1893. On his own behalf defendant testified to the truth of the statements contained in his affidavit, and the only evidence offered in support of plaintiff's allegation that defendant's application was made for the use and benefit of another than himself was an agreement, the nature of which does not clearly appear, made with one Fowler about January 1, 1905, and a contract made January 23, 1905, some 40 days after the filing of his application, whereby defendant agreed to sell the land in question to one Rubenstein. Assuming these contracts subsequently made to constitute any evidence of the falsity of the affidavit, there was, nevertheless, a conflict of testimony upon the issue as to whether or not defendant at the time he made the application to purchase did so for his own use and benefit, and the finding of the court therein cannot be disturbed.

The contract to sell the land to Rubenstein was made before the certificate of purchase was issued, and it is contended that, by reason of entering into this contract prior to the issuance of this certificate, defendant lost his right to complete the purchase. In support of his contention appellant cites numerous cases, in all of which the decisions were based upon an express statutory provision either prohibiting or limiting the right of alienation or transfer; for instance, the statutes of the United States relating to homesteads require, upon the making of final proof, an affidavit that no part of such land has been alienated. Rev. St. U. S. § 2291 [U. S. Comp. St. 1901, p. 1390]. So, too, there is an express prohibition of transfer or alienation prior to the issuance of the patents as to lands held under claim of preemption. Rev. St. U. S. § 2263. Our attention has not been called to any such limitation or requirement contained in the law relative to public lands of the state. The contract is with the state, and in the absence of any legislative expression other than that contained in section 3500, Pol. Code, which clearly was not intended to apply to an agreement to sell, made subsequent to the filing of an application and prior to the issuance of the certificate of purchase, it cannot be held that appellant's rights are in any wise abridged by the agreement under discussion. Section 3515, Pol. Code, expressly provides that "certificates of purchase, and all rights acquired thereunder, are subject to sale," etc. This express statutory grant of the right to sell the certificate cannot be construed as an expression of legislative intent that one who agreed to sell after filing his application and before the issuance of his certificate to purchase should lose his right to purchase. The policy of the law is to discourage restraints upon alienation. Rose v. Wood & Lumber Co., 73 Cal. 385, 15 Pac. 19; Phillips v. Carter et al., 67 Pac. 1031, 135 Cal. 604, 87 Am. St. Rep. 152; Lamb v. Davenport, 85 U. S. 307, 21 L. Ed. 759; Adams v. Church, 193 U. S. 510, 24 Sup. Ct. 512, 48 L. Ed. 769; Arnold v. Christy, 33 Pac. 619, 4 Ariz. 19.

Prior to the amendment of 1885, section 3495, Pol. Code, providing for the purchase of school lands, contained a provision requiring the affidavit of the applicant to state therein that the purchase "was for his own use and benefit, and for the use and benefit of no other person," etc. In construing this statute—the facts being that H. had applied to purchase a section of school land under an agreement made with N. at the time of filing his application that one-half thereof was for the use and benefit of N., and which one-half thereof H. was to convey to N. as soon as purchased—the court held in Thompson v. Hancock, 51 Cal. 110: "There is nothing in section 3495 of the Political Code which prohibits the sale of any portion of a sixteenth or thirty-sixth section, belonging to the state, to one who has contracted to convey to another a part of the land so acquired," reversing the lower court upon this point.

We find nothing in the lake land act of 1893, under which this application was made, which prohibits the applicant from making an agreement to sell the land before the issuance to him of the certificate of purchase therein provided for.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 622

## BOHN v. PACIFIC ELECTRIC RY. CO.

(Civ. 362.)

(Court of Appeal, Second District, California. May 28, 1907.)

JURY—RIGHT TO JURY TRIAL—TAKING CASE FROM JURY—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The right of the trial court to grant a nonsuit at the close of the evidence, where it would be obliged to set aside a verdict for plaintiff, exists, and the exercise thereof is not violative of Const. art. 1, § 7, declaring that the right of trial by jury shall remain inviolate, or of Code Civ. Proc. § 2101, requiring all questions of fact, where the trial is by jury, to be decided by the jury, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 235.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by John L. Bohn, administrator of Peter Bohn, deceased, against the Pacific Electric Railway Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Kendrick, Knott & Ardis, for appellant. Bicknell, Gibson, Trask, Dunn & Crutcher (Norman S. Sterry, of counsel), for respondent.

SHAW, J. The defendant owned and operated an electric railway line running from the city of Los Angeles through the town of Compton to Long Beach. It appears without conflict in the evidence that on September 12, 1904, the defendant was running a car at the usual rate of speed north on Wilmington street in said town of Compton, and when approaching Main street, which crosses said Wilmington street, one Peter Bohn appeared in a vehicle, to which was hitched a team of horses which he was driving south along said Wilmington street parallel with and on the west side of defendant's tracks. The car, running at a speed of 15 to 20 miles per hour, which was not in excess of the usual speed, was approaching the crossing at which there was a sign, "Railroad. Look out for the Cars," and its approach was in plain view of said Peter Bohn. The usual signal whistle was given, and the gong was kept going. There was nothing in Bohn's manner which indicated that he contemplated trying to cross the track until the car had reached a point about

60 to 90 feet from the crossing, when he suddenly turned his horses upon the track, with the result that a collision occurred in which said Peter Bohn was killed. His administrator sues for damages. At the close of plaintiff's evidence, defendant moved for a nonsuit, which was denied. Defendant then introduced its evidence and renewed its motion for a nonsuit, which motion the court granted, and judgment was entered for defendant. Plaintiff's motion for a new trial was denied, and he appeals from that order.

The error assigned is the order granting the motion for nonsuit. It is not claimed that the deceased was not guilty of gross negligence, as he clearly was, but it is contended that the motorneer in charge of said car saw the deceased upon the track in time to have stopped the car, and by the exercise of ordinary care he could have stopped the car after he saw the danger to which said deceased was exposed by reason of his position. Appellant contends that the action of the court in granting the motion was in violation of section 2101, Code Civ. Proc., and section 7, art. 1, of the Constitution of this state, which provides: "The right of trial by jury shall be secured to all, and remain inviolate." Like constitutional provisions are contained in the organic law of every state in the Union; yet, notwithstanding this fact, the courts of last resort recognize the rignt of the trial judge in proper cases to direct a verdict in favor of the plaintiff, or to grant a nonsuit. The practice has from the earliest date in the history of this state received judicial sanction. In Ringgold v. Haven, 1 Cal. 115, the court says: "If, therefore, upon a given state of facts, a court would be obliged to set aside a verdict of the jury as against the evidence, we see no reason or propriety in submitting such facts to them for their consideration. When their determination will be a nullity, why compel them to deliberate? Such a course is neither creditable to the law, nor complimentary to the jury." This language was cited with approval in Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303; and again in Geary v. Simmons, 39 Cal. 224, the court says: "A court is justified in granting defendant's motion for nonsuit, after the evidence on both sides has been heard, in a case where, if the motion had been denied and a verdict found for plaintiff, it would have been set aside as not supported by, but contrary to, the evidence." In Fox v. Southern Pacific Co., 95 Cal. 234, 30 Pac. 384, a second motion for nonsuit was made and granted after all the evidence was in. In reviewing this ruling the court says: "Practically, therefore, the real question in the case at bar is whether or not the court abused its discretion in holding that the evidence was insufficient to support the verdict; and it is clear to us, from an examination of the evidence, that this question must be answered in the negative." To the same effect is Vanderford v. Foster, 65 Cal. 49, 2 Pac. 736, and Fagundes v. R. R. Co., 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824. In Estate of Morey, 147 Cal. 495, 82 Pac. 57, the court in discussing a similar question says: "With regard to the granting of a motion for nonsuit made at the close of the evidence for plaintiff and defendant, the rule seems to be well established that the trial court has discretion, and that it is not error to grant the motion where, upon all the evidence, it is clear that if a jury should bring in a verdict against the defendant it would be the duty of the court to set it aside and order a new trial." To the same effect is Estate of Dole, 147 Cal. 188, 81 Pac. 534.

Nor is the practice confined to this state. Quoting from Cooper v. Waldron, 50 Me. 81: "When in any case it is clear that upon the evidence verdict for the plaintiff cannot stand, that in the end judgment must be rendered for the defendant, what good reason can be assigned for submitting the case to the jury? If their verdict is right, nothing is gained; and, if it should happen to be wrong, it must be set aside. To withhold a case from the jury is no greater interference than to set aside their verdict. To set aside their verdict impliedly impeaches either their intelligence or their integrity, and tends to lessen public confidence in the usefulness of the institution. * * * If the presiding judge is of the opinion that the facts admitted or clearly established are not sufficient to prove a want of probable cause, he must either nonsuit the plaintiff or direct the jury to find a verdict for the defendant. The better course is for the judge to nonsuit the plaintiff, for it is idle to submit to the jury a question that can be answered in only one way." And in Reed v. Inhabitants, 8 Allen, 522, the court held: "Where the whole evidence introduced by the plaintiff, if believed by the jury, is so insufficient to support a verdict that the court would not permit one to stand, it is the duty of the court to instruct the jury, as a matter of law, that there is not sufficient evidence to warrant a verdict for plaintiff." "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." Byrd v. So. Express Co., 51 S. E. 851, 139 N. C. 273. "There is in every case a preliminary question, which is one of law, namely, whether there is any evidence upon which the jury could properly find the verdict for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit, if the onus is on the plaintiff, or direct a verdict for the plaintiff, if the onus is on the defendant." The above is the English rule as expressed by Mr. Justice Willes in Rider v. Wombell, L. R., 4 Ex. 38, and the same rule obtains in practically all of the states of the Union.

Measured by this rule, the question before us is one solely of an abuse of discretion by the trial court; and upon the evidence as disclosed by the record we are firmly convinced there was no abuse of discretion on the part of the court in making the order of which appellant complains. The evidence in support of the allegation that the motorman operating the car could, by the exercise of ordinary care, have stopped the car after he had become aware of the dangerous position occupied by deceased, is not only meager but of a character entitling it to little, if any, weight. Had the case been submitted to the jury and a verdict for plaintiff followed, it is clear that it would have been the duty of the court to have set the same aside and ordered a new trial. Under such conditions, no good purpose could be subserved by submitting the case to the jury. The same object is accomplished by a shorter legal route in ordering a nonsuit. As said in Estate of Morey, supra, the practice is only justified in very clear cases, and where there is even an approach to a substantial conflict in the evidence the issue should be left with the jury. The right of the court to set aside a verdict which is unwarranted by the evidence is beyond question. We are unable to perceive any constitutional distinction between the exercise of such right and the right to order a nonsuit in a proper case at the close of the evidence.

There was no abuse of discretion in granting the motion for nonsuit, and the order denying a new trial is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 603

## CARSTENBROOK et al. v. WEDDERIEN et al. (Civ. 293.)

(Court of Appeal, Third District, California. May 27, 1907.)

1. LANDLORD AND TENANT—RENT—ACTIONS—TIME TO SUE.

Under the terms of a farm lease, the lessors were to receive one-third of all crops grown and harvested by the lessees. The lessees, in addition to a sum paid upon the execution of the lease, were to advance on demand $54 per month during the period of the lease, which was to be repaid by the lessors at the time of harvest; the lessees having a lien upon the lessors' share of the crops for the amount. Before the last monthly advancement was due, a flood rendered the raising of a crop impossible. *Held*, that the lessees were not required to wait until demand and payment of the last monthly amount before bringing an action against the lessors for the advancements.

2. TRIAL—FINDINGS—RESPONSIVENESS TO ISSUE.

In an action by lessees to recover from their lessors advancements of rent, an issue tendered by the lessors' counterclaim was that the lessees used the premises for pasturage purposes solely, and that the reasonable value of the pasturage was $1,000. *Held*, that a finding that the lessees were entitled to all the pasturage during the term of the lease, and that the lessors take nothing by reason of their counterclaim, was sufficient to cover the issue.

3. LANDLORD AND TENANT — ENJOYMENT OF PREMISES—PASTURAGE RIGHTS.

Where there was no provision in a lease for years reserving to the lessors the right to the pasturage, the lessees were entitled to it, under Civ. Code, § 819, providing that a tenant for years, unless he is a wrongdoer or holding over, may take the annual products of the soil.

Appeal from Superior Court, Yuba County; E. P. McDaniel, Judge.

Action by H. J. Carstenbrook and another against W. A. Wedderien and another. From a judgment for plaintiffs and an order denying a new trial, defendants appeal. Affirmed.

W. H. Carlin and Waldo A. Johnson, for appellants. M. F. Brittan and J. E. Evert, for respondents.

HART, J. This action is brought by plaintiffs to recover the sum of $591, together with interest thereon at the rate of 8 per cent. per annum, alleged to have been loaned and advanced to defendants under and by virtue of the terms of a certain written agreement of lease entered into between the parties, involving the leasing of certain lands to plaintiffs by defendants. A jury was waived by the parties, and the case tried by the court. Plaintiffs were awarded judgment for the sum of $659.86, which includes the principal sum sued for and interest in the sum of $68.86. Defendants take this appeal from said judgment and an order denying their motion for a new trial.

By the terms of the said written agreement or lease, which was executed by the parties on the 21st day of January, 1904, the defendants leased to the plaintiffs certain real property, situated in Yuba county; said lease to take effect on and from the said date of its execution and to continue in force until and including the 28th day of September, 1904. It was provided in the lease that the plaintiffs should have the option, upon the expiration of the term thus expressly agreed upon, of extending the term of their lease of said lands for a further period of four years. The lease is made a part of the complaint and is set out in hæc verba in the findings, and so much thereof as may be necessary to an understanding of the issues presented by the pleadings reads as follows:

"Upon the following terms and conditions, to wit: Said second parties will at all proper times and seasons during the term of this lease, and according to the terms of good husbandry practiced in the neighborhood, crop said lands and premises to grain and hay and such other crops as they shall in their sound discretion deem advisable; that they will carefully plant, care for, protect and harvest all of said crops without any expense to said first parties except for sacks as hereinafter mentioned, and will deliver to said first parties, or their order, within a reasonable time after said crops shall have been gathered and harvested, subject to the lien for advancements made hereunder and to be made hereunder by said second parties to said first parties as hereinafter mentioned, at such place as said first parties shall designate in the city of Marysville, one-third of all of said crops of grain, said first parties to furnish at their own expense sufficient sacks to contain their rental or share of one-third of all crops of grain grown and harvested upon said lands under the terms of this lease; and said second parties will further deliver to said first parties properly stacked on said premises one-third of all hay grown and cut upon said premises under the terms of this lease.

"Said second parties hereby covenant and agree to pay to said first parties, at the date of the execution of this lease, the sum of two hundred and thirteen dollars ($213.00), and upon the request and demand of said first parties the further sum of fifty-four dollars ($54.00) on the first day of each and every month commencing with the first day of February, 1904, during the period of this lease, that is, up to and including the 28th day of September, 1904, and the further sum of fifty-four dollars ($54.00), on the like request and demand of said first parties, on the first day of each and first day of September, 1908, if said period or every month thereafter up to and including the term of said lease be continued and extended to September, 1908, as hereinabove provided. Said sum of $213.00 and said sum of $54.00 to be paid monthly as herein specified, shall be deducted with interest as herein specified, by said second parties, when paid, from the one-third share of said first parties in the crops raised under the terms of this lease and shall bear interest from the date of their several payments at the rate of eight (8) per cent. per annum, and said sum with interest as aforesaid shall be and constitute a lien on said one-third portion of said crops reserved herein as and for rental for said first parties, in favor of said second parties, until the same together with interest as aforesaid be repaid by said first parties to said second parties, and should the total of said advancements, together with interest as aforesaid, in any season, exceed said lessors' (said first parties) share in the entire crops for said season, then in such event said first parties shall pay to said second parties the excess thereof received by them from said second parties.

"It is further agreed by and between the parties hereto that said advancements made and to be made hereunder by said second parties to said first parties, together with interest as aforesaid, shall be repaid by said first parties to said second parties at the harvest of said crops, in gold coin of the United States of America."

The complaint is verified. The answer admits that the plaintiffs paid to the defendants the sum of $591, but specifically denies all the other material averments of the complaint, and sets up a counterclaim upon a quantum valebat, for the sum of $1,000, alleged as the reasonable value of the use of the leased lands for the purposes of pasturage, to which use, it is alleged, it was converted by plaintiffs; said pasturage being, it is claimed, the sole and exclusive property of defendants. It is insisted that the judgment should be reversed for two reasons: "(1) Because the demands sued upon were not due when the action was commenced; (2) because the findings do not cover all the material issues raised by the pleadings."

The action was commenced on the 8th day of August, 1904. A demurrer was sustained to the original complaint, and thereafter and on the 6th day of February, 1905, plaintiff filed an amended complaint, which (a demurrer thereto having been overruled) tendered the issues of fact upon which the cause was tried. The court found from the evidence "that pursuant to the terms of said agreement said plaintiffs did, at the proper time in the year 1904, and in accordance with the terms of good husbandry as practiced in the neighborhood in which said lands are situated, carefully crop and plant said lands and premises to grain and hay, and did carefully care for and protect said crops during the said year 1904, and that thereafter and during the said year of 1904, and before the time for harvesting the said crops, the whole of said crops were totally destroyed by an act of God and without any fault or neglect of said plaintiffs, or either of them, and as a result thereof there were no crops or any crop to harvest upon said lands and premises described in said agreement during said year of 1904." The court was fully warranted in making this finding from the evidence received. The plaintiffs testified that, having entered into the possession of the lands referred to in the lease between the 10th and 15th of February, 1904, at once proceeded to plow the arable or tillable portions thereof, preparatory to seeding and cultivating the same in obedience to the covenants and conditions of the lease. The property, or the "ranch," as in common vernacular it is designated, embraces some 393 acres of land, of which 205 acres are "farming" lands, or lands adapted to and suitable for the cultivation of cereals. Approximately 140 acres of the land were plowed; the balance being too wet to undergo that process to any practical purpose. A short time thereafter heavy rains came, the water in the Feather river, on which the lands are situated, rose to such an extent as to overflow its banks, and the flood waters inundated a large part of the land; the same remaining thereon so that the land could not be utilized for farming purposes for a long period of time. The plaintiff H. J. Carstenbrook testified: "Some time in May I sent my teams there again and summer-fallowed 85 acres, on the north side of the road, and also a piece on the south side that had been winter plowed. All told, I replowed about 115 acres during that year after I had entered into the lease. I made two plowings that year on the place. After the first plowing, I did not sow the piece on the south side of the house, next to the levee, because I could not get on it, because of the water on it. The other part I had just seeded to barley, when the water came up on it. This was about 70 acres. There were about 85 acres in the whole piece, but I did not seed 10 or 15 acres of it, because it was too wet. About 85 acres I plowed the second time. The portion of the land north of the house, about 85 acres, I seeded to barley twice, and the water came up and drowned out both times. The water came up the second time about the 28th of March and remained over it fully three weeks, and probably longer, and the ranch was not at any time afterward in such condition that it could have been cropped." This witness also testified to having had 22 years' experience in the business of farming in Sutter and Yuba counties. He stated that after the water had finally subsided and receded from the land there was nothing left "but a water hole," and that it was not possible under the conditions then existing to cultivate a crop of any character; that there was no volunteer crop in that year upon the 115 acres which were replowed and summer-fallowed; that the vegetation on the land after the floods was not such as could be made into good hay; and that therefore he turned about 288 head of sheep and 8 or 9 head of other live stock upon the land, and thus, from the latter part of June or the first of July to a short time before the 28th of September, used said land "off and on" for pasturage purposes. He testified that he and his coplaintiff had under lease at the time an adjoining farm, on which they also pastured their sheep and other cattle, alternately running them on the land leased from defendants and then on the adjoining land mentioned. The other plaintiff, J. D. Carstenbrook, corroborated the testimony thus given by his partner and coplaintiff as to the unfavorable conditions with which they were confronted in an effort to cultivate the land in accordance with the terms of the lease and their failure to do so for the reasons stated by the first-named witness, and also upon the point that the grass or vegetation on the land after the flood waters had receded, and it was too late to do anything in the way of seeding the land in wheat and barley or either, was unfit to be profitably mown for hay. Some five or six other witnesses—farmers residing and who had for many years lived and farmed in the neighborhood of the land in question—gave testimony corroborative of that given by plaintiffs. All of them testified that plaintiffs, by the exercise of the most prudent husbandry, did their utmost to cultivate and grow suitable crops upon the land, but failed because of the intervention of unfavorable climatic conditions; that, under the circumstances, it was impossible to crop the land; that there grew upon the land after the water from the overflow of the river had disappeared "dog-fennel" and other weeds unfit even for the purposes of pasturage; that, while there was a small quantity of grass growing on the land upon which sheep and other cattle could thrive for a very limited time, it was measurably insignificant, and in consequence, for purposes of hay, not worth its cutting. In fact, the testimony of these witnesses was uniform upon the point that a crop of hay could not have been cut from the land after the recession of the waters of the overflow. From the conditions existing and as thus briefly described, it was manifestly impossible to have cultivated and advanced to a state of fruition any kind of a crop upon the land, and therefore it irresistibly followed that the terms upon which the plaintiffs took possession thereof under the lease could not be by them met and carried out. These conditions, as the court found, and as the evidence conclusively demonstrates, were not brought about through the fault or the negligence or default of the plaintiffs, but were the consequences of the course of nature and resulting circumstances, to repel, overcome, or control which is, of course, beyond the power of any known human agencies, except, perhaps, through efficient levee fortifications, constructed to guard against overflows of the flood waters. Under the stipulations of the lease, as will be observed, the defendants, in consideration of transferring the possession and use of their land to plaintiffs, were to receive one-third of any and all crops grown and harvested by said plaintiffs, "subject to the lien for advancements made hereunder and to be made hereunder" by said plaintiffs. The latter, under the terms of the lease, advanced to defendants, upon the execution of the instrument, the sum of $213, and were to thereafter further advance to them on the first day of each month the sum of $54 "commencing with the first day of February, 1904, during the period of this lease, that is, up to and including the 28th day of September, 1904"; said advances to be made "upon the request and demand" of said defendants.

The contention is that the action was prematurely brought because the plaintiffs defaulted in making the last advance of $54; that is, the advance which they would have been required to make upon demand of defendants if the land had been successfully farmed. In other words, the sum of $54 not having been advanced or loaned to appellants for the month of September, no right of action accrued to respondents for the total amount already so received by defendants. The contention is, in our opinion, wholly without any reason for its support. Upon the question of the time of repayment, the agreement is in no sense obscure. It provides that said "advancements made and to be made hereunder by said second parties, together with interest as aforesaid, shall be repaid by said first parties to said second parties at the harvest of said crops, in gold coin," etc. It certainly would not be attempted to be maintained that this clause of the lease means that the money should not be returned until crops had been actually harvested, and it is not so contended. The proper and the only true construction of it is that the money should be repaid at that time of the season when crops, if there were any, should be harvested, or at any other time, we think, when it could become a certainty or settled fact that it was impossible, from the inordinate quantity of water from the river overflows covering the land, to grow crops thereon. The evidence shows that it was plainly apparent to the parties to the lease, at and before the time at which crops should have been harvested upon the land had they been seeded and grown, that there was no possibility of securing crops from the land, and, in consequence, no possibility of the receipt by the defendants of the compensation to which they would have been entitled had the season been more propitious. The conditions upon which the land was leased necessarily involved returns to both parties from their investment, as it may properly be styled, as indeterminate, uncertain, and problematical as must be usual to enterprises which, like this, are required to depend, as among the prime factors essential to their prosperousness and final success, upon favorable meteorological and other conditions. Each of the parties, in other words—the defendants as well as the plaintiffs—by their written covenants manifested, mutually, a willingness to take a chance of reaping the benefits which ordinarily attend such a venture, and of suffering together the disadvantages and losses which the interference of adventitious circumstances too often bring to it. The termination of the lease was fixed for the latter part of September in order, without doubt, that the entire harvesting season would thus be included in and covered by the lease, thereby giving plaintiffs full opportunity to properly gather whatever crops they might deem it the part of wisdom to grow. There is nothing in the language of the lease, reasonably construed, which bound plaintiffs to advance the $54 a month after it became certain that there could be no possible hope or expectation of harvesting a crop of any character from the land. The moneys received by defendants from plaintiffs were, it is admitted, mere loans, to secure repayment of which it was agreed that plaintiffs should retain, until their accounts were adjusted, the share to which the defendants, by the terms of the lease, would be entitled, of any crops which might be harvested upon the land. That point or stage of the season having been reached where it must have been absolutely clear to both parties that no crop of any kind whatsoever could be gathered from the land, owing to the unfavorable conditions which existed, by what process of reasoning can it be maintained that, under the terms of the lease, interpreted agreeably to reason, the plaintiffs were in no position to sue for advances already made, because they had not made the further loan of $54, which they would probably have been required to make in the event that the land had been successfully cropped? The lease may well be construed as obligating plaintiffs to make the loans to defendants as stipulated therein so long as there existed a prospect or hope of realizing some returns from the cultivation of the land in the manner agreed upon, and that, when the time arrived that any reason for such prospect or hope ceased to exist, then the obligation to make such advances ceased to be binding or of any force. We can conceive of no reason, under a fair interpretation of the language of the lease, why the plaintiffs should have been forced, before acquiring a right to sue for moneys already loaned to defendants, to go through the form of advancing a further sum of $54. The logic of the argument may be stated thus: "We owe you, it is true, the sum of $590," say the defendants, "but you have no right now to sue us, nor can you ever acquire any such right until you have made the advance to us of the further sum of $54. The reason for such further loan has, of course, ceased to exist, but we are, nevertheless, under the strict letter of the lease, entitled to a further advance of $54. When you have thus carried out your part of the agreement, you are then authorized to and have the legal right, immediately thereafter to sue us, not only for the last advance made, but for the whole amount loaned to us." This, it seems to us, is the necessary effect of the argument, and the proposition is obviously a reductio ad absurdum.

We think the findings sufficiently respond to and include all the material issues tendered by the pleadings. The specific complaint upon this point is that the court omitted to make any finding upon the issue involved in the alleged counterclaim set up by the defendants to the effect that "during the period of the lease plaintiffs used the leased premises for pasturage purposes solely," etc., and that "the reasonable value of this pasturage was the sum of $1,000." The finding of the court upon this question is as follows: "That said plaintiffs, under the terms of this agreement, are entitled to all of the pasturage on said land during the terms of said lease, and that said defendants take nothing by reason of their counterclaim." This finding is sufficient to cover the issue to which it relates. It appears to be clear enough to require no amplification or explanation to comprehend its meaning. The plain meaning of it is (and it can be construed as meaning nothing else) that the pasturage on the land was the property of plaintiffs, and that therefore the claim of defendants that it belonged exclusively to them, and that they were entitled to damages in any sum from plaintiffs for taking and using it, is without any foundation in fact. The authorities cited by counsel are where no finding whatever was made upon a certain material issue raised by the pleadings, or even an attempt to make one.

The grounds upon which the motion for a new trial was based and urged here upon appeal from the order practically call only for a discussion of the questions presented on the appeal from the judgment, and which we have considered. Counsel insist that the court erred in refusing to grant the motions of defendants to dismiss the action and for judgment on the pleadings, and also in denying their motion for a nonsuit; but the questions arising thereon, as suggested, have been disposed of in the discussion of the points urged on the appeal from the judgment.

The plaintiffs were, we think, entitled to the use of the pasturage and feed growing upon the land. There is no provision in the lease reserving to the lessors the right to the pasturage, and unless such right was withheld from plaintiffs, who were tenants for years, by the terms or some covenant of the lease, the plaintiffs were acting within their rights when they grazed their stock upon the land. Section 819, Civ. Code; Marshall v. Luiz, 115 Cal. 625, 47 Pac. 597. Of course, it should be unnecessary to say that, if the lessees had succeeded in growing upon the land a crop of hay, or of barley or of wheat, worth harvesting, in point of quantity and quality, they would not have been justified in entirely appropriating the same for the pasturing of their stock or otherwise, without accounting to the defendants for their share thereof. But we feel convinced from the testimony adduced at the trial that, after the disappearance of the flood waters from the land, the vegetation growing thereon which was at all capable of utilization was, even for the purposes of pasturage, of comparatively little value, and that the consequence of gathering it, if, indeed it was in such condition as to have rendered it practicable to reap it, considering the cost and labor required to do so, would have been loss rather than profit. The evidence indisputably establishes the fact that the plaintiffs, who are experienced farmers, and who, from having been engaged in the business of farming for many years in the section of the state where the leased lands are situated, must be thoroughly familiar with the methods and requirements of successful farming in that locality, unremittingly strove to cultivate and grow crops upon the property, as they agreed to do, by the covenants of the lease. There was no sane reason why they should not have done so. They had equal concern with the defendants in the success of the venture, for their failure because of negligence or for any other reason within their control to make the business prosperous and profitable could not result otherwise, quite naturally, than to militate against their own welfare as well as against that of the defendants.

We have carefully consulted all the authorities cited by counsel for appellants as sustaining their several contentions, and readily concede that they contain declarations of sound law, but are unable to perceive their apposition to the facts presented in the case at bar. We can find no reason for disturbing the judgment or the order.

For the reasons stated in the foregoing discussion, the judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

5 Cal. App. 638

## NEVADA NAT. BANK OF SAN FRANCISCO v. BOARD OF SUP'RS OF KERN COUNTY et al. (Civ. 312.)

(Court of Appeal, Third District, California. May 28, 1907. Rehearing Denied by Supreme Court July 27, 1907.)

1. MANDAMUS — PETITION — SUFFICIENCY — WATERS AND WATER COURSES—IRRIGATION DISTRICTS—BONDS—ASSESSMENTS.

Laws 1897, p. 267, c. 189, § 39, provides that, in case the board of directors of an irrigation district refuse to make an assessment to pay interest on bonds or bonds maturing, the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment to be made, etc. *Held* that where, in mandamus to compel supervisors to make an assessment, it appeared that all the land of the district was situated in one county, the petition was not insufficient because it failed to state that the office of the board of directors was situated in the county where the proceedings were brought.

2. WATERS AND WATER COURSES—IRRIGATION DISTRICTS—BONDS—ASSESSMENTS—LEVY.

Laws 1897, p. 267, c. 189, provides that the board of directors of an irrigation district shall levy an assessment sufficient to raise annual interest on bonds, and in any year in which the bonds shall fall due must increase the assessment to an amount sufficient to pay the principal, and, in case of the neglect or refusal of the board of directors to cause such assessment and levies to be made, the assessment shall be made by the county supervisors of the county in which the office of the board of directors is situated "in like manner and with like effect as if the same had been made by the board of directors, and all expenses incident thereto shall be borne by the district." *Held*, that expenses of a levy were properly included in the levy made by the supervisors.

3. MANDAMUS — WATERS — IRRIGATION DISTRICTS — BONDS — ASSESSMENT — COMPELLING LEVY.

Mandamus was properly awarded to compel supervisors to make an assessment and levy under the statute, though petitioner's demand was represented by a judgment against the district rendered in an action on the district's bonds.

4. WATERS AND WATER COURSES—IRRIGATION DISTRICTS — BONDS — ASSESSMENTS — LEVY —STATUTES—VALIDITY.

Section 39, providing for an assessment and levy by the board of supervisors, is not violative of Const. art. 11, § 12, declaring that the Legislature shall have no power to impose taxes upon counties or public or municipal corporations, but may by general laws vest in the "corporate authorities" thereof the power to assess and collect taxes.

5. SAME.

Laws 1897, p. 267, c. 189, § 39, provides that the board of directors of an irrigation district shall levy an assessment sufficient to raise the annual interest on outstanding bonds, and in any year in which any bonds shall fall due must increase the assessment to an amount sufficient to raise a sum sufficient to pay the principal of the bonds as they mature; and provides that, in case of the neglect of the directors so to do, an assessment and levy shall be made by the board of supervisors of the county in which the office of the directors of the district is situated. *Held*, that it is not necessary that the directors or supervisors make several assessments for each year, but the board of supervisors may make one levy and assessment for the payment of the aggregate amount of the installments of interest and principal due in successive years.

6. MANDAMUS—IRRIGATION DISTRICTS—BONDS—ASSESSMENTS—LEVY—JUDGMENT.

In mandamus by a judgment creditor of an irrigation district to compel the supervisors to make an assessment and levy under Laws 1897, p. 267, c. 189, § 39. a judgment awarding the writ was not erroneous because it made no provision for other creditors.

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Mandamus by the Nevada National Bank of San Francisco to compel the board of supervisors of Kern county to levy and collect a tax for the payment of a judgment in favor of petitioner against the Poso irrigation district. From a decree awarding the writ, respondents therein appeal. Affirmed.

J. W. P. Laird, C. L. Claflin, H. L. Packard, and G. W. Zartman, for appellants. H. V. Kimberlin and G. H. Smith, amicus curiæ. Heller & Powers, for respondent.

BURNETT, J. The judgment or decree from which the appeal has been taken is as follows: "The alternative writ of mandate issued in this action having been served on defendants, and the said defendants having appeared and answered the verified petition of plaintiff, and the issues thereby joined having been brought for trial before this court sitting without a jury this 13th day of February, 1905, Messrs. Heller & Powers appearing as attorneys for plaintiff and J. W. P. Laird, Esq., appearing as attorney for defendants, and documentary and oral evidence having been introduced, and the matter having been argued and submitted, this court finds that all of the allegations set forth in plaintiff's petition or complaint are true; and that the Poso irrigation district is a municipal corporation organized under the laws of the state of California, and is wholly situated in the county of Kern, state of California; and that the superior court of the county of Kern, state of California, in the action therein pending, wherein the above-named plaintiff was plaintiff, and the said Poso irrigation district was defendant, duly gave, made, and entered a judgment, requiring said Poso irrigation district to pay the said plaintiff the sum of $12,262.96, together with interest thereon, at the rate of seven (7) per cent. per annum, from the 26th day of August, 1902, and for other purposes; and that said Poso irrigation district has no funds to be applied to the payment of said judgment; and that there is no property belonging to said Poso irrigation district upon which execution could be levied; and that the officers of said irrigation district have refused and neglected to levy an assessment or do or perform any of the acts provided by law, to assess the real property in said district, for the purpose of paying the money due on said judgment; and that the defendant, board of supervisors, after petition to do so to it, has also refused to take the necessary steps to levy an assessment on the property of said district, or to cause any levy of any assessment to be made on the property in said district, or to take any steps for the purpose of assessing said district, and collecting the taxes on the property in said district, in order to pay said judgment; and that plaintiff is a party beneficially interested and has no means of collecting its judgment without the action of said defendant; and that said plaintiff has no plain, speedy, adequate, or other remedy in the ordinary course of law. Now, therefore, it is hereby ordered, adjudged, and decreed that said defendants immediately proceed to levy an assessment in accordance with law upon the real property within the boundaries of said Poso irrigation district which is subject to an assessment of said district sufficient to pay said judgment of plaintiff, to wit, the sum of $12,262.96, together with the interest thereon at the rate of seven (7) per cent. per annum from the 26th day of August, 1902, and also all expenses incident to the making of said levy and assessment and incident to the collection of said assessment, which expenses shall be estimated by the said defendant, board of supervisors, and shall be included within said levy and shall also include plaintiff's costs in this action, which are hereby taxed at $——— against said defendant, and which shall be included within said levy, and when sufficient money is collected the defendant shall pay to plaintiff from the sum collected whatever amounts are collected on said assessments until said plaintiff shall be paid the said amounts hereinbefore referred to, to wit, the sum of $12,262.96, together with interest thereon at the rate of seven (7) per cent. per annum from the 26th day of August, 1902, and the costs of suit herein. And it is further ordered, adjudged, and decreed that a peremptory writ of mandate shall be issued to said defendants commanding them to forthwith do the acts herein ordered that they shall do, and that a return day be inserted in said writ as on or before the 15th day of September, 1905. Paul W. Bennett, Judge of the Superior Court."

The action is based upon the provisions of section 39 of "An act to provide for the organization and government of irrigation districts, approved March 31, 1897" (Laws 1897, p. 267, c. 189), which is in the following language: "Sec. 39. The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and in any year in which any bonds shall fall due must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury and be apportioned to the several proper funds. In case of the neglect or refusal of the board of directors to cause such assessments and levies to be made as in this act provided, then the assessment of property made by the county assessor and the state board of equalization shall be adopted, and shall be the basis of assessment for the district, and the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment roll for said district to be prepared, and shall make the levy required by this act, in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must, respectively, perform such duties, and shall be accountable therefor upon their official bonds as in other cases."

The bonded indebtedness herein involved was incurred prior to the enactment of said statute, but this circumstance is unimportant in view of the fact that the act of 1889, passed prior to the issuance of the said bonds and amending the act of 1887, known as the "Wright Irrigation Act," contains a provision identical, as far as the question before us is concerned, with said section 39 of the act of 1897. The judgment herein is vigorously assailed by numerous counsel, including a learned "friend of the court," and we have examined with care the points and cases to which our attention has been directed, and we shall proceed to state our views thereon in the order in which the various propositions are advanced in the briefs.

The position of appellants, as stated by counsel, is that the judgment must be set aside, and the writ vacated, because: "(1) The petition upon which the writ is based is wholly insufficient to give the court jurisdiction to issue the peremptory or any writ herein. (2) The court exceeded its authority and jurisdiction in its direction to the board of supervisors by said writ: (a) In directing a levy and collection for plaintiff's costs expended in the present action. (b) In directing a levy for expenses to be incurred in such levy and collection. (c) In directing said board to estimate such expense for the purpose of levy and collection. (d) In directing said board to pay over to said plaintiff, when collected, the amounts due it on its said judgment. (3) The court exceeded its jurisdiction in directing said board of supervisors to make levy to pay said judgment. (4) That section 39, upon which this proceeding is based, is unconstitutional and void."

In addition to the foregoing, the brief filed by "amicus curiæ" presents specifically these considerations: "(1) Upon the failure of the board of directors or of the board of supervisors, in any year, to levy an assessment for the interest, or the interest and installments of principal, falling due in that year, its power ceases. In other words, the act does not confer upon the directors or the board the power to make a general assessment for the aggregate of indebtedness accruing for the previous years, or, as in this case, for a period of 16 years. The power, if it exists, can only be to make separate annual assessments for each year based on the values of that year; for otherwise the obligations of the parties would be varied, and the act would be unconstitutional. But this, from the nature of things, is impracticable, at least after the lapse of a year or two, and it is therefore submitted that the provision of the amendment of 1839, conferring the power of assessment upon the board of supervisors, is, on this account, a mere brutum fulmen, and practically void. (2) By the provisions of the statute the taxes collected constitute a common bond fund for the benefit of all the creditors, and all have a common interest in it. * * * A suit, therefore, to dispose of this fund, cannot be maintained without making the others parties, or suing for their common benefit. Code Civ. Proc. §§ 378, 379, 382, 389, and Meyer v. City of San Francisco (Cal. Sup.) 88 Pac. 722. (3) If in this state the equitable doctrine as to laches be held to apply to proceedings of the court generally (Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423), a very extreme case of laches is here presented."

In support of their first proposition, it is urged by appellants that the petition for the writ of mandate is fatally defective, in that it does not appear therein that the office of the board of directors of the irrigation district is situated in Kern county, where the suit was brought. The contention is based upon the language of said section 39 that "the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment," etc. There was no corresponding allegation nor finding in the case at bar, and it is claimed that this is jurisdictional. As far as the absence of any finding is concerned, no such issue was presented, and it is hardly necessary to cite authorities to the point that the findings must be confined to the issues made by the pleadings. But appellants are wholly at fault in their claim that the want of jurisdiction is disclosed by the allegations of the petition. They have entirely mistaken the rule as applied to the jurisdiction of courts of record. The presumptions here are in favor of jurisdiction, and not against it. There can be no question that, under the authority with which superior courts are clothed by the Constitution, the superior court in and for Kern county, in the exercise of its general powers, had jurisdiction to entertain an application for a writ of mandate against the supervisors of that county. If there were any exceptional circumstances which, if disclosed, would divest the court of jurisdiction, in the absence of any allegation concerning them in the complaint, the burden is upon the defendants to present them. Since it does not affirmatively appear that by reason of the peculiar condition suggested the court did not have jurisdiction, by virtue of its general authority, the presumption must be indulged against appellants' contention. But, again, it is manifest that the provision was intended for a case where the irrigation district comprised land in more than one county. Here it appears that it is confined entirely to Kern county. There seems to be no merit in this contention, and we have probably devoted to it more attention than it deserves.

In the specification of particulars wherein it is alleged the court exceeded its authority in its direction to the board of supervisors, exception is taken to that portion of the decree providing for the costs of the present action and expenses to be incurred in the levy and collection of the judgment. It is insisted that said section 39 limits the power of the board of directors of the district to the levy of an assessment sufficient to raise the annual interest on the outstanding bonds and in any year in which any bonds shall fall due to increase such assessment to an amount sufficient to pay the same as they mature, and that the delegation of authority to the board of supervisors cannot be more comprehensive than the authority conferred upon the board of directors in the first instance. The consideration of the costs of the present action may be eliminated, as the record shows that no amount was awarded for costs. The expenses of the levy and assessment would seem to be a legitimate portion of the burden to be borne by the property owners in whose behalf the bonded indebtedness was incurred. In fact, said section 39 makes provision for it in this language: "And all expenses incident thereto shall be borne by such district." If we understand the position of appellants, it is that other provision is made for said expenses in case of the levy by the board of directors, and, since there is a delegation of power to the supervisors, their authority is limited to the method pointed out for the directors to pursue. Of course, the act contemplates that the board of directors will do its duty, and ample provision is made in detail for incurring and liquidating a bonded indebtedness. But we do not understand that in the technical sense the authority conferred upon said directors is sought to be delegated to the board of supervisors. Rather is it true that the board of directors is empowered to bind the district by taking certain steps, and the authority of the said board to liquidate an indebtedness must be exercised in the manner pointed out. But in case of its refusal or neglect to act, then the board of supervisors is granted directly by the Legislature the power to levy an assessment to provide not only for the payment of the amount due, but also for the expense of said levy. The statute does not expressly provide that the expense shall be included in said levy, but it is fairly implied, and any other construction seems unreasonable. The context clearly shows, we think, that in this way the expenses "shall be borne by the district."

The case of Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290, cited by appellants, is not in point. That was not a case where the directors refused to act. It was a suit to enjoin the collection of an assessment, and no such question was considered as is involved here in reference to the authority of the board of supervisors in the premises. The important point decided therein is shown by the following quotation: "A court of equity, as such, in the absence of statutory authority, has no jurisdiction to enforce a lien that is created by statute, for the enforcement of which the statute has provided a mode. The enforcement of the lien in such case can be only in the mode provided by the statute." It was also held that the court should have determined the validity of the assessment which it was sought to collect. There is nothing in that case inconsistent with our position here, as we hold that the court below directed the board of supervisors to follow the mode that is at least implied by the statute. The objection that the board of supervisors is without authority to estimate the expenses of levying and collecting the assessment is also without persuasive force. As suggested by respondent, no one is presumably better fitted to make the estimate than the supervisors, and we think it is implied that they should do so when an emergency arises such as in the case at bar.

The position taken by appellants that the lower court exceeded its jurisdiction in directing the board of supervisors to pay over to the plaintiff from the sum collected a sufficient amount to satisfy plaintiff's demand seems to be in accord with the statute. Respondent rather concedes that the judgment is erroneous in this respect, but claims that it "does not affect the validity of other portions of the decree," and that the decree can be modified by striking out that provision, leaving other portions of the decree in full force and effect. Since the act provides in the first instance that the tax collector and treasurer of the district shall collect and receive the money, and, "in case of neglect or refusal of either of them to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must respectively perform such duties and shall be accountable therefor upon their official bonds as in other cases," and as there is no authority to depart from the provisions of the act, the portion of the decree complained of should be stricken out. There is no good reason, though, why this should necessitate a new trial.

We cannot see any merit in appellants' contention stated by them as follows: "The petition to the board of supervisors as well as the writ prays that a levy to pay the judgment therein set out be made by said board of supervisors in conformity with the act in question and more particularly in conformity with subdivision 39 thereof. As we have already pointed out, section 39 relates specially to interest on outstanding bonds. The decree and the writ directs the levy to pay a judgment. The original contract between plaintiff and the district is so completely merged in the judgment, in a new form of contract, that the court cannot see that it is for interest on outstanding bonds and therefore payable by the provisions of section 39." A large number of cases is cited in support thereof, but their effect seems to have been misapprehended. The quotation made by appellant from Taylor v. Root, *43 N. Y. 344, may be accepted as a fair expression of what is held in all of them: "The cause of consideration of the judgment is of no possible importance; that is merged in the judgment. When recovered the judgment stands as a conclusive declaration that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's original claim. * * * This assent may have been reluctant, but in law it is an assent, and defendant is estopped by the judgment to dissent. Forever thereafter, any claim on the judgment is setting up a cause of action on the contract." It is hard to perceive how appellant can obtain any comfort from the quotation. It is too well settled to be controverted that a judgment does not create a new obligation. It simply presents in a different form the obligation already incurred, and, besides, it affords the highest sanction of the law to the validity of the obligation. It seems to be established by the authorities that the proper course to pursue when municipalities refuse to pay their bonds is by an action at law to establish the validity of the bonds and the amount due thereon, and then to apply for a writ of mandate to compel the proper authorities to raise what is required to satisfy the debt by the assessment and levy provided by statute. The following cases cited by respondent so hold: Heine v. Commissioners, 19 Wall. (U. S.) 655, 22 L. Ed. 223; Herring v. Modesto Irrigation District (C. C.) 95 Fed. 705, 710; Marra v. San Jacinto & Pleasant Valley Irrigation District (C. C.) 131 Fed. 780, 789; Board of Supervisors of Riverside County v. Thompson, 122 Fed. 860, 59 C. C. A. 70. The latter case was similar to the one at bar, involving the same statute, and from it the following quotation seems germane: "The present proceeding is not a new action to establish the rights of the defendant in error as against other parties. It is a proceeding in the nature of an execution to enforce the judgment already rendered. The right of the defendant in error to call upon the board of directors to enforce the judgment was established in that judgment as well as his right to have recourse to the board of supervisors in case of the refusal or neglect of the board of directors to make the levy and assessment. Neither the board of directors nor the board of supervisors nor the taxpayers of the Perris irrigation district can be heard to defend the present proceeding on any of the grounds litigated, or which might have been litigated, in the former action."

The principal attack directed against the judgment is based upon the ground that said section 39 is unconstitutional for these reasons: (1) Because it delegates the power to assess and collect taxes in the district to other than corporate authorities thereof; (2) because it directs the assessment of property within the district to be made by persons not representatives of the district; (3) because it delegates to a legislative officer the power to perform the purely executive functions of the assessor. In this connection attention is directed to section 12, article 11, and section 10, article 13, of the Constitution of this state and numerous decisions of our Supreme Court. Said section 12, supra, provides that "the Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes," and said section 10 provides for the assessment of property where it is situated "in the manner prescribed by law."

As pointed out by respondent many of the decisions cited by appellant were rendered under the Constitution of 1849, which contained the following provision: "Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law; but assessors and collectors of town, county and state taxes shall be elected by the qualified electors of the district, county or town in which the property taxed for state, county or own purposes is situated." If that provision were a part of the organic law now, it is probable that said section 39 would be unconstitutional, in so far as it provides for the steps to be taken by the board of supervisors; but under the present Constitution the power to assess and collect taxes is conferred upon "the corporate authorities," with the restriction that the assessment shall be made where the property is situated and in the manner prescribed by law. We cannot see that said section 39 is in conflict with this requirement. The board of supervisors is a "corporate authority" of the district, and the assessment and levy according to the terms of the decree are to be made as "prescribed by law."

In the case of McCabe v. Carpenter, 102 Cal. 470, 36 Pac. 837, it is said: "It is contended that the law [referring to a statute establishing high schools] is unconstitutional, in that it authorizes the county superintendent of schools to furnish to the board of supervisors an estimate for the tax and makes it the duty of the board to proceed to fix a rate which will realize the amount, thus leaving the amount of the tax wholly to the discretion of an executive officer, and leaving no discretion in the board." The conclusion of the court, announced by Commissioner Temple, was: "But since the power to levy a tax is purely legislative, it would seem to follow that the power cannot be vested in any other authority of the local corporation than the body in which is vested the legislative power of such municipal corporation. At all events it could not vest such power in an executive officer of such corporation." Here the board of supervisors is authorized to make the levy in case of the refusal of the directors to act, the statute in question makes the board a part of the "corporate authority" of the district, the board is undoubtedly a legislative body, it does not make the assessment, but bases the levy upon the assessment made by the county assessor, and we fail to see how there is any violation of the provisions of the Constitution, especially when, as here, the district is confined to one county.

In Board of Education v. Board of Trustees, 129 Cal. 604, 62 Pac. 173, there is an interesting discussion of article 1, § 12, of the Constitution, and it is said by the court through the commissioner who is the amicus curiæ herein: "These provisions apply to all kinds of public or municipal corporations, or we may say to all municipalities and quasi municipalities. These differ greatly in their organization. In some, as in cities generally, the powers of the government are distributed into separate departments; in others all the powers of the municipality are invested in one body—as, e. g., in the board of supervisors of a county, the board of trustees of a school district, etc. In the latter case the board of supervisors or board of trustees, or other governing body, constitutes the corporate authority of the municipality, in which might be vested the power to impose taxes." So it may be admitted that in the first instance the duty here is cast upon the board of directors of the district to make the levy; but in case of its refusal to act the board of supervisors constitutes the legislative corporate authority to supply the omission. The power of the Legislature is not exhausted when it confers the authority upon the directors; but it may also authorize the supervisors to perform a similar function in certain contingencies. This it has done. It would seem just and reasonable that this power should be lodged in some body outside of the board of directors of the district to meet such an emergency as is here presented, where, according to the findings of the court, said directors have repudiated a legal obligation and have endeavored to prevent its enforcement.

There seems to be no decision of the Supreme Court passing directly upon the constitutionality of the proceeding herein involved, but an application of the principles so clearly enunciated in the able opinion of Mr. Justice Harrison in the leading case of In re Madera Irrigation District, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, wherein the Wright irrigation law is upheld, in our opinion leads to the conclusion that said section 39 is not obnoxious to the Constitution. In that case it is said: "Whenever a special district of the state requires special legislation therefor, it is competent for the Legislature by general law to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the Legislature may clothe it with such as in its judgment are proper to be exercised within and for the benefit of such district." And it was held that these corporations are mere agencies of the state in local government, that they possess only the powers conferred by the Legislature, and that it was the purpose of the Constitution to leave in the hands of the Legislature full discretion in reference to the government of said corporations. In the exercise of this discretion the Legislature has conferred upon the legislative body of the county a certain supervisory authority over the district. This seems to be a reasonable provision in furtherance of the design of the framers of the Constitution. As the section, when fairly construed, requires the board of supervisors to base the levy upon the assessment of the county assessor, there would seem to be no force in the contention of the appellant that the property owners have no opportunity to be heard to correct any defects in the assessment.

The most serious objection, probably, is the one made by the amicus curiæ: "That an annual assessment upon the real property in the district is the exclusive mode provided by the statute for the payment of the principal of the bonds authorized by the statute to be issued." In this connection he cites the case of Merchants' Bank v. Escondido District, 144 Cal. 329, 77 Pac. 937. It is therein stated: "The act providing for the organization of the district, and the organization of the district under the provisions of the act by the votes of the electors, cannot be otherwise regarded than as a contract between the state and the individuals whose property was thereby affected." The soundness of that proposition would scarcely be questioned by any one. It is further stated that: "The burden thus imposed was that the bonds issued under the act should be paid by revenue derived from an annual assessment upon the real property of the district, and that their lands 'should be and remain liable' for such assessment, and this implied that this should be the extent of the burden. But by the amendatory act the board of directors is authorized, without the consent or even the knowledge of the landowners, to pledge or hypothecate the property acquired with their money." Hence it was held that the amendment would deprive the landowners of their property without due process of law and was also a violation of the inhibition against impairing the obligation of contracts, since the property owners were only liable "for continued assessments until the balance of the bonds shall be paid." No fault can be found with that decision as applied to the facts of the case. The amendment held unconstitutional was enacted after the issuance of the bonds, and it is too clear for argument that it gave the bondholders security that was not provided by the law at the time the obligation was incurred by the district, and was therefore in violation of the terms of the contract between the debtors and creditors. The case is in point here if it can be shown that the method provided for the collection of the debt adds to the property owners an additional burden to what was imposed by the statute at the time the bonds were issued. But, as we have seen, the statute has not been substantially changed, and so the question resolves itself into one as to the proper construction of said section 39. The statute no doubt contemplates annual assessments, as it is constructed upon the theory that the board of directors will do its duty, but it does not prescribe that this shall be the exclusive method of raising the money to pay the bonds.

The argument made by respondent is substantially this: The board of directors of the district is not required to levy the assessment at any particular date, but must make it after the equalization of the assessment made by the assessor of the district. This levy by said board may be as late, then, as the end of the fiscal year, and hence it could not be said to be in default till the end of the year, and hence the powers of the supervisors could not be invoked till after that time. The power of the board of supervisors must therefore be exercised in making the levy for the payment of interest coupons or installment coupons which matured in a previous year. Furthermore, the statute does not provide the time when the levy shall be made by the supervisors, and there is nothing therein inconsistent with the position that one levy may be made for the payment of the aggregate amount of installments of interest and principal due in successive years. The contention of the amicus curiæ is: "If the power still exists in the directors or supervisors to make any assessment and levy, it can only be to make several assessments for each year, and each assessment must be of the values of the lands of the district in that year." This, he contends, is impracticable, and hence he would have the court reach the conclusion that there is no method provided for the payment of the debt and the bondholders are without redress.

We are not inclined to consider the law so impotent as is implied by appellants' argument. We hold that the burdens of the property owners have not been increased since they incurred the obligation to pay these bonds. The statute, in our opinion, does not expressly nor by implication prohibit the method adopted herein for the collection of the money due. In fact, the forbearance to sue for several years and the use of one levy, instead of many, constituted a favor to the debtors and tended, not to increase, but to reduce, the burden of the property owner.

We fail to see any force in the contention that the judgment is erroneous because it makes no provision for other creditors. The debtor should hardly be allowed to raise this question when it appears that the amount claimed is due the creditor who has brought the suit. Again, there is nothing to show that the other bonds issued have not been paid, or that there is any other creditor who desires to participate in the fund. If there are other creditors whose claim the appellants are solicitous to have paid, it is fair to presume that respondent will not object to an increase in the amount of the levy so as to meet the other obligations of the district.

The question of laches suggested by appellants is disposed of by the case of Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467. We think the circumstances detailed in the petition for the writ excuse the delay, and show that no prejudice has been caused thereby to appellants.

The court below is directed to modify the judgment by striking therefrom the following: "And when sufficient money is collected the defendant shall pay to plaintiff from the sum collected whatever amounts are collected in said assessments until said plaintiff shall be paid the said amounts hereinbefore referred to, to wit, the sum of $12,262.96, together with interest thereon at the rate of 7 per cent. per annum from the 26th day of August, 1902, and the costs of suit herein"—and as so modified the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(151 Cal. 465)

## GRAHAM v. MAYOR AND BOARD OF TRUSTEES OF CITY OF FRESNO.

(S. F. 4,762.)

(Supreme Court of California. July 1, 1907.)

1. Justices of the Peace — Authority — Constitutional and Statutory Provisions.

The amendment to Const. art. 11, § 6, adopted November 3, 1896, inserting "except in municipal affairs," in the provisions that cities and towns and all charters thereof adopted by authority of the Constitution shall be subject to and controlled by the general laws and Constitution, and Const. art. 11, § 8½, being an amendment adopted November 3, 1896, providing that it shall be competent for all charters formed under the authority given by Const. art. 11, § 8, to provide for the constitution, jurisdiction, etc., of police courts, the manner, time, and terms for which the judges thereof shall be elected or appointed, and for the compensation of the judges, etc., do not affect the power of the Legislature to provide for justices' courts in cities and towns as part of the state system of justices' courts.

2. Municipal Corporations — Legislative Control—Constitutional Provision.

Under Const. art. 11, § 6, as amended, the provisions of freeholders' charters are supreme as to all matters which the Constitution authorizes to be provided for therein, and are exempt from any control by any subsequent act of the Legislature.

3. Same—Cities of Fourth Class.

Under Const. art. 11, § 8½, being an amendment adopted November 3, 1896, providing that it shall be competent in all charters formed under the authority of Const. art. 11, § 8, to provide for constitutional regulation, government, and jurisdiction of police courts, and for the compensation, etc., of judges thereof, the provisions of Code Civ. Proc. § 103, requiring a city of the fourth class to furnish the city justice of the peace a suitable office in which to hold his court, does not apply to a city of the fourth class whose charter provides for a police court.

Sloss, J., dissenting.

In Bank. Mandamus by George B. Graham against the mayor and board of trustees of the city of Fresno. Application denied.

Geo. B. Graham, in pro. per. D. S. Ewing (Frank Karke, of counsel), for defendants.

ANGELLOTTI, J. The city of Fresno is a city organized under a freeholders' charter framed and adopted under the provisions of section 8, art. 11, of the Constitution of this state, and approved by the Legislature on January 28, 1901 (St. 1901, p. 832, c. 9). According to the federal census of 1900 it has a population of more than 10,000 and less than 15,000, and therefore, if we assume that the provisions of the general classification act, as amended March 5, 1901 (St. 1901, p. 94), apply, it is a city of the fourth class within the meaning of section 103, Code Civ. Proc. Its charter provides for a court to be known as the "police court of the city of Fresno"; the same to consist of one judge to be elected at the general municipal election, who shall receive a salary from and be furnished with a courtroom by the city, which court shall have exclusive jurisdiction in all prosecutions for violations of city ordinances and actions for the recovery of fines, etc., and the enforcement of obligations or liabilities created by the city ordinances, and, within the city limits, concurrent jurisdiction with township justices' courts in all matters wherein said justices' courts may have jurisdiction. Sections 61, 61, 62, 68, 200, 221, Charter. Under these provisions, a police court has been established and is now being maintained in the city; one H. F. Briggs being the judge thereof. The city of Fresno constitutes a portion of the third judicial township of the county of Fresno. At the general state election held November 6, 1906, the plaintiff, George B. Graham, was elected "city justice of the city of Fresno," and qualified in the manner required of justices of the peace. He claims that it is the duty of the defendants to furnish him, as such city justice, with a suitable office wherein to hold his court. Defendants have refused to comply with his demand in this regard, and plaintiff has instituted this proceeding to obtain a peremptory writ of mandate compelling such compliance.

Plaintiff's claim is based on section 103, Code Civ. Proc.; the general section providing for justices' courts, their number in townships and cities, their election, etc. That section, after providing for the justices of townships, to be elected at a general state election, provides that: "In every city or town of the third and the fourth class there must be one justice of the peace, * * * to be elected in like manner by the electors of such cities or towns respectively." It further provides that such justice of the peace of cities or towns shall have the same jurisdiction, civil and criminal, as justices of the peace of townships, and also jurisdiction of all proceedings for the violation of any ordinance of a city, and all actions for the recovery of any licenses required by any ordinance of the city, and shall exercise all powers, duties, and jurisdiction, civil and criminal, of "police judges, judges of the police court, recorder's court, or mayor's court within such city." It further provides that every city justice of the peace in any city or town of the fourth class shall receive as his sole compensation a salary of $1,500 per annum from the salary fund of such city or town, and shall be provided by the city authorities with a suitable office in which to hold his court, and requires him to pay into the city or town treasury all fees chargeable by law for services rendered by him.

Prior to the adoption of certain constitutional amendments in 1896, it was established that, by reason of section 1, art. 6, providing that the judicial power of the state shall be vested in certain courts therein named, "justices of the peace, and such inferior courts as the Legislature may establish in any incorporated city or town, or city and county," section 11 of the same article providing that the Legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities or towns, or cities and counties, and shall fix by law the powers, duties, and responsibilities of such officers, and section 13 of article 6 providing that the Legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 of the article, and fix by law the powers, duties, and responsibilities of the judges thereof, the whole matter of the establishment and regulation of justices and other inferior courts in cities and towns, and the compensation of the judges thereof, was in the hands of the Legislature, and that such laws as section 103, Code Civ. Proc., constituted a valid exercise of the legislative power. People v. Cobb, 133 Cal. 74, 65 Pac. 325; People v. Sands, 102 Cal. 12, 36 Pac. 404; Coggins v. City of Sacramento, 59 Cal. 599; Jenks v. Council, etc., 58 Cal. 576; Bishop v. Council, etc., 58 Cal. 572. In Bishop v. Council, supra, a writ of mandate was granted to compel the city authorities to furnish such a city justice, elected at a general state election, with a suitable office. In Jenks v. Council, supra, a similar writ was granted requiring the payment of the salary of such a justice from the city treasury. In Coggins v. City of Sacramento, supra, an action by a city justice against the city for salary and office rent, was sustained, and by People v. Sands, supra, and People v. Cobb, supra, it was thoroughly established that such justices are to be elected in the same manner as other justices of the peace, at a general state election, and that vacancies in the office are to be filled in the manner prescribed by the state law. It was further established that a police court created by the provisions of a freeholders' charter was not a court created by the Legislature, and therefore that it was not competent to provide therefor in such a charter. People v. Toal, 85 Cal. 333, 24 Pac. 603; Ex parte Ah You, 82 Cal. 339, 22 Pac. 929; People v. Sands, supra. Defendants' claim is that by reason of certain constitutional amendments made in the year 1896, not only is the charter provision for a police court of the city valid and effectual, which is admitted, but that the provision of section 103 of the Code of Civil Procedure for a city justice of the peace cannot be held applicable, and especially that the provisions of said section for the payment of a salary to such justices from the city treasury and the furnishing of an office at the cost of the city are without force as to said city. The constitutional amendments relied on are: First, the municipal affairs amendment of section 6, art. 11; and, second, section 8½ of article 11. The latter section adopted November 3, 1896, so far as applicable, is as follows: "It shall be competent in all charters framed under the authority given by section eight of article eleven of this Constitution, to provide, in addition to those provisions allowable by this Constitution, and by the laws of the state, as follows: (1) For the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the compensation of said judges and of their clerks and attaches."

We cannot find in subdivision 1 of section 8½ of article 11 any intention to interfere with the power of the Legislature in the matter of provision for justices of the peace for cities and towns. That subdivision is limited in terms to "police courts," and there is no mention whatever therein of justices of the peace or justices' courts. The term "police court" ordinarily refers to an inferior municipal court with a limited jurisdiction in criminal cases only, a court with the power to try certain misdemeanor cases arising from the violation of state law or municipal ordinance, and with the power to conduct preliminary examinations in cases of felony and certain misdemeanors, and to hold defendants to answer for trial for the same, and does not include the justices' courts established by our law. The term should probably be here construed to also include such inferior courts as may properly be held to be purely municipal, though given by the state certain jurisdiction in state as distinguished from municipal matters, courts coming within the class specified in the Constitution as "such inferior courts as the Legislature may establish in any incorporated city or town or city and county," such as a city recorder's court or a mayor's court. See Ex parte Soto, 88 Cal. 624, 626, 26 Pac. 530. But the city justice of the peace provided for by section 103, Code Civ. Proc., does not come within this category. People v. Sands, supra; People v. Cobb, supra. Justices of the peace are part of the constitutional judicial system of the state, having concurrent jurisdiction with superior courts in certain matters expressly given by the Constitution (section 11, art. 6, Const.), and also having such jurisdiction in civil and criminal cases as is given by the general laws of the state to all justices of the peace. In this regard there is no distinction whatever between township and city justices. See cases last cited. A city justice is simply a part of this general state system, elected for a certain subdivision thereof. It is immaterial in this connection that the Legislature has attempted to confer upon city justices an additional jurisdiction in matters peculiar to the city, such as cases arising from violations of municipal ordinances, etc. The Constitution in terms provides that the Legislature shall determine the number of such justices of the peace to be elected in townships, incorporated cities and towns, or cities and counties, and shall fix by law the powers, duties, and responsibilities of such office. Section 11, art. 6. In view of the explicit provisions of the Constitution as to justices of the peace for cities and towns, as well as townships and cities and counties, and the decisions of this court in regard thereto, it is inconceivable that this amendment, limited in terms to police courts, was intended to trench in the slightest degree upon the power of the Legislature to provide for justices' courts in cities and towns as part of the general state system of justices' courts, and we cannot give it any such effect.

It does not follow, however, that the provisions of section 103, Code Civ. Proc., as to the payment of the salary of such a city justice from the municipal treasury, and the furnishing to him of an office by the municipality, will be held valid as to a city having a police court established under a valid charter provision. The decisions heretofore cited sustaining the statutory provisions in that behalf were all cases decided prior to the adoption of the constitutional amendments, and at a time when, as we have already seen, no effectual provision for any court could be made in such a charter. The city justice of the peace established by the Legislature has always been given, in addition to the ordinary jurisdiction of a justice's court, the power and jurisdiction of an ordinary police court of a city, the expense of maintenance of which has always been considered a proper charge on the city, and his office thus partook of the character of both a county and township office and a city office. People v. Sands, supra; People v. Cobb, supra. The Legislature having had, prior to the amendments, the sole power to provide such a police court in a city or town, also had the power to provide for the maintenance of the same by the city or town, and the city justice's court being the court invested by the Legislature with that jurisdiction, and thus, in effect, made also a city police court, the Legislature was authorized to require the expense thereof to be borne by the municipality.

The effect of subdivision 1 of section 8½ of article 11 was to make the matter of such police courts purely a municipal affair as to any freeholders' charter city which subsequently made appropriate provision in its charter for such court. It confided the subject-matter of such courts, and the election and compensation of the judges thereof, to any such city desiring to assume, and assuming, control thereof, just as, by the same section, the matter of fixing the compensation of county officers in consolidated cities and counties was confided to the city and county to be provided for in its freeholders' charter. Such jurisdiction could not coexist in both the Legislature and the city, and the provision for the assumption of such jurisdiction by the city necessarily contemplated the removal of the same from the Legislature, whenever the jurisdiction was assumed by the city. Any act of the Legislature relative to such subject-matter would necessarily be inconsistent with a charter provision in regard to the same subject-matter. As to such matters as the Constitution authorizes to be provided for in freeholders' charters, the provisions of the charter are supreme, superseding all laws inconsistent therewith (section 6, art. 11, Const.), and being exempt from any control by any subsequent act of the Legislature.

For a city maintaining a police court under valid provisions in that behalf in its freeholders' charter, the Legislature, therefore, no longer has the power to provide such a court. While it still has the power to provide a justice's court for any such city as part of the general state system of justices' courts, it no longer has the power to make such court also a city police court, maintainable at the expense of the city. This would be, in effect, the same thing as providing a separate police court for the city, to be maintained at the expense of the city. Any provision of that character would be an invasion of the jurisdiction of the municipality, and inconsistent with the charter provision regarding the subject-matter of city police courts, as to which the plain object of the constitutional provision was to vest entire control in any freeholders' charter city electing to assume such control, and to free any city so doing from legislative control in that regard. As to such cities, the city justice of the peace provided by section 103, Code Civ. Proc., must be held to be the same in all respects as a township justice, simply a county or township officer performing no municipal functions whatever.

The Legislature is not empowered to direct the appropriation of municipal funds for the payment of the salary or office expenses of one who is simply a county or township officer. Municipal funds can be appropriated, under our system, only for municipal purposes. Conlin v. Board of Supervisors, etc., 114 Cal. 404, 46 Pac. 279, 33 L. R. A. 752. The only ground upon which the decisions heretofore cited upholding the provision for the payment of salaries and office expenses of city justices by municipalities can be sustained is that such justices, under the law then in force, in addition to being justices of the peace with the same jurisdiction as township justices, were also city police judges, performing municipal functions. See People v. Sands, supra; People v. Cobb, supra. As we have seen, such is no longer the situation in a city having a police court established under valid provision therefor in its freeholders' charter.

We are therefore of the opinion that the provision of section 103, Code Civ. Proc., requiring a city of the fourth class to furnish the city justice of the peace with a suitable office in which to hold his court, cannot now be held applicable to the city of Fresno.

The application for a peremptory writ of mandate is denied.

We concur: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

SHAW, J. I concur in the opinion of Justice ANGELLOTTI. I wish to say, however, that I do not understand that opinion to hold that when a freeholders' charter has created a police court, and vested in it jurisdiction over offenses against city ordinances and suits to collect city license taxes, or any other jurisdiction that could be vested in such police court, such provisions of the charter would have the effect of preventing the Legislature from vesting the same jurisdiction in a justice's court created by general laws under the provisions of article 6 of the Constitution, or that such charter provisions would at all affect the jurisdiction of any such justice's court, whether theretofore or thereafter established. The proposition, as I understand it, is that, when the special charter has provided a police court, it is not competent for the Legislature to charge upon the city the expenses of any justice's court created by general laws. Whether, in any case, the expenses of such justice's court created under article 6 of the Constitution, could be imposed upon a city operating under a special charter, is a question not decided, and one which does not necessarily arise in this case.

I concur: BEATTY, C. J.

SLOSS, J. I dissent, and think the writ should issue. In my opinion, neither of the amendments of 1896 to article 11 of the Constitution affects the rule declared in Bishop v. Council, 58 Cal. 572, and Jenks v. Council, 58 Cal. 576.

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(151 Cal. 474)

## CITY OF REDLANDS et al. v. BROOK, City Treasurer. (S. F. 4,775.)

(Supreme Court of California. July 1, 1907.)

1. MUNICIPAL CORPORATIONS—POWER TO ISSUE BONDS—LIGHTING STREETS.

Municipal Incorporation Act 1883 (St. 1883, p. 269, c. 49), § 862, empowers municipal corporations to lay out, alter, improve, etc., streets and other public highways and to drain and light them, etc. Section 866 (page 271) provides that municipal corporations of the sixth class may incur a bonded indebtedness whenever the board of trustees shall deem it necessary to supply a deficiency in the funds applicable to the payment of any expense which they are empowered to incur. *Held* to give a city power to issue bonds to meet the expense of purchasing electric lighting for streets from a private company and of maintaining the streets and public places.

2. SAME—EFFECT OF CURATIVE STATUTES.

Act March 4, 1907 (St. 1907, p. 104, c. 80), to legalize bonds to be issued and sold by municipalities where authority for such issuance had already been given by a vote of more than two-thirds of the electors, operates to legalize such an issue of bonds by a city, although the act under which they were issued had been repealed by implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1951.]

3. CONSTITUTIONAL LAW—CURATIVE STATUTES—POWER OF LEGISLATURE.

In the absence of constitutional restrictions, the power of the Legislature to validate past transactions which it could have authorized in advance is restrained only by the necessity of protecting vested rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 536.]

4. STATUTES — SPECIAL LAWS — CURATIVE STATUTES.

An act to legalize bonds to be issued and sold by municipalities, which embraces all municipal corporations and every case in which not less than two-thirds of the electors voting at a special election called for the purpose have approved the proposed issue of bonds, is not a special law within Const. art. 4, § 25, subds. 14, 18, forbidding special laws giving effect to invalid instruments, or legalizing except as against the state the unauthorized or invalid act of an officer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 81.]

5. SAME.

The fact that the law is limited in its application to bonds sold after its passage, and, for not less than par, does not render it a special law in a constitutional sense.

In Bank. Mandamus by the city of Redlands and others against A. E. Brook. Writ granted.

F. A. Leonard, for plaintiffs. Henry M. Willis, for defendant.

BEATTY, C. J. This is an original proceeding in which the plaintiffs pray for a writ of mandate to compel the defendant to sign certain municipal bonds which the plaintiffs propose to issue. The cause has been submitted upon a general demurrer to the complaint for want of facts. The material facts alleged, and by the demurrer admitted, are that Redlands is a city of the sixth class. That its board of trustees at a regular meeting duly adopted, by a vote of more than two-thirds of all its members, a resolution declaring it necessary to incur an indebtedness of $50,000 for the following purposes: "For electric lighting of said city to be furnished by private company for the fiscal year 1907; and for the care and maintenance of streets and public parks of said city for said fiscal year (not including, however, any municipal improvements of any kind or nature whatever)." That said resolution was approved by the executive of said city. That an ordinance was duly passed calling for a special election at which the electors of said city should vote on the question of the issuance of the bonds. That the election was duly held and out of a total of 852 votes 753 were in favor of issuing the bonds. That thereupon an ordinance was duly passed providing for the issuance and sale of the bonds by which it was made the official duty of the defendant to sign the bonds and coupons. That demand was made upon him to sign said bonds and coupons, but he refuses to do so, alleging as his reason for such refusal "that said bonds are invalid and void and would not create a legal obligation against said city if signed or executed by him." It is further alleged that said proposed indebtedness of $50,000 will not exceed, together with all the indebtedness of said city, in the aggregate, 15 per cent. of the assessed value of all the real and personal property in said city. These, with other allegations of the complaint, it is conceded, show that all the constitutional and statutory requirements as to procedure in the matter of the issuance of municipal bonds have been fully complied with; but it is objected that the purposes for which the proceeds of the bonds are to be used are not among those for which municipal corporations are authorized to borrow money.

The declared purposes to which the proceeds of the bonds were to be applied, no less than the concluding portion of the resolution to incur the indebtedness—the part in parenthesis—which was carried into the ordinance subsequently passed, show that the proceedings were not intended to be based on the act of February 25, 1901 (St. 1901, p. 27, c. 32), which confers authority to create a bonded indebtedness for the sole purpose of acquiring, constructing, or completing permanent improvements, the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality. The limited authority granted by this act would seem to indicate an intention on the part of the Legislature to withhold the power to borrow money to pay for current expenses, and if it was the only law relating to the subject it would seem very plain that the bond issue in question here is illegal. But section 866 of the municipal incorporation act of 1883 (St. 1883, p. 271, c. 49) is far more liberal in terms and effect. It is therein provided that municipal corporations of the sixth class may incur a bonded indebtedness in the method here followed whenever the board of trustees shall deem it necessary for the purpose of supplying a deficiency of the funds in the treasury applicable to the payment of any expense which they are empowered to incur in behalf of the municipality. And by section 862 (page 269) of the same act they are empowered to "lay out, alter, keep open, improve and repair streets, sidewalks, alleys, squares and other public highways, and places within the city or town, and to drain, sprinkle, oil and light the same." In view of this provision there can be no question as to the power of the board of trustees to incur the expense of purchasing electric lighting from a private company or the expense of the care and maintenance of the streets and public places in the city. And if they can lawfully incur such expenses it is very clear that section 866, by its terms, confers the power to supply any deficiency in the funds applicable to these purposes by the issuance of bonds.

The only question that suggests itself is whether section 866 is still in force; whether, in other words, it may not have been repealed by the passage of the later act of 1901, in which, as above shown, the power of municipal corporations to incur a bonded indebtedness is limited to the acquisition, construction, or completion of permanent improvements the benefit of which will inure to the future inhabitants of the city or town, in contradistinction to those things which are properly deemed a current expense payable out of the revenue of the year in which they are consumed. This is a question of very serious import, which does not seem to have engaged the attention of counsel, and in the absence of argument we are not willing to decide it. We merely direct attention to the fact that here is a general law applicable to all municipal corporations organized under the law of 1883, later in date than that act and covering the subject of municipal bonds. Such laws, notwithstanding repeals by implication are not favored, have sometimes been held to operate such repeal of older statutes to which they make no express reference.

We are, however, relieved of the necessity of deciding this question in the present case by reason of the enactment of a curative statute approved March 4, 1907 (St. 1907, p. 104, c. 80), by which the proceedings in this and all similar cases have been validated.

In the absence of constitutional restrictions, the power of the Legislature to validate past transactions which it could have authorized in advance is restrained only by the necessity of protecting vested rights. Here are no vested rights to be guarded, and the only constitutional restrictions to which our attention has been called are contained in subdivisions 14 and 18 of section 25 of article 4 of the Constitution, which forbid the enactment of special laws giving effect to invalid deeds, wills, or other instruments, or legalizing, except as against the state, the unauthorized or invalid act of any officer. The answer to the objection based on these provisions is that the act of March 4, 1907, is not a special law. It is a curative act, and, of course, is retroactive in its operation, applying exclusively to past transactions; but it embraces all municipal corporations, and every case in which not less than two-thirds of the qualified electors voting at a special election called for the purpose have approved the proposed issue of municipal bonds. The fact that the law is limited in its application to bonds sold after its passage, and for not less than par, does not render the law special in a constitutional sense. There was an excellent reason for discriminating between such bonds, and others that might have been marketed prior to the statute for less than their value, for the very reason that there was a doubt as to their validity.

We do not deem it necessary to discuss this matter more in detail, or to cite the cases referred to in the briefs. It is enough to say that there is no constitutional objection to the validating act, and that the proceedings of the plaintiffs in ordering the issue of these bonds, if not originally valid, certainly became valid immediately upon the passage of the act of March 4, 1907. A very instructive opinion of the Supreme Court of Minnesota in a case closely resembling this, and in which the authorities are extensively reviewed, is City of Minneapolis v. Brown, 106 N. W. 477, 97 Minn. 402.

It is ordered that peremptory writ of mandate issue as prayed.

We concur: HENSHAW, J.; McFARLAND, J.; SLOSS, J.; LORIGAN, J.

151 Cal. 479

## NEW LIVERPOOL SALT CO. v. WESTERN SALT CO. (L. A. 1,920.)

(Supreme Court of California. July 2, 1907. Rehearing Denied Aug. 1, 1907.)

1. TROVER AND CONVERSION — EVIDENCE TO ESTABLISH.

Defendant contracted for the sale of all the salt in its possession to a salt company, the title to vest at once in the purchaser. It then sold a part of the salt to other parties. The salt company thereafter sold the entire salt covered by the contract to plaintiff. All of the payments were made to defendant as provided by the contract. *Held*, that defendant was liable to plaintiff for the conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 119, 120.]

2. SALE—CONSTRUCTION OF CONTRACT—PAYMENT OF PRICE—EFFECT OF DEFAULT.

A contract for the sale of a certain salt provided that it be paid for in certain payments made at stated times, and also that the seller be allowed 25 cents per ton for expenses of delivery, payable each month, the amount thus paid being deductible from the last payment to be made on the salt, and that on default in payments the title should revert to the seller. *Held*, that the provision for forfeiture referred only to those sums which constituted a part of the purchase price, and not to the charge allowed for expenses of delivery.

3. SAME — ACTION BETWEEN SELLER AND THIRD PERSON.

Where defendant sold salt to a company which before delivery the company sold to plaintiff, in a suit against the defendant for converting a part of the salt to its own use after the sale to the company, the defendant cannot complain that the plaintiff has failed to pay the company for the salt, and that according to his contract of sale the title to the salt has reverted to the salt company, since the enforcement of the forfeiture of plaintiff's title to the salt could be waived, and the salt company had taken no action to enforce the same.

4. TROVER AND CONVERSION—DAMAGES—VALUE OF PROPERTY—EVIDENCE.

In an action to recover a large quantity of salt or its value converted by the seller, a wholesale merchant, after the sale, the defendant is liable for the wholesale price or value only, and evidence of the market value at retail, unsupplemented by proof of the difference between the wholesale and retail prices, was insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trover and Conversion, § 242.]

Department 1. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by the New Liverpool Salt Company against the Western Salt Company to recover possession of a quantity of salt or its value. From a judgment for defendant and an order denying plaintiff's motion for a new trial, plaintiff appeals. Reversed.

Purcell Rowe, C. H. Rippey, and A. Haines (J. S. Chapman, of counsel), for appellant. Victor E. Shaw and Titus, Wright & Creed, for respondent.

SHAW, J. The plaintiff appeals from the judgment and from an order denying its motion for a new trial. The action was for the possession of 4,600 tons of salt, or its value, if possession could not be recovered.

The salt in controversy consisted of salt sold by the Western Salt Company to another corporation, known as the "Amalgamated Salt Company," by a written contract executed December 20, 1902. At the time of the sale the salt was left in the possession of the Western Salt Company in accordance with the terms of the contract. Afterwards, on January 2, 1904, the Amalgamated Salt Company sold the salt embraced in that contract to plaintiff. The following is a statement of the material parts of the agreement of sale of December 20, 1902, between the Western Salt Company and the Amalgamated Salt Company: The Western Salt Company, which was the party of the first part, thereby sold to the Amalgamated Salt Company "all salt now owned by the party of the first part which is now lifted from the vats, sacked and stored in piles, bins and warehouses on the premises of the party of the first part," at the head of the bay of San Diego. The buyer agreed to pay for this salt $8,000 of its capital stock, to be transferred to the Western Salt Company, and, in addition thereto, as follows: "Twenty-three hundred dollars ($2,300.00) on or before January 13, 1903, and the further sum of thirty-four hundred and fifty dollars ($3,450.00) on or before the 13th day of April, 1903. And the party of the second part further agrees to pay to the party of the first part twenty-five cents (25) per ton, on the 13th of each month for the salt delivered by the party of the first part and taken by the party of the second part in the preceding month, said 25 cents per ton to represent the sewing, sacking and delivery of said salt on board cars at the works of the party of the first part on said premises; * * * providing however, that the party of the second part agrees to further pay to the party of the first part on or before January 1, 1904, the further sum of eleven hundred and fifty dollars ($1,150.00), after deducting from said sum the amount which the party of the second part may have paid under the provision in this contract for the payment of 25 cents per ton upon the 13th of each month for sewing, sacking and delivery of said salt. It is further understood and agreed, that said party of the second part has the right to the immediate possession of said salt and that it shall be lawful for said party of the second part, its agents and employés, to enter any premises on which said salt may be stored, or such other places as said salt is, or may be stored, and take and carry away said salt, and to occupy and use so much of any place where said salt may be stored so far as is necessary for use for such purpose while preparing said salt for transportation, without any charge therefor by way of rental or otherwise, but nothing in this clause shall be a waiver on the part of the party of the first part to the compensation as hereinbefore agreed upon. The title to said salt is hereby vested in the party of the second part, and it is further agreed between the parties hereto that in case any of the payments aforesaid shall not be made as above specified, then the title to said salt shall revert to the party of the first part, and it shall have the right to sell the same for the amount due it under this agreement, and no salt shall be removed from said premises by the party of the second part until said sums, amounting to $5,750.00, shall be paid."

1. The findings are that the salt on the premises on December 20, 1902, at the time of the sale to the Amalgamated Salt Company, amounted to only 1,788 tons; that after that date, and prior to the sale to the plaintiff in January, 1904, the defendant had sold, shipped, and converted to its own use 963 tons of the said salt, leaving only 825 tons remaining on the premises at the time of the latter sale. The court concluded that the effect of the agreement by which the salt was sold to plaintiff in 1904 was that the plaintiff thereby acquired title only to the salt then remaining upon the premises; that is, to the 825 tons aforesaid. In this, we think, the court was in error. The contract of sale in 1904, by its terms, purports to sell to the plaintiff "all that certain salt, 4,600 tons or more, which said salt was purchased by the party of the first part (Amalgamated Salt Company) of the Western Salt Company, and is particularly described in that certain agreement made and entered into by and between the said Western Salt Company (and) the party of the first part, on the 20th day of December, 1902." This clearly describes and purports to sell and transfer title to all the salt included in the act mentioned, wherever it might then be situated. The defendant contends that the previous sale and conversion of the 963 tons, involving, as it is claimed, the removal of that salt from the defendant's premises, or its destruction, excludes that part of the salt from the operation of the contract of sale to the plaintiff. There is no evidence that any part of the salt was destroyed. The evidence merely shows, as the court found, that it had been sold, shipped, and converted by the defendant. It is therefore unnecessary to determine what would be the effect upon the validity of the sale if it had been actually destroyed at the time. Under the contract with the Amalgamated Salt Company, the defendant was the bailee of all the salt, and that company was the bailor. Civ. Code, §§ 1748, 1822. It was the defendant's duty, as bailee, to safely keep the salt bailed and deliver it to the bailor, or its successor in interest, on demand. Lawson on Bailments, § 22; Story on Bailments, § 122. Neither the wrongfu conversion of property to his own use by a bailee, nor his wrongful transfer of the possession thereof to another, can divest the title of the true owner. This is settled in this state by the decision in Howe v. Johnson, 117 Cal. 41, 48 Pac. 978, and Faulkner v. Bank, 130 Cal. 258, 62 Pac. 463. The title

thus remaining in the Amalgamated Salt Company, after the conversion, was a species of property, and as such it was subject to sale and transfer by the owner. Civ. Code, §§ 1044, 1047; Rice v. Whitmore, 74 Cal. 623, 16 Pac. 501, 5 Am. St. Rep. 479; Curtin v. Kowalsky, 145 Cal. 434, 78 Pac. 962. The contract of sale by that company to the plaintiff described the salt converted, as well as that remaining in the defendant's possession, and therefore its effect was to transfer to the plaintiff the title to all the salt in controversy wherever situated, and notwithstanding its previous removal by the defendant. The plaintiff, by virtue of its purchase of all the salt embraced in the contract of December 20, 1902, above quoted, and the extension of the time of making the $1,150 payment from January 1, 1904, to February 1, 1904, was entitled to the immediate possession of all the salt at the time of its purchase thereof. The payment of $1,150 was not a condition precedent to the existence of the right of immediate possession, at least not until February 1, 1904, when it became due. To avoid all question upon this point, however, the plaintiff paid it before that day, and thus complied with every condition that could at any time become necessary to entitle it to demand delivery of the salt from the defendant, including that removed and converted as well as that remaining on hand. It made the demand, and possession was refused. A right of action for possession, or for the value of the salt, if possession could not be recovered, immediately accrued to the plaintiff.

The fact that the defendant had, before the demand, or before the action was begun, parted with the possession of the salt, was no defense. Nor would the fact that plaintiff was vendee of the original bailor affect the case in this particular. This question was fully considered in Faulkner v. Bank, supra. It was there held that an assignment of a note by the owner, after the bailee had parted with its possession to a stranger, transferred the title and right of possession to the owner's assignee, and that the bailee could not defend an action by the assignee for its possession or value, on the ground that, before the demand by the assignee, he had delivered it to a third person who claimed to be the owner, and that he was therefore unable to deliver possession in compliance with the demand. The opinion declares that the action is of the character formerly known as an action in detinue, and that the rights of the parties are to be determined by the principles of the common law applicable to that form of action. It then quotes passages from 1 Chitty's Pleadings, 138; Haley v. Rowan, 5 Yerg. 301, 26 Am. Dec. 268, and Reeve v. Palmer, 5 Com. B., N. S. 84, to the effect that, if a bailee wrongfully deliver the goods to another, he will continue liable in detinue for the goods or their value, that it does not lie in his mouth to set up his wrongful act in answer to such action, or to say that he is unable to comply with the demand for possession because of his own breach of duty, and that the burden is on him to show any excuse, such as that his possession ceased before suit brought, by accident, or some means beyond his control and without his fault. The opinion proceeds to say that these principles "are eminently just, and are founded on the maxim that no man can take advantage of his own wrong, and they are as applicable now to an action based on a contract of bailment as they were to such action when it had to be brought under the special form of detinue." The following authorities are of similar effect: 14 Cyc. 259, 260; 5 Cyc. 188, 189; 3 Am. & Eng. Ency. of Law, 763; Lawson, Bailments, § 23; Schouler, Bailments (2d Ed.) p. 30, note; Cobbey on Replevin, § 212; Howe v. Johnson, supra; Serat v. Utica, 102 N. Y. 681, 6 N. E. 795; Rogers v. Windoes, 48 Mich. 630, 12 N. W. 882; Brady v. Whitney, 24 Mich. 156; Tome v. Dubois, 73 U. S. 548, 18 L. Ed. 943.

2. The two payments amounting to $5,750, called for by the contract of December 20, 1902, were duly made as agreed, but no salt was delivered under the contract, prior to February 1, 1904. The plaintiff made the final payment of $1,150 to the defendant in January, 1904, and thereupon demanded delivery of the salt. During the months of February, March, and April, after the suit was begun, the defendant delivered the remaining 825 tons. The plaintiff has not paid any additional sum for the expenses of delivering this salt. The court below held that the 25 cents per ton, for delivery expenses of the salt thus subsequently delivered, was not included in the final payment of $1,150, but was additional thereto, basing this conclusion upon the fact that the delivery was made after the making of said final payment. The court was of the opinion that the provision that the delivery expenses were to be deducted from the final payment applied only in case the salt was delivered before that payment was made, and that, if it was delivered after that payment, the charge was to be an addition to the price. From this it concluded that the failure to pay $206.25 for expenses of delivering the salt delivered after the suit was begun caused the forfeiture of the plaintiff's title to that part of the salt and defeated its right of action, and that the defendant was therefore entitled to judgment. The contract should not be thus construed. A contract is not to be construed to provide a forfeiture, unless no other interpretation is reasonably possible. The 25 cents per ton for expenses of delivery was not to be due until after delivery, and then only to the extent of the salt delivered. Delivery could not be enforced until after the first two money payments, amounting to $5,750, were made. The defendant was given

power to sell the salt that might be forfeited, a power which ordinarily requires delivery of possession to make the sale complete, thus implying that the forfeiture was to be of salt in its possession, and not salt delivered to the purchaser. It was evidently expected that all the salt would be delivered long before the $1,150 became due. If so, the amount to be deducted for delivery expenses would be ascertained before that installment was paid. Considering all the provisions of the contract, together with the surrounding circumstances, we think its true construction is that the provision for a forfeiture upon failure to make any payment specified in the contract, referred only to those sums which constituted the part of the purchase price of the salt payable in money, and which might become due before delivery, and not to the charge of 25 cents per ton for sewing, sacking, and delivery of the salt on board cars, which was not to be paid until the 13th of the month succeeding such delivery. It is unnecessary, in this action, to determine whether or not the defendant is entitled to further charges for these delivery expenses, after having received full payment of the final installment of $1,150. Our conclusion is that, after having paid the final installment, the failure of the plaintiff to pay delivery charges for subsequent deliveries did not cause the title to such salt to revert to the defendant.

3. The contract of sale from the Amalgamated Salt Company to the plaintiff also contained a provision that, if payment of the price was not made as specified, the title should revert to the Amalgamated Salt Company. The court found that at the time of the trial the plaintiff had not yet paid that company for the 825 tons of salt received by it under the contract. It would seem that from this fact the court believed that the plaintiff's original title to the property had been defeated, and that it could not recover possession. We think this was a matter of no concern to the defendant. If a forfeiture took place, as was claimed, it was after the suit was begun. The enforcement of such forfeiture could be waived. Some affirmative action by the Amalgamated Salt Company would be necessary as evidence of an intention to enforce it. It does not appear that any such action was taken, and its enforcement will not be presumed in favor of the defendant for the purpose of defeating this action.

4. There is a claim by the plaintiff that the finding that the salt which was the subject of the sale of December 20, 1902, was only 1788 tons, is not sustained by the evidence, and that the court should have found that it consisted of 4,600 tons. It was not seriously contended that the evidence was such as to require a finding that there was at that time 4,600 tons of salt on the premises "lifted, sacked and stored in piles, bins and warehouses," as stated in the contract, nor that any specific quantity was described in the contract. The contention is, in this behalf, that one Wadsworth and one Babcock, as agents of the defendant, negotiated the sale of the salt to the Amalgamated Salt Company; that they then represented to that company that there was at least 4,600 tons of salt situated as described; that, because of these representations, the defendant is, as a matter of law, estopped to deny that any less quantity was so situated and sold; and that this estoppel operates not only in favor of that company, but also in favor of plaintiff, as defendant's vendee. We need not determine the soundness of the propositions that the representations created an estoppel, and that the estoppel operates in favor of the vendee. There was evidence from which the court may have concluded that Wadsworth was not the agent of the Western Salt Company, but was the agent and promoter of the Amalgamated Salt Company; that in that capacity, and before the latter company was incorporated, he visited the salt works of defendant and saw the salt there on hand; that whatever statements were made to the Amalgamated Salt Company were made by him in his report to that company after its incorporation, as its own agent; and that the principal object of the Amalgamated Salt Company in making the contract was not to purchase any particular quantity of salt, but to buy the stock of salt which the Western Salt Company then had ready for market so as to prevent the continued competition of the latter in the salt business. Upon such facts the court might justly hold that the contract should be taken literally, as its words imply; that is, as a sale of the salt on hand at that place ready for market, without especial regard to its quantity. We express no opinion upon the question whether it could, under different circumstances, be construed otherwise. If the court believed the facts were as above indicated, there could be no estoppel.

5. The plaintiff further contended that the pleadings admitted that the amount of salt on hand at the time of the sale on December 20, 1902, was 4,600 tons. We need not decide this proposition. It may be conceded that the pleadings are somewhat ambiguous upon that point; but, as the judgment must be reversed and a new trial had, the defendant may be allowed to amend its pleadings, if it so desires, so as to remove all doubt upon that subject.

We may add, with respect to the value of the salt, that evidence of the market value of salt at retail, in lots of less than a ton, in the city of San Diego, would be a very unsatisfactory measure of value of salt in lots of 1,000 tons or more at wholesale, and that, unless such evidence was supplemented by proof of the difference between the wholesale and retail prices, it would not, of itself, enable the court to find the value. The defendant is liable only for the wholesale price or value; that is, of the going price when sold in similar lots by manufacturers to the trade.

The judgment and order are reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

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5 Cal. App. 678

## SUMMERFIELD v. DOW. (Civ. 397.)

(Court of Appeal, Second District, California. June 4, 1907. Rehearing Denied by Supreme Court Aug. 3, 1907.)

JUSTICES OF THE PEACE — COMPENSATION — STATUTES—VALIDITY.

Pol. Code, § 4014, as amended in 1907, provides for two justices of the peace in each township, except in townships containing cities in which city justices are elected, and in townships having a population of less than 5,000, there shall be but one, and except in townships containing a population of more than 100,000 and less than 300,000, there shall be four. Section 4231, subd. 15, as amended by St. 1907, p. 424, c. 10, fixes the salary of justices of the peace by allowing them the fees allowed by law, except that no justice shall receive more than $1,500 per annum for services rendered by him in criminal cases, and except that in townships having a population of more than 100,000 and less than 300,000, each justice shall receive a salary of $3,000 per year, which shall be in lieu of all fees for the performance of any official act. *Held*, that section 4231, subd. 15, as amended, is not in conflict with Const. art. 11, § 5, providing that the Legislature shall regulate the compensation of all officers in proportion to duties, since the adjustment of compensation between the different classes of justices is based on proper distinctions.

Petition for a writ of mandate by Joseph W. Summerfield against Herbert G. Dow, as auditor of Los Angeles county, to compel respondent to draw a warrant on the county treasurer to pay petitioner his salary. Writ granted.

C. L. Shinn, for petitioner. Anderson & Anderson, for respondent.

TAGGART, J. Petition for writ of mandate. Petitioner is a justice of the peace for Los Angeles township, Los Angeles county. Respondent is the auditor of Los Angeles county. On May 11, 1907, petitioner demanded of respondent that he draw a warrant upon the treasurer of Los Angeles county for $250, payable to petitioner as his salary for the month of April, 1907, under the provisions of subdivision 15 of section 4231 of the Political Code, as amended March 18, 1907 (St. 1907, p. 424, c. 10). Respondent refused to issue said warrant, and, as cause why the mandate of this court should not issue commanding him to do so, says the statute providing for such salary is unconstitutional. The provision of the Constitution said to have been violated by the Legislature in enacting the section mentioned is the requirement of section 5 of article 11 that "It [the Legislature] shall regulate the compensation of all such officers [county, township and municipal officers] in proportion to duties," etc. Section 4014 of the Political Code, as amended in 1907, provides for two justices of the peace in each township of the state; provided that in townships containing cities in which city justices or recorders are elected and in townships having a population of less than 5,000 there shall be but one, and provided further that in townships containing a population of more than 100,000 and less than 300,000 there shall be four justices of the peace. Subdivision 15 of section 4231, which relates to the compensation of justices of the peace in counties of the second class (Los Angeles), provides that justices of the peace shall receive as compensation "such fees as are now or may be hereafter allowed by law; provided that no justice of the peace shall receive more than $1,500 per annum, which may be paid in monthly installments of not exceeding $125 per month for all services rendered by him in criminal cases * * * or proceedings to which the people of the state of California are parties. * * * And provided further, that in townships having a population of more than one hundred thousand and less than three hundred thousand each justice of the peace shall receive a salary of three thousand dollars per year, payable in like manner and out of the same fund, and at like times as county officers are paid and such salary shall be in lieu of all fees due or to become due such justice for performance of any official act. And all fees * * * shall be and become the property of the county in which such justice exercises his jurisdiction." Another proviso requires the board of supervisors of the county to provide an office and necessary furniture therefor and appoint a clerk for each of said four justices' courts, and a salary of $100 per month is provided to be paid to each of said clerks.

Los Angeles township is the only one in Los Angeles county to which the provisions as to clerks, salary, offices, etc., can apply, and it is contended: First, that the compensation provided is not in proportion to the duties that the respective justices of that township may be required to perform; and, second, that, when compared with the compensation fixed for justices of the peace in other townships of Los Angeles county, the salary allowed is not in proportion to the duties of the office.

While it is possible, we might even say probable, judging from human nature in the average, that some of the justices of the township in question will perform more of the duties of the office than others, we do not think this is a failure of uniformity of operation which can be reached in this manner. This presents one of those evils of our governmental system which must find relief at the ballot box. A statute which provides four officers to attend to all the business of a specified kind within a certain district at equal salaries impliedly imposes a duty upon these officers to equitably apportion the business among them, whether there be any express statutory regulations in this regard or not. Any inconvenience to the public from the overzeal of one or more of the incumbents of the office of justice of the peace to do too much (or too little) will have to be borne until the opportunity arises to change the personnel of the offices. That a more excellent system was provided for San Francisco by the Code of Civil Procedure (section 85 et seq.) does not imply that the latter is the only constitutional plan. The validity of a law is not to be tested by its application to extreme cases, or by assuming that public officers will grossly and arbitrarily violate their duties. If every law were declared unconstitutional which by the application of such tests could be shown capable of working injustice, we would have very few laws left. Rode v. Siebe, 119 Cal. 520, 51 Pac. 869, 39 L. R. A. 342.

The greater stress, however, is laid upon the objection that there is not a due apportionment of duties and compensation between the justices outside of Los Angeles city and those inside. The path of judicial interpretation through the field of county and township legislation discloses many byways. Conflicting views are not wanting in the various declarations of the law on the subject by the courts. But we are not called upon to distinguish these cases, nor to attempt to reconcile them in reaching a conclusion on this point. The two cases relied upon by respondent to sustain his position that the law is unconstitutional (Tucker v. Barnum, 144 Cal. 266, 77 Pac. 919, and Millard v. Kern County, 147 Cal. 682, 82 Pac. 329) hold that a classification of townships by population for the purpose of fixing the compensation of the officers thereof, according to the method prescribed by the Constitution for classifying counties, is valid and proper. In Tulare County v. May, 118 Cal. 308, 50 Pac. 427, it is held that different methods of fixing compensation of county officers may be provided in different counties. In Vail v. San Diego Co., 126 Cal. 35, 58 Pac. 392, the same doctrine is declared and rule applied where a county officer in one class of counties was compensated by salary and the same officer in all the other classes of counties in the state received fees and a per diem for services rendered. This rule is recognized and applied to township officers in two different classes of counties in the later case of Johnson v. Gunn, 148 Cal. 745, 84 Pac. 665. In Tucker v. Barnum, the unequal limitations upon the fees that might be collected for the same services was declared to violate the rule that compensation must be in proportion to duties, and also to violate the rule as to local and special laws affecting the fees and salaries of officers. The act before the court in Millard v. Kern Co. was declared invalid on the authority of the former case, and was subject to the same objection when considered independent of the provision relating to the justices of the peace to whom were given a fixed salary for all services in civil and criminal cases. The section classifying townships and fixing the compensation of the justices of the peace was considered as an indivisible act, and on the theory that one part could not be permitted to stand without the other, the decision in that case may be sustained. This view of the opinion in that case is supported by the fact that no attempt is made to point out the differences between the two cases, and the decision in the Millard Case is rested solely upon the rule of stare decisis. This is also further strengthened by the special concurring opinion of Justice Angellotti in the latter case. These cases are easily distinguishable from the case at bar. Subdivision 15 of section 4231 does not in express words classify the townships of Los Angeles county. It fixes a uniform rule of compensation by fees for all the justices of the peace in the county, with a limitation of $1,500 per annum in criminal cases, and, by a proviso, establishes salaries for the four justices of the peace provided for one of the classes of townships created by the general law. Section 4014, Pol. Code. Both the other classes created by section 4014 receive the fees allowed by law, with the same limitations in criminal cases. The Legislature in its discretion has fixed a different mode of compensation in the two classes created by the legislation for the purpose of fixing compensation, and there is nothing before this court from which it can ascertain whether the compensation of one class will be less or more than the other.

Conceding full force and effect to all that has been said since Longan v. Solano Co., 65 Cal. 122, 3 Pac. 463, in regard to compensation being fixed in proportion to duties, rather than according to population, the same rules of interpretation of statutes are applicable. The mode and measure of compensation of public officers are both peculiarly matters of legislative discretion, and an act of the Legislature in relation thereto ought to be clearly shown to be unconstitutional before being so declared by the courts. The validity of statutes should not be determined upon mere possible contingencies. So long as the classification seems based upon conditions which suggest the propriety of the different adjustments made between the classes, and the adjustments proceed upon intrinsic differences, and are not based upon mere arbitrary distinctions, it should be upheld. Vail v. San Diego, supra.

While the population of a township may not alone be sufficient to determine the duties required of an officer, density of population has always been regarded as one of the prime considerations in ascertaining the amount of compensation to be paid a public officer for discharging the duties of his office, and also in determining the system to be adopted in measuring such compensation. Salary is the method most generally adopted to compensate officers of large cities, and fees those of smaller cities and towns and nonurban communities. The adjustment between the classes in the act under consideration appears to proceed not only upon intrinsic differences existing between the townships of the respective classes, but is based upon well-recognized distinctions, which go directly to the duties required of such officers, and to the methods of compensation ordinarily and generally used. To sustain respondent's position here would be to hold any act unconstitutional which provided fees as the measure of compensation in one class of townships and salaries in another. We find no authority to sustain such a position.

We are of the opinion that the Legislature did not violate its legislative discretion in enacting the portion of subdivision 15 of section 4231 of the Political Code, as amended in 1907, which fixes the salary of the justices of the peace of Los Angeles township at $3,000 per annum for the personal discharge of their official duties. In arriving at this conclusion, however, we have not considered those provisions relating to salaries of clerks, office rent, supplies, etc., as affecting the compensation of the justices of the peace. These are matters which naturally suggest questions which have not been presented on this application. For instance, the question of whether or not it is competent to create special township officers for one class of townships in one county (that is, clerk of the justice's court), under a classification of such townships by population for the purpose of fixing compensation. Neither have we considered the proviso as to rent, furniture, supplies, etc., because we deem it unnecessary to the decision of the question raised on this application. The Legislature has made express provision for a salary of $3,000 for the justices of the peace in Los Angeles township, and petitioner is entitled to receive the salary of $250 per month as demanded.

The writ of mandate of this court is directed to issue commanding respondent to draw his warrant upon the county treasurer of Los Angeles county for the amount as prayed for.

We concur: ALLEN, P. J.; SHAW, J.

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(5 Cal. App. 654)

## PEOPLE v. COLLINS. (Cr. 88.)

(Court of Appeal, First District, California. June 1, 1907.)

1. RAPE—ASSAULT WITH INTENT TO COMMIT RAPE—INDICTMENT AND INFORMATION—SUFFICIENCY.

Under Pen. Code, § 220, providing that every person who assaults another with intent to commit rape, etc., is punishable, etc., an information charging that defendant unlawfully made an assault on, etc., a female under the age of 16 years, etc., with the intent to ravish, etc., was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 37-41.]

2. SAME—SUFFICIENCY OF EVIDENCE.

In a prosecution for assault with intent to commit rape, evidence examined, and *held* sufficient to support a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 78-82.]

3. SAME—QUESTIONS FOR JURY.

In a prosecution for assault with intent to commit rape, the intention with which defendant made the assault was a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 87.]

4. CRIMINAL LAW—APPEAL—OBJECTIONS NOT RAISED BELOW.

Where no objection is made to testimony given without the witness being sworn, the objection cannot be made for the first time on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2640, 2643.]

5. SAME — APPEAL — REVIEW—DISCRETION OF TRIAL COURT—WITNESSES—COMPETENCY.

The question as to the competency of a witness of tender years is one peculiarly within the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3062.]

6. SAME—TRIAL—MISCONDUCT OF JUDGE.

Where, in a prosecution for assault with intent to commit rape, the attitude of defendant's counsel disconcerted prosecutrix, a timid child, the court properly admonished counsel to keep without the railing where prosecutrix was being examined as a witness; it not appearing that counsel could not hear the answers of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1522.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

William H. Collins was convicted of assault with intent to commit rape, and appeals. Affirmed.

H. A. Krouse, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, P. J. The information charges the defendant with assault with intent to commit rape; the charging part being as follows: "Said William H. Collins * * * unlawfully, violently and feloniously did make an assault upon one Katie Simonetti, a female under the age of sixteen years, to wit, of the age of six years, who was not then or there the wife of said William H. Collins, with the intent then and there feloniously and by force and violence to carnally know and ravish the said Katie Simonetti and accomplish with her an act of sexual intercourse against her will, without her consent and by force, contrary to the form," etc. Defendant's counsel insists that the information is not sufficient because it does not allege that the assault was an attempt to commit a violent injury upon the person of the child so as to show an assault, as defined in section 240 of the Penal Code. There was no demurrer to the information, and the point is for the first time raised in this court. However, we are of the opinion that the information is sufficient. It substantially follows the language of the statute, which is: "Every person who assaults another with intent to commit rape," etc. Pen. Code, § 220. It states the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended. In such case the information is sufficient. The word "assault" as used in the statute implies force by the assailant, and resistence by the one assaulted. It has always been held in this state that, where a crime like this is charged to have been committed upon a child under 16 years of age, there can be no consent, as the law resists for her. People v. Verdegreen, 106 Cal. 215, 39 Pac. 607, 46 Am. St. Rep. 234; People v. Vann, 129 Cal. 118, 61 Pac. 776. It is not necessary for courts to draw fine analytical distinctions between an attempt to commit an offense, and an assault with intent to commit such offense. People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165; People v. Christian, 101 Cal. 471, 35 Pac. 1043.

We have carefully examined the evidence, and find it sufficient to support the verdict. Without going into minute detail, there is evidence tending to show the following facts: Defendant roomed on the third floor of a lodging house at 694 Fourth street in the city of San Francisco. About 9 o'clock, or a little before, in the evening, he was seen going upstairs to his room carrying two little girls in his arms, of which the child upon whom the assault is alleged to have been made was one. He remained in the room for some 20 minutes, and came downstairs with both children in his arms. The child upon whom the assault is alleged to have been made went home, and immediately complained to her mother that the defendant had hurt her, showing the mother her private parts. The mother examined her person, and found the parts red, but did not notice any blood or bruises of any kind. The child testified that defendant got down on his knees, and took up her clothes, and put something in her private parts which hurt her; that he took down her "panties" and took his thing out of his pants; that she was scared, but did not cry, because defendant held her mouth. The police officer to whom complaint was made on the same evening visited the room of defendant at 9:30, and again at 12:30, but did not find defendant there. On the following evening, about half-past 7, he met the defendant and asked him about the matter, and defendant denied that he had the two little girls in his room on the evening of the 8th, or that he was there himself. Defendant in his testimony admits that he had the two little girls up in his room at the time alleged, and attempted to explain it by saying that he took them up to see his own little girl; but, as his own wife and little girl were not there at the time, the explanation may very well have been such as not to be believed by the jury. Defendant further testified as to leaving his room on the evening of the 8th a little before 9 o'clock, and that he went with a Mr. Kaiser to Fifth and Townsend streets, and stayed there until half-past twelve that night, and that at 2 o'clock a. m. he went with Kaiser to Fourth and Bluxome streets. He does not appear to have gone to his room any more that night.

It is argued that, as the child had not been torn or penetrated, defendant could not have actually tried to have sexual intercourse with her. What his intentions were was a question particularly for the jury. The jury heard the evidence, and saw the witnesses and the defendant when he was testifying in his own behalf. The facts in this case are very similar to the facts in People v. Johnson, 131 Cal. 511, 63 Pac. 842, and that case is direct authority for the view we have taken in this case. It was there said: "The defendant assaulted the child. Being under 16 years of age, she was incapable of consenting, and therefore the assault in law was without her consent. If he had in fact had sexual intercourse with her, he would have been guilty of rape. As he did not have sexual intercourse with her, but did assault her, the question as to his intent was to be determined by all the circumstances and by the acts of defendant. The fact that defendant unbuttoned his trousers, that he took out his private parts, and that he wanted to have sexual intercourse with the child, were sufficient to justify the jury in drawing the logical rational conclusion that defendant's object was to have sexual intercourse with the child. Whether he desisted because he had satisfied his morbid depraved passions in the manner described in the evidence, or because he was afraid of an outcry from the child, or because of his impotence, are all matters of conjecture. We do not think the crime charged against this defendant, and of which he was convicted, is of such a nature that we should attempt to shield him upon imaginary reasons, or upon a theory that might possibly account for his acts as being done with the intent only to gratify an unnatural desire. We must suppose that his acts were done with the purpose and desire that would ordinarily characterize the acts of an individual of the male sex when such acts were done with one of the female sex. That a man should entice a little girl into his room, undress her, and fondle her for the purpose of gratifying an unnatural desire, and not for the purpose of having sexual intercourse, is possible, but not at all probable. The intent of a person cannot be proven by direct and positive evidence. It is a question of fact to be proven like any other fact, by acts, conduct, and circumstances."

It is contended that the record does not show that Katie Simonetti was sworn, and further that her examination showed that she was of tender age, and incapable of receiving just impressions of the facts respecting which she was examined, or of relating them truly. The minutes of the trial do not show that she was sworn, but the bill of exceptions shows that she was examined as to her competency before being sworn, and that after such examination she "was duly sworn." Counsel, in the discharge of their duty, owe it to the court not to raise and discuss a point entirely devoid of merit, especially where the record does not sustain the statement. It is an elementary principle, supposed to be understood by every member of the bar, that if no objection were made to the testimony of a witness, and the testimony was given without the witness being sworn, the objection could not be made for the first time in this court. Here the record does not show that the witness was not sworn, nor that any objection was made to her evidence upon this ground, and the bill of exceptions shows that she was sworn.

Equally without merit is the contention that the court erred in allowing the child to testify. She was carefully examined by the judge, and her examination shows that she was capable of receiving just impressions of the facts, and knew and understood them sufficiently to give her version of them. The question as to the competency of a witness of tender years is one peculiarly within the discretion of the trial court. People v. Wilmot, 139 Cal. 103, 72 Pac. 838; People v. Craig, 111 Cal. 460, 44 Pac. 186; People v. Bradford, 1 Cal. App. 41, 81 Pac. 712.

It is claimed that "the most glaring and prejudicial error and deprivation of the right to a fair and impartial trial" occurred when the court requested the defendant's attorney not to step within the railing where the little girl was being examined as a witness, and to take his seat. From our information as contained in the record we are of opinion that the court properly admonished counsel. The child was timid, and both the counsel for the prosecution and the judge were endeavoring to get her to narrate in her own way what occurred. Defendant's counsel had interrupted time and time again with needless objections devoid of merit. Finally, when counsel arose and walked up inside the railing and near the child, the judge informed him that he had "the right to make any objection, but your activity inside the railing disconcerts the witness." It does not appear that counsel could not hear the answers of the witness. The court seems to have been very liberal with him, as he was allowed to ask questions in cross-examination which take up page upon page of the transcript with no apparent merit.

Many other questions are raised in the brief, but are as devoid of merit as those we have discussed.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

5 Cal. App. 659

## HOLMES et al. v. SALAMANCA GOLD MIN. & MILL. CO. et al. (Civ. 344.)

(Court of Appeal, Second District, California. June 1, 1907.)

1. Mines and Minerals—Recovery of Unpatented Mining Claims—Pleadings—Issues—Evidence.

Where the complaint, in an action for the possession of unpatented mining claims, alleged plaintiff's ownership, possession, and right of possession at a specified date and his ouster by defendant, defendant, under a general denial, might show that the deeds under which plaintiff claimed title were bad.

2. Deeds — Execution — Evidence — Sufficiency.

On the issue of the execution of a deed, evidence examined, and *held* to warrant a finding that the possession of the deed was wrongfully obtained by the grantee without the knowledge or acquiescence of the grantor, and title did not pass.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 645.]

3. Corporations — Deeds — Requisites — Delivery.

The board of directors of a corporation authorized the execution of a conveyance by its secretary and president. The secretary retained possession of the deed, signed by the president and himself, until after the grantee therein brought suit for the possession of the premises described therein, when the officers acknowledged the same, and it was placed on record. It did not appear that an immediate delivery was intended, or that the grantee paid anything of value for the property. *Held* to justify a finding that the deed was not delivered to the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1784.]

4. Mines and Minerals—Recovery of Unpatented Mining Claims—Pleadings—Issues—Evidence—Admissibility.

Where, in an action for the possession of unpatented mining claims, plaintiff claimed ownership through conveyances executed by the original locator, and defendant pleaded the general denial, evidence of a forfeiture of the rights of the original locator, or his successors, under Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1427], because of the nonperformance of the annual assessment work and of defendant's entry on the premises and his relocation of the same, was admissible.

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by W. H. Holmes and others against the Salamanca Gold Mining & Milling Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Powers & Holland, for appellants. Collier & Smith, Works, Lee & Works, Lawler, Allen & Van Dyke, and C. F. Smith, for respondents.

ALLEN, P. J. Action to recover possession of certain unpatented mining claims. Defendants had judgment. Plaintiffs in due time appealed, upon a statement, from the order denying a new trial.

The only questions presented upon this appeal relate to the action of the trial court in admitting certain testimony and as to the sufficiency of the evidence to support certain material findings. The complaint is in the usual form, alleging plaintiffs' ownership, possession, and right of possession on December 30, 1903, of three unpatented lode mining claims, designated as the "Bonanza," "Blossom," and "Lucinda," and of plaintiffs' ouster therefrom by defendants. The answer is a denial of the ownership and right of possession in plaintiffs, and of the ouster. Under these issues the court found that on the date named plaintiffs were not the owners or entitled to the possession of said mining claims, although they were in actual possession; that plaintiffs had not performed the annual assessment work thereon for three years; and that defendants had made valid locations of such claims after forfeiture by plaintiffs and had taken peaceable possession and continued work thereon up to the commencement of the trial.

Plaintiffs deraigned title through mineral locations, the validity of which is not questioned, and through deeds from such locators and intermediate owners. The court, under objections, permitted the defendants to introduce testimony tending to vitiate two deeds affecting plaintiffs' title to the "Bonanza" claim. This action of the court is assigned as error, because no question of fraud was raised by the answer. The recent decision of Chrast v. O'Connor, 83 Pac. 238, 41 Wash. 360, would seem to settle this question adversely to appellants. That decision is based upon Mather v. Hutchinson, 25 Wis. 27, where it is held that, under a complaint averring ownership in general terms, the defendant must be allowed to prove anything which would defeat the title offered by the plaintiff. The reason assigned is most convincing, for plaintiff not being required to set up his deraignment of title he might upon the trial prove under such general averment any source of title available. Any other rule applying to defendants would require them to foreknow and avoid, by specific allegations, a title which plaintiff was not bound to disclose at all. This rule has support, also, in Cooper v. Miller, 113 Cal. 246, 45 Pac. 325; Goldberg v. Bruschi, 146 Cal. 710, 81 Pac. 23; and Sparrow v. Rhoades, 76 Cal. 211, 18 Pac. 245, 9 Am. St. Rep. 197.

The court found that the plaintiffs were not the owners or entitled to possession of the mining property on December 30, 1903, nor were they on said date ousted therefrom by defendants. These findings are attacked by appellants upon the ground that there is no evidence in the record sufficient for their support. The findings of the court as to ownership and right of possession may be sustained upon either of two theories: First, that plaintiffs failed in their deraignment of title from the original locators; or, second, that all rights under the original location had lapsed by reason of the failure to do the annual assessment work required by the federal statutes in order to perpetuate the possessory right, and that defendants exercising a right of citizenship had entered thereon and made a subsequent location before resumption of work by appellants. The first theory, in so far as the "Bonanza" claim is concerned, derives its support alone from the testimony of one Acosta, which is to the effect that he never knowingly or voluntarily made any conveyance of this mine to plaintiffs, and never knew that he had any title to the mine and never made any claim of ownership thereto; that his only contract with the plaintiffs was that if they would pay him $400 in settlement of a claim of $650, which he held against certain trustees, he would give them a receipt in full; that pursuant to this agreement he went with plaintiffs to the town of Hedges, where several papers were spread upon a counter; that when he signed one plaintiffs took it away and presented him with another; that in that way he signed two, three, or four papers; that no notary or other officer ever made known to him the contents of the papers so signed, or asked him any questions in relation thereto; that personally he did not know or care what he was signing, but simply wanted to get his money and get away from the mine; that he never had knowledge of any deed having been made to him by such trustees until he received that information in court upon the trial. If the court accepted Acosta's statements as true, which fact is suggested by the findings, it would follow that the possession of the deed from Acosta was obtained by the plaintiffs surreptitiously. A deed, the possession of which is fraudulently or wrongfully obtained from the grantor, without his knowledge, consent, or acquiescence, is no more effectual to pass title to a supposed grantee than if it were a total forgery. Devlin on Deeds, § 267, and cases cited. The validity of the deed from Acosta to plaintiffs depends upon his due execution thereof and voluntary delivery. That such deed be voluntary, it is essential that the character of the instrument be known, as well as that the act of delivery should be intended by the party. If the delivery be not voluntary, the instrument is a nullity, unless some act is shown in respect thereto which would estop the grantor from denying its validity, or by some subsequent act a ratification is established. There is nothing in the record from which it may be claimed that plaintiffs were, by the conduct of Acosta, led to do what they otherwise would not have done to their pecuniary prejudice—this being said to be the vital principle of equitable estoppel. Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695. If Acosta's statements be true, under the contract with plaintiffs the payment of the $400 made by plaintiffs was not upon the faith of any conveyance, nor was it intended that a conveyance should enter into the transaction connected with the payment of money to him. Neither can it be said that, with knowledge of the transaction brought home to him, Acosta ever acquiesced in said deed or ratified the same.

As to the "Blossom" mine, the record discloses that the title thereto was never in Acosta; that as early as 1891 the owners of said mine joined in a conveyance of the "Blossom" mine to a corporation known as the "Blossom Mining & Milling Company." If the plaintiffs ever acquired any title to this particular mine, it was through a conveyance directly to them by the Blossom Mining & Milling Company, authorized by the board of directors in 1902. It appears from the testimony of the secretary that, notwithstanding the authorization at the date last named and the physical signing of the deed pursuant thereto by the president and secretary of the corporation, the secretary retained possession of the deed and put the same in the minute book of the corporation, where it remained until long after the commencement of this action, when the officers acknowledged the same, and it was placed upon record. From this evidence the court was justified in an implied finding that the conduct and acts of the parties in 1902 did not amount to a delivery; nor does it appear from the record that an immediate delivery was intended, notwithstanding the secretary was also one of the grantors; nor is there anything shown indicating that plaintiffs ever paid to the corporation anything of value for this property, or ever acquired any equitable interest therein.

As to the "Lucinda" claim, nothing appears in the record supporting plaintiffs' claim of ownership and right of possession. If, therefore, these plaintiffs, without color of title, entered into the possession of any of these mineral claims without relocation or initiating any right thereto, the same was open to relocation at any time after the legal owners were in default in the annual assessment work. It is contended, however, by appellants, that evidence of the nonperformance of the annual assessment work was inadmissible because no claim of forfeiture was alleged in the answer. Under a general denial or its equivalent, each party to a contested action claims the title out of which the right of possession springs, and the court determines which of the two holds it. Marshall v. Shafter, 32 Cal. 197. It must be conceded that, if the defendants' title is in issue, they are entitled to prove those facts which tend to support it, and it is essential in determining defendants' ownership in the case at bar for the court to know whether or not the mineral ground which they claim to have relocated and own was at the date of relocation open thereto. Section 2324, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1427], provides that, upon a failure to comply with the conditions relative to the annual assessment work, the claim or mine "shall be open to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." There is little room for controversy as to the default upon the part of the owners under the original location in the performance of the annual assessment work for the three years preceding the relocation. Whoever were the successors to the ownership of the original locators, if they failed for three years to perform the annual assessment work, the mines and claims became open to relocation. It is determined in Contreras v. Merck, 131 Cal. 214, 63 Pac. 336, that the principal fact at issue was the ownership of the mine; that it was not necessary for plaintiff to allege forfeiture or abandonment by defendant. If this be the rule, as applying where the issue of ownership is raised by the answer with the presumptive denial upon the part of plaintiff, no reason is apparent why the same should not apply to the issues raised by a complaint and answer. If the original locator, or his successors in interest, be in default in such annual assessment work, they are no longer the owners of the exclusive possessory right; and the defendant should be permitted to show that such exclusive possessory right has terminated, and that after such termination he peaceably entered upon the premises and relocated the same. The mere naked possession of mineral land does not guaranty any rights as against a subsequent locator entering in good faith and making a valid location of the property. Horswell v. Ruiz, 67 Cal. 112, 7 Pac. 197.

It is further claimed by appellants that there is no evidence connecting any of the defendants, other than Clark, with the relocation, or title to these claims. We think this point need not be considered further than to suggest that the plaintiffs have made all of these defendants parties and have alleged that they had ousted plaintiffs from the possession and were the present occupants of the premises. They allege that the Salamanca Gold Mining & Milling Company is a corporation, and no finding in that regard was necessary.

A careful examination of the record convinces us that there is no prejudicial error apparent therein, and the order is affirmed.

We concur: SHAW, J.; TAGGART, J.

5 Cal. App. 668

## KEIFER v. MYERS. (Civ. 343.)

(Court of Appeal, Second District, California. June 3, 1907. Rehearing Denied by Supreme Court Aug. 1, 1907.)

SALES—SALE DISTINGUISHED FROM PLEDGE.

Plaintiff's transfer of 198 shares of corporate stock to defendant was a pledge and not a sale, where, when the transfer was made, they executed an agreement reciting the transfer, that defendant was the owner of the stock, that it was pledged to a bank as additional security for plaintiff's debt, that the company was indebted to M., that plaintiff had loaned and would lend money to the company, that plaintiff desired an option to purchase 198 shares of the stock, and binding defendant to sell within one year, upon plaintiff reimbursing defendant for money paid the bank for plaintiff, for one-half the money advanced the corporation by M. and defendant; there being no other consideration for the transfer, and none of plaintiff's liabilities being canceled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 14.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by J. H. Keifer against R. H. Myers. Plaintiff appeals from a judgment of nonsuit. Reversed.

Lynn Helm and E. S. Williams, for appellant. W. R. Hervey and R. H. Myers, for respondent.

SHAW, J. Appeal from a judgment of nonsuit. At the time in question, the Sanitary Laundry Company was a corporation with a capital stock of $40,000, divided into 400 shares of the par value of $100 each. Of this stock the appellant, J. H. Keifer, owned 198 shares, one George R. Myers owned 198 shares, and the remaining four shares were owned by three other persons, who, with said Keifer and said George R. Myers, constituted the board of directors of said corporation. The corporation was in financial distress, and it appears that neither appellant nor said George R. Myers was in a position to extend it the aid needed. The appellant had borrowed from the Broadway Bank & Trust Company $4,500, evidenced by two promissory notes, and as security for their payment had, in addition to giving a mortgage upon certain real estate owned by him, deposited his 198 shares of stock in pledge with said bank as collateral security. The laundry company was largely indebted to said George R. Myers for moneys which he had loaned it. Under these conditions, the respondent, R. H. Myers, and J. H. Keifer entered into negotiations, which, on December 30, 1903, culminated in a transfer of respondent's 198 shares of stock to said R. H. Myers, and contemporaneously therewith the execution of an agreement in writing, wherein it was recited that said Keifer had sold, assigned, and transferred to R. H. Myers 198 shares of stock, and that R. H. Myers was the owner and holder thereof. That said stock was pledged to said bank as additional security for the payment of a certain promissory note of $4,500, executed by said J. H. Keifer and his wife, which said note was also secured by a mortgage of real estate. That said laundry company during the time said Keifer was a stockholder had become largely indebted to George R. Myers for moneys by him loaned to said company. That said R. H. Myers had loaned and advanced, and would thereafter loan and advance, divers sums of money to discharge a part of the indebtedness of the said company in order to save it from bankruptcy, and to pay such of the operating expenses as might be necessary for the best interests of the company. That said Keifer desired an option to purchase 198 shares of said stock, and wherein said R. H. Myers covenanted and agreed to sell to said Keifer, within one year, time being made the essence of the contract, 198 shares of said stock, upon Keifer making payment to R. H. Myers of: First, all moneys paid to said bank by R. H. Myers on account of the notes of said Keifer, for the payment of which said stock was held as collateral security; second, one-half of all moneys theretofore or thereafter, up to the exercise of the option, advanced to said company by R. H. Myers, less any payments made thereon by said company; third, one-half of all moneys theretofore loaned to said laundry company by said George R. Myers, less any payments made thereon by said company; and, fourth, interest on said sums at 7 per cent. per annum. It was further provided that an accounting for any dividends paid upon said stock should be made and credited to said Keifer at the time of his exercising said option to purchase. R. H. Myers covenanted to advance to the company from time to time such sums of money, not exceeding $4,000, as might be necessary to save the company from bankruptcy. At the same time, and with the consent of appellant, an agreement in writing was made between said bank and said R. H. Myers, whereby the bank agreed to deliver the 198 shares of stock so pledged to it by Keifer to the said R. H. Myers at any time upon his paying the sum of $1,000, to be applied on Keifer's indebtedness to said bank, and the delivery to the said bank of an agreement on the part of R. H. Myers to pay any deficiency, not exceeding $750, which might remain upon Keifer's notes after exhausting the real estate so held by it as security for the payment thereof.

It will be noted, by this agreement with the bank, R. H. Myers assumes no obligation whatever. There was no other consideration for said transfer than that mentioned in the agreement. It appears that R. H. Myers did pay upon said indebtedness of Keifer the sum of $714.92, and no more, and that from the proceeds of the real estate so held by the bank the sum of $2.540 was paid on the principal, together with $260 interest thereon. From time to time after December 29, 1903, which was the date of both the agreement made between Keifer and Myers and that between Myers and the bank, though neither was delivered until the 30th of December, 1903, R. H. Myers advanced to said laundry company divers sums of money, part of which was paid by said company. Keifer did not exercise his option to repurchase the stock within the year, but on January 24 and January 27, 1905, he offered to repurchase and redeem said stock under the terms of said agreement, and asked respondent to render him a statement and account of the amount due thereon, which he, in writing, tendered and offered to pay. No objection was made to this tender. Respondent claimed that the transaction constituted an absolute sale, and that appellant, having failed to exercise his option within the year, had lost the right to purchase the stock. On the other hand, appellant contends that the transfer was a pledge of stock.

"The motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against defendant." Hanley v. California, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; Goldstone v. Merchants', etc., Storage Co., 123 Cal. 625, 56 Pac. 776. The record shows that the agreements dated December 29, 1903, were delivered on the following day, on which date the certificate of stock representing the 198 shares of stock which Keifer had pledged to the bank was withdrawn and a new certificate for said stock issued to R. H. Myers and by him redeposited with said bank. The agreement whereby Keifer was given the right to repurchase the stock and the transfer of the stock to R. H. Myers constituted one and the same transaction. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially the one transaction, are to be taken together. Civ. Code, § 1642." Curtin v. Ingle, 137 Cal. 95, 69 Pac. 836, 1013. It appears that R. H. Myers paid no consideration whatever for the transfer of the stock; that he assumed no obligation whatever to pay anything upon Keifer's indebtedness to the bank, nor did he secure the release of Keifer's obligations as a stockholder of the company, or assume or agree to pay them. If the company failed to pay George R. Myers, Keifer was still liable for his proportion of its indebtedness, notwithstanding the loss of his stock. There was no cancellation or surrender of the evidence of any of Keifer's indebtedness. The only obligation assumed by R. H. Myers was to advance money to the company only in case it became necessary to save the company from bankruptcy. Such contingency might never arise; but, if any advances were made, it was provided that Keifer should pay one-half thereof upon a repurchase of the stock. If Myers was the owner of the stock, instead of the pledgee, as he claims, the covenant was an obligation to protect his own property, and not Keifer's—a proposition which borders upon absurdity.

The fact that the agreement giving Keifer the right to repurchase and the transfer of the stock were contemporaneous (Weiseham v. Hocker, 54 Pac. 464, 7 Okl. 250; Clark v. Woodruff [Mich.] 51 N. W. 357;[1] Watkins v. Williams, 31 S. E. 388, 123 N. C. 170); that the stock had a substantial value, and Myers neither paid nor agreed to pay anything in consideration of its transfer to him (Husheon v. Husheon, 71 Cal. 407, 12 Pac. 410; Rubo v. Bennett, 85 Ill. App. 473); that none of Keifer's existing liabilities were canceled, and Myers assumed no part thereof under the terms of the agreement; that as a condition of retransfer Keifer was to pay one-half of the company's unpaid indebtedness to George R. Myers and one-half of the money which respondent had loaned the company, which shows that to this extent at least the stock was transferred as security (sections 2986, 2987, Civ. Code) for existing debts of the company for a part of which Keifer was liable (Ahern v. McCarthy, 107 Cal. 386, 40 Pac. 482; Farmer v. Grose, 42 Cal. 169); that no fixed price was specified as a consideration for the repurchase, but the amount was to be as much as would reimburse R. H. Myers for one-half of such sums as he might advance and which might remain unpaid, including one-half of the amount due from the company to George R. Myers; that Keifer was chargeable with interest and to be credited with dividends—all are circumstances which tend, some of them very strongly, to prove that the transfer was a pledge, and not a sale of the stock.

Respondent lays much stress upon the words used in the agreement, but the use of the words "sold, transferred, and assigned," and the recital that Myers is the owner of the stock, cannot change the character of the transaction. For the purpose of ascertaining the real contract made by the parties, the court looks beyond the terms of the instrument. Hodgkins v. Wright, 127 Cal. 688, 60 Pac. 431.

The judgment is reversed.

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 665

## WILLMON v. PECK et al. (Civ. 280.)

(Court of Appeal, Second District, California. June 3, 1907.)

1. Specific Performance — Contracts—Enforceable — Certainty — Description of Subject-Matter.

To warrant the specific performance of a contract for the conveyance of land, the agreement to convey must not only be in writing and subscribed by the party to be charged, but the writing must contain such a description of the property, either in terms or by reference, that it can be ascertained without resort to parol evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 69–82.]

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[1] 90 Mich. 83.

2. EVIDENCE—PAROL EVIDENCE—ADMISSIBILITY.

Under Civ. Code, § 1741, providing that a contract for the sale of land must be in writing, where the description in a contract for the sale of land was definite, certain, and complete, parol evidence was inadmissible to show that the subject of the contract was entirely a different piece of land from that described therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1778-1780.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by J. C. Willmon against George H. Peck and others for specific performance of a contract to purchase real estate. From a judgment for defendants, plaintiff appeals. Affirmed.

D. M. McDonald and Harris & Harris, for appellant. Frank Karr, and Wellington Clark, for respondents.

SHAW, J. Plaintiff appeals from a judgment rendered in favor of defendants in an action for the specific performance of a contract to purchase real estate. At the time of the transaction, George H. Peck was the owner of the east ½ of the only block numbered 61 located in the city of San Pedro, which east ½ of said block comprised lots 7 to 12, both inclusive. Neither defendant had or claimed any interest in the west ½ of said block, which comprised lots 1 to 6, both inclusive. It appears from parol testimony that some time prior to February 3, 1903, the date of the alleged purchase, a real estate broker, as the agent of said George H. Peck, and at his request, made a rough pencil sketch of said east ½ of said block 61, showing the same to be divided into lots numbered 1 to 14, both inclusive, which sketch was shown to said George H. Peck and posted in his office. This sketch or subdivision of the east ½ of said block was exhibited to the plaintiff by said agent, who pointed out to him upon the ground that portion of said east ½ of said block corresponding to lots designated as 5 and 6 upon said rough pencil sketch so made by said agent. This sketch was never filed for record, nor was it produced at the trial, though the said agent then made and exhibited a copy of said sketch as nearly as he could reproduce the same, which, like all of the foregoing parol testimony, was received in evidence over the objections of the defendants. No survey was ever made of the east ½ of said block for the purpose of subdividing it. It was agreed between plaintiff and said agent acting for defendant George H. Peck that plaintiff would purchase lots 5 and 6, as designated on said pencil sketch, whereupon plaintiff gave to said agent his check, payable to said George H. Peck, for $100, as a deposit upon the purchase price of said lots, which check said Peck received and cashed, and thereupon delivered to said plaintiff a receipt reading as follows: "San Pedro, February 3, 1903. Received from J. C. Willmon one hundred dollars part payment on lot 5 and 6, block 61, San Pedro. Full price $1,500.00. Geo. H. Peck." Plaintiff thereafter tendered the balance of the purchase price and demanded a conveyance of lots 5 and 6, as designated upon said so-called subdivision of the east ½ of block 61, which deed also described said lots by metes and bounds, and upon a refusal of said demand brought this action.

Both the check and the receipt describe the property sold as being "lots 5 and 6, block 61, city of San Pedro," both of which lots are in the west ½ of said block, and neither of which was owned by either of the defendants. The lots involved in this action are admittedly not the ones so described, but are lots 5 and 6 as delineated upon the alleged pencil sketch of what was represented to plaintiff as being Peck's subdivision of the east ½ of block 61; and, while the trial court permitted parol evidence tending to prove that the lots sold were other than those so described in the writing, it, in effect, found that such evidence was valueless; and as a conclusion of law the court found, inasmuch as parol testimony could not be received for the purpose of supplying the description of real estate in the contract for the sale thereof, that said contract was fatally defective for want of description of the lands claimed to be covered thereby, and that said defects could not be supplied by parol evidence. In making this finding the court arrived at the same result, though in a roundabout way, as though it had excluded the testimony in the first instance. The evidence was improperly admitted, and, having been admitted, "it was entitled to no weight whatever, and should be given none in arriving at a conclusion as to the sufficiency of the evidence." Hoult v. Baldwin, 78 Cal. 410, 20 Pac. 864.

The conclusion of the trial court was undoubtedly correct. The land described in the receipt, lots 5 and 6, block 61, in the city of San Pedro, is situated in the west ½ of said block; but it was not these lots, the conveyance of which the plaintiff sought to enforce, but other lots situated in the east ½ of said block, and which he sought to identify and describe by parol testimony. The law seems well settled that, in order to warrant the specific performance of a contract for the conveyance of real property, the agreement to convey must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Marriner v. Dennison, 78 Cal. 208, 20 Pac. 386; Craig v. Zelian, 137 Cal. 106, 69 Pac. 853. Where there is an incomplete description, parol evidence not inconsistent therewith may be offered in aid thereof, not however, for the purpose of introducing a new description. Thus, where the subject of a contract of sale was a certain quantity of fruit from sundry orchards in Ontario and Cucamonga, parol evidence was held admissible to identify the orchards. Ontario, etc., Ass'n v. Cutting F. P. Co., 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231. Here the description in the contract is definite, certain, and complete, and it is sought by parol evidence to show that the subject of the contract was entirely a different piece of land. This would be in violation of express statutory provision. Section 1741, Civ. Code. "It must, of course, appear from the memorandum what is the subject-matter of the defendant's engagement. Land, for instance, which is purported to be bargained for, must be so described that it may be identified." Browne on Stat. of Frauds, § 385; Ferguson v. Blackwell, 58 Pac. 649, 8 Okl. 489.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 686

## DODD v. PASCH et al. (Civ. 339.)

(Court of Appeal, First District, California. June 5, 1907.)

1. Evidence—Parol Evidence as to Writings—Leases.

Where, on an issue as to whether a lease was from month to month or for a year, the tenant produces a written lease for a year, it was error to admit oral evidence to show an understanding that it was to be from month to month.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1741.]

2. Landlord and Tenant—Lease—Requisites.

A written lease is binding when signed by the lessor, though not signed by the lessee, when the lessee has taken possession thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 66.]

3. Same.

A written instrument, reciting that the owner of certain premises had received a certain sum on account of the premises at a monthly rental from October 1st, for the first six months, and at a certain other sum per month for the remainder of the year closing the first of the next October, constituted a lease for a year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 61.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Fred Dodd against H. C. Pasch and another. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Johnston & Jones and W. P. Thompson, for appellants. Lewis H. Smith, for respondent.

HALL, J. Appeal from judgment and order denying defendants' motion for a new trial.

Plaintiff brought this action to recover the possession of certain premises rented of plaintiff by defendants. The complaint was framed upon the theory that the defendants were tenants from month to month and were holding over after one month's notice terminating their tenancy. Defendants pleaded that they leased the premises for one year ending October 1, 1906, and at the trial introduced in evidence in support thereof a writing signed and delivered to defendants by plaintiff in the words following, to wit:

"Fresno, Cal., Sep. 25, 1905.

"Received of Pasch Bros. Twenty and $^{no}/_{100}$ dollars on a/c of old Schien store at a monthly rental from Oct. 1, of $125.00 per month for first 6 months, i. e. to April 1st; of $75.00 per month for the remainder of the year closing Oct. 1, 1906. $105 (one hundred and five) due and payable.

"$20 $^{no}/_{100}$ Fred Dodd."

Defendants went into possession October 1, 1905, and paid all rent up to March 1, 1906, at which time they tendered the rent for March, which was refused by plaintiff; he having on February 28th given defendants a notice to surrender possession March 1, 1906. The trial court, over the objection and exception of defendants, permitted the plaintiff to give testimony of an oral agreement to the effect that he leased the premises sued for, known as the old Schien store, to defendants from month to month, although he admitted that he executed and delivered to defendants the writing above set forth, and that the money specified had been paid. The court made findings in accord with the theory of plaintiff, and gave judgment accordingly.

Defendants contend that the writing above set forth constituted a written contract of lease for the term of one year ending October 1, 1906, and that no evidence of any oral agreement contrary to the terms thereof was admissible. Of the correctness of this contention we have no doubt. The instrument clearly shows the contracting parties, the premises leased, the rent, and the term, which is clearly one year, ending October 1, 1906. These are all the essential requisites of a lease that need be specified in the contract of lease. Other conditions usually contained in leases are nonessential. The time of payment even need not be specified, for when not stated in the lease, nor governed by usage, it is fixed by the law. Civ. Code, § 1947. "To constitute a lease no particular form of words is necessary. Whatever words show an intention on the part of the lessor to dispossess himself of the premises, and on the part of the lessee to enter and hold in subordination to the lessor's title, are sufficient." 18 Am. & Eng. Ency. of Law, 605. Munson v. Wray, 7 Blackf. (Ind.) 403, was an action against Mrs. Munson for holding over her term as tenant, brought on the theory that she was a tenant at will or at sufferance.

Defendant (Mrs. Munson) gave in evidence an instrument in writing signed by the complainant as follows: "Rec'd of Mrs. Munson $3.50 for rent of my brick house in Covington for one month, with privilege of keeping it six months at the same rate. No. 91 or 95. Dec'r 1st, 1843"—and proved that it had reference to the premises sued for. The court held it a good lease, and that the lessee could not be dispossessed, if she paid the rent, until the expiration of the six months. In Eastman v. Perkins, 111 Mass. 30, a writing at the foot of a receipted bill for hay in these words: "Left at stable on Oak street, where Andrew J. Perkins takes possession. Rent to begin October 1, 1870, for one year at $150. John C. Hoadley"—was held to be a good lease. The court said: "The memorandum affixed to the bill of parcels expresses the consent of the owner that the defendant should have immediate possession of the stable, and should continue to occupy it at a specified rent and for a definite time. Although brief and informal, therefore, it had all the essential elements of a present demise [citing cases]. Being accepted by the defendant, it gave him all the rights of a lessee."

In the case at bar, defendants, by paying the rent and entering into possession of the premises, accepted the lease. It was not necessary for the lessee to sign the lease. Johnson, Landlord & Tenant, § 77; Taylor on Landlord & Tenant, § 147; 18 Am. & Eng. Ency. of Law, 606; Castro v. Gaffey, 96 Cal. 421, 31 Pac. 363; Scott v. Glenn, 97 Cal. 513, 32 Pac. 573. The instrument in question being a valid lease, and unambiguous as to the term of the tenancy, it was error to allow oral evidence that the tenancy was from month to month. Civ. Code, § 1625; McDonald v. Poole, 113 Cal. 437, 45 Pac. 702.

The cases relied on by respondents on this question are not in point. In Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109, the writing relied on was a mere memorandum so vague and uncertain as not to constitute a contract at all.

The case at bar was not an attempt to explain a clause or term susceptible of two different interpretations (Williams v. Ashurst, 144 Cal. 619, 78 Pac. 28), or to prove a collateral parol agreement not inconsistent with the writing (Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571; Guidery v. Green, 95 Cal. 630, 30 Pac. 786), but a bald attempt to contradict the terms of the written contract.

Neither can the action of the trial court be sustained on the theory that the writing was a receipt, for, while it is a receipt, it is also something more. It is a contract of lease of the premises described for the term of one year.

The judgment and order are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

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5 Cal. App. 674

## PEOPLE v. MEYERS. (Cr. 83.)

(Court of Appeal, First District, California. June 4, 1907.)

1. LARCENY—EVIDENCE—SUFFICIENCY.

On a trial for larceny, evidence examined, and *held* to support a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 164–169.]

2. CRIMINAL LAW—VERDICT—CONCLUSIVENESS.

Under Const. art. 6, § 4, as amended November 8, 1903, conferring on District Courts of Appeal jurisdiction of questions of law alone in criminal cases, a verdict in a criminal case, supported by legal evidence, is conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074–3076.]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

George Meyers was convicted of larceny, and he appeals. Affirmed.

E. W. Rowland and J. J. Earle, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. Defendant was charged with the crime of grand larceny, and upon the trial was found guilty. His motion for a new trial was denied, and appeal is taken from the judgment and from the order denying such motion. The sole point made by the appellant is that the verdict of the jury is entirely unsupported by the evidence.

Briefly, the testimony is as follows:

Mrs. Grace Hopkins testified: "On the evening of November 23, 1905, at about midnight, in front of a hotel on Mason street in San Francisco, I saw Arnold, Noelke, and defendant, Meyers, all strangers to me. There three men and myself, at the invitation of Arnold, went into a saloon nearby, and had several drinks of whisky, the last of which looked smoky. At that time I had $48 in a purse in my stocking, and on my fingers three diamond rings worth $125, $90, and $60, respectively. While in the saloon, in attempting to remove my glove, Arnold saw my rings and made a grab for my hand. I withdrew my hand and replaced my glove." She further testified: "I remember nothing that happened for several hours after my drinking that smoky liquor. The next thing that I recollect is awakening in a filthy room in which I had never been before. I was in bed, and not entirely dressed, but my clothes had been loosened. My dress was open. My corset strings had been cut, and the corset removed and thoroughly searched. My shoes and stockings were on the floor and had been carefully examined; even the soles of the shoes having been inspected. My rings were not to be found, and on the dresser I discovered my purse inverted and empty."

The defendant, George Meyers, testified: "I am one of the defendants charged jointly with Arnold and Noelke. I have known Noelke for some time. I first met Arnold on the night of November 23, 1905. Noelke introduced us. About half-past 1 in the morning of November 24, 1905, the three of us were standing on Mason street in front of the Alturas, where Noelke lived, when Mrs. Hopkins passed by. She was intoxicated, and asked us: 'Which of you is going to buy me a drink?' Arnold said that he would do so, and started down the street with her. Noelke and I followed, and the four of us went into a saloon near the Linwood. Arnold sat next to Mrs. Hopkins at the table. We had several drinks, but I did not notice any that appeared cloudy or smoky. We left the saloon about 2:30 a. m. and went into the Linwood; Arnold and Mrs. Hopkins leading the way. Arnold went to the desk and engaged a room, and the night clerk took him and Mrs. Hopkins up in the elevator. Arnold motioned to Noelke and me to remain in the office, and we did so. Later I took Noelke home to the Alturas. He was quite drunk. When I left him there he said to me: 'Arnold has a good job at the Park, and I'd hate to see him lose it on account of a woman. Don't let him oversleep, but send him out to work. I returned to the Linwood, inquired of the clerk the number of the room occupied by Arnold and Mrs. Hopkins, and having been refused the key went upstairs and pounded on the door to arouse Arnold. This I was doing as an accommodation to my friend Noelke, as I had no interest in Arnold, having only met him the night before. Before I had received any response from Arnold, I was compelled to desist by the night clerk, who told me that I was disturbing the whole house. I returned to the office, but presently went upstairs again hoping that I might awaken Arnold, renewed the knocking at the door less violently than before, and was asked by Arnold what I wanted. I told him to get up, that it was time for him to go to work, and he said: 'All right, I'll be out in a minute.' I waited for him. Presently he came out and asked me to go with him and have a drink, and we left the Linwood together. I had not entered the room occupied by Arnold and Mrs. Hopkins since she went up with Arnold in the elevator. I did not take or assist in taking any property from her person. On leaving the Linwood, Arnold and I had a drink together, and he then asked me if I was acquainted at any pawnshop in the city. I said that I knew a clerk at a place on Kearny street, and Arnold asked me to take him there, and said that his girl had given him some things to pawn for her. So I went with him to Jacobs', and there he pawned three rings for $100. I had never seen the rings before that moment, and had no idea where he obtained them, except from his statement that his girl had given him some articles to pawn. We left the pawnshop together and had another drink. We then separated, and I do not know what Arnold did during the rest of the day. After that I saw Arnold nearly every day until we were arrested, about a week later. We were arrested by Officer Ryan, with whom I subsequently talked once or twice about the case. His account of our conversations was in the main correct. I never received any money from Arnold on account of the deal between him and the pawnbroker, nor on any other account; and I never said that I did."

Charles Clark testified: "I was on duty as night clerk at the Linwood Hotel on Mason street at about 2 o'clock November 24, 1905, when Mrs. Hopkins, Arnold, Noelke, and defendant, Meyers, arrived. Arnold came to the desk and engaged a room. I asked him his name, and he replied: 'Any old name, say Burke.' The room I assigned them was on the second floor. I entered the elevator to take the party up. Arnold and Mrs. Hopkins stepped in, and Noelke and Meyers started to follow, when Arnold motioned them to stay back, and they retired. They remained in the office while I took the others upstairs. Mrs. Hopkins remarked while in the elevator that the place was 'dirty' and 'a pretty poor looking dump.' I showed them to the room, and saw them enter and shut the door. The door locked with a snap lock. I then returned to the office, where Noelke and Meyers were waiting. They remained for some time, then went out, and returned. Noelke was quite drunk. At about 5:30 o'clock Meyers and he went outside, and Noelke did not return. Meyers returned in a few minutes. He said something about getting Arnold up and sending him to work. He learned which was his room, and then ran upstairs. He asked me for the key to the room, which I refused to give him, as Arnold had given me particular instructions not to allow any one to enter the room. Presently I heard a terrible racket upstairs. I went up and found Meyers in the hall outside of the door of the room which I had given to Arnold and Mrs. Hopkins. He was pounding and kicking on the door. I forced him to stop and to go down to the office with me as he was creating a sufficient disturbance to arouse the whole house. Presently Meyers went up again and made a good deal of noise, but was not quite so boisterous as on the former occasion, so I did not disturb him this time. I do not know whether he was in the room on these several trips or not. Presently he and Arnold came down together and left the hotel at about half-past 7."

H. Wilkins and A. E. Trimple testified that they were clerks at the Jacobs' pawnshop; that they knew Meyers; that on November 24, 1905, at about 8 o'clock in the morning, Meyers and another man, whose name was given as Burke, called at the pawnshop, and Burke pawned three diamond rings for $100. It is conceded that it was Arnold, under the name of Burke, who pledged the diamond rings.

James L. Ryan, a member of the detective force of the city and county of San Francisco, testified that Meyers told him that he (Meyers) had received from Arnold a commission of $15 out of the $100 in the pawnshop transaction.

If there was no legal evidence to support the verdict of the jury in this case, as is contended by appellant, then there would be presented a question of law upon which, of course, this court would have jurisdiction to pass. The record, however, shows clearly there was legal evidence to prove all the facts constituting the crime alleged. In such a case the decision of a jury, in so far as this tribunal is concerned, is absolutely final. Article 6, § 4, Const. Cal. amended November 8, 1903; People v. Maroney, 109 Cal. 279, 41 Pac. 1097; People v. Fitzgerald, 138 Cal. 41, 70 Pac. 1014; People v. Donnolly, 143 Cal. 398, 77 Pac. 177; People v. Gonzales, 143 Cal. 606, 77 Pac. 448. In People v. Maroney, supra, it is said: "The power of a jury in determining the weight to be given to testimony is, within the rules of evidence, exclusive and supreme, and appeals to this court in criminal cases do not lie from the verdict of the jury upon controverted questions of fact, but solely upon propositions of law." In People v. Fitzgerald, supra, it is said: "By the Constitution appellate jurisdiction is conferred upon this court in 'criminal cases prosecuted by indictment or information in a court of record on questions of law alone.' Where there is evidence therefor to sustain the verdict, a question of law cannot arise, but only in a case where there is in effect an entire lack of evidence."

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

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5 Cal. App. 684

In re LONG'S ESTATE. (Civ. 367.)

(Court of Appeal, Second District, California. June 5, 1907. Rehearing Denied by Supreme Court Aug. 3, 1907.)

1. EXECUTORS AND ADMINISTRATORS—JUDICIAL SALE—ORDERING RESALE—DISCRETION.

Code Civ. Proc. § 1554, provides that if, after the confirmation of the sale of decedent's estate, the purchaser neglects or refuses to comply with the terms of sale, the court may order a resale. Decedent's property was bid in March 6th, on condition that the bidder be furnished a certificate showing clear title, and the bid was confirmed. On July 20th, motion was made to set aside the sale and order a resale for the bidder's neglect to pay the balance; the hearing of the motion being continued to August 10th at the bidder's request, and he stating that he could not then raise the money. Title had been accepted in June, and a tender of the deed and a demand for the balance of the purchase price were admitted. *Held*, that there was no abuse of discretion in ordering a resale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1517.]

2. APPEAL — REVIEW — APPEAL FROM FINAL ORDER—REVIEW OF SUBSEQUENT ORDER.

Where, after an order was made August 10th, setting aside a sale of decedent's property and ordering a resale, the bidder filed an affidavit purporting to embody his objection to granting the order, and October 12th the affidavit was ordered stricken from the files, no appeal being taken from that order, neither the affidavit nor the ruling in striking it may be considered on an appeal from the order setting aside the sale taken three weeks before October 12th.

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

In the matter of the estate of Louisiana R. Long, deceased. E. R. Fox appeals from an order setting aside a sale of real estate of the estate to him and ordering a resale. Affirmed.

L. M. Fall and E. R. Fox, for appellant. Frank James, for respondents.

SHAW, J. This is an appeal from an order of the court setting aside a sale of certain real estate belonging to the estate of Louisiana R. Long, deceased, and ordering a resale of the property.

The only facts material to the case are that on March 6, 1906, appellant in open court bid $15,400 cash for certain real estate belonging to the estate of deceased, upon condition that he should be furnished an unlimited certificate of title showing the property entirely clear of all liens or clouds. The bid was accepted, appellant paid $1,550 on account of the purchase price, and thereupon the court made its order confirming the same. Thereafter, on July 20, 1906, pursuant to notice duly given, respondents moved the court to set aside the sale so made to appellant and order a resale of the property; the grounds of the motion being that said appellant had neglected and refused to pay the balance of the agreed purchase price of the property. The hearing of this motion was, at the request of appellant, continued from July 20th to August 10th, on which last-mentioned date the court made the order setting aside the sale, and from which this appeal is prosecuted.

Some time in June, 1906, there was delivered to appellant a certificate of title executed by the Title Insurance & Trust Company of Los Angeles, and appellant then accepted the title to the property as shown by this certificate, provided the respondents, who were the executors of the estate of said deceased, would credit him on his bid with the sum of $63 paid on a street improvement bond, to all of which the executors consented and agreed. A tender of the deed and a demand for the balance of the purchase price was admitted. The only objection urged against granting this motion was the condition of the money market; Fox stating that he was not able at that time to raise the balance of the purchase price. Whereupon the court, at his request, continued the hearing to August 10, 1906, at which time the order granting the motion was made. Section 1554, Code Civ. Proc., provides: "If, after the confirmation, the purchaser neglects or refuses to comply with the terms of the sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a re-sale to be made of the property." Under this provision of the statute, the making of the order was a matter solely within the discretion of the court. The record discloses no abuse of discretion. Indeed, the circumstances would seem to permit no other course than that pursued. After the order was made, appellant filed an affidavit, which purported to embody his objections to the granting of the motion. This affidavit was, by an order of the court made October 12, 1906, stricken from the files. No appeal was taken from this order, and neither the affidavit nor the ruling of the court in striking it from the files can be considered on this appeal, which was taken some three weeks prior to said October 12th.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 696

## WHITTLE v. WHITTLE. (Civ. 275.)

(Court of Appeal, First District, California. June 6, 1907.)

1. APPEAL—RECORD—REVIEW.

The record is not in condition for review of the overruling of defendant's objection to proceeding with the case till the original pleadings were produced or other papers were substituted therefor; the pleadings being in the record on appeal, and it not appearing that they are not the original papers, nor that they were not found and used on the trial.

2. WITNESSES — EXAMINATION — REFRESHING MEMORY—WRITINGS ADMISSIBLE.

The complaint, in an action for money had and received, having alleged the money was received from C., plaintiff may introduce a note executed by C. to plaintiff and defendant, preliminary to asking defendant, who was being examined as a witness for plaintiff, if she collected part of the note.

3. LIMITATION OF ACTIONS—MONEY RECEIVED.

The statute commences to run against an action for money had and received from the time the money was received, and not from the time the note, in payment of which the money was received, was due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 268, 269.]

4. JUDGMENT—RES JUDICATA.

The judgment of defendants, in an action on a note by one of the joint payees against the maker and the other payee, the latter being made a defendant because she would not consent to become a plaintiff, and the judgment being because of the maker having paid the note to the defendant payee, is not a bar to an action by the former payee against the latter payee, for money had and received of the maker in payment of the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1092–1097.]

5. MONEY RECEIVED — DEFENSES — HUSBAND AND WIFE.

To an action for money had and received it is a good defense that defendant is the wife of plaintiff, and that, after he had deserted and left her without means, she received the money in payment of a note, of which they were the joint payees, and used it for the necessaries of life.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Robert Whittle against Annie Whittle, sued as Anne Whittle. Judgment for plaintiff. Defendant appeals. Reversed.

J. C. Bates, for appellant. P. J. Mogan and M. S. Eisner, for respondent.

COOPER, P. J. The complaint alleges that the plaintiff and defendant are husband and wife, but that they have been living separate and apart since August, 1893; that in November, 1893, the defendant received $1,097.60 to and for the use of plaintiff; that said money was partly the separate property of plaintiff and partly community property; and that defendant has not paid the same nor any part thereof. The answer alleges that all the money received by the defendant was received by her as the wife of the plaintiff, and was necessarily used by her for the necessaries of life for her board and maintenance after plaintiff had willfully deserted and separated from her without just cause. The cause was tried, findings filed, and judgment thereupon entered for plaintiff. This appeal is from the judgment and the order denying defendant's motion for a new trial.

Several errors are assigned and argued in appellant's brief, which we will notice in the order in which they are discussed. It is claimed that error was committed in trying the case without the pleadings being before the court. It appears from the bill of exceptions that the plaintiff's attorney stated to the court that the papers in the case were missing from the files, but that he had copies that he could supply in case the originals were not found. Defendant's attorney objected to proceeding with the case until the original papers were produced or other papers substituted in lieu thereof. The court overruled the objection, and the trial proceeded. The correct practice would have been to find the originals or supply copies before the trial of the case, but that may have been done. The pleadings are now here as a part of the record, and it does not appear that they are not the original documents, nor does it appear that they were not found and used during the trial. No further question appears to have been raised concerning them, and no injury to defendant is made to appear.

The plaintiff offered in evidence a note for $924.60, dated February 19, 1891, made by Mary D. Carpenter and payable to plaintiff and defendant. To this the defendant objected upon several grounds, among others that it was not admissible under the pleadings, and that it appeared to be barred by the statute of limitations. The court overruled the objection. The ruling of the court was not erroneous. The complaint alleges that the money was received from Mary D. Carpenter. The note was only used to refresh the memory of defendant, who was being examined as a witness for plaintiff. She was asked if she collected any part of the said note, and she answered that she did collect one-half of it, $462.30, about November 3, 1893. This was the basis of the judgment entered up for plaintiff. The question under investigation was as to the fact of defendant receiving the money, and the date when it was received.

The defendant, by way of estoppel, offered in evidence the judgment and judgment roll in a former suit in the superior court of the city and county of San Francisco, in which the present plaintiff was plaintiff, and the present defendant and Mary D. Carpenter were defendants; the action being to recover judgment upon the promissory note hereinbefore referred to. The court sustained the plaintiff's objection to said judgment roll, to which ruling the defendant excepted, and now claims that the court erred in so doing. Without regard to the question, discussed in the briefs, as to the estoppel not having been pleaded in the answer, we are of opinion that the judgment was not admissible. The former suit was between the same parties, but the question involved and the issue under investigation was not the same. That was an action to recover the amount of the promissory note against Mary D. Carpenter, the maker thereof. The present defendant was made a defendant in the former action because, as alleged, she would not consent to become plaintiff. She was one of the parties to whom the note was payable, and no judgment was asked against her. The court in the former suit found that defendant Mary D. Carpenter had paid the said note to this defendant. Judgment was accordingly entered for the defendants in such former suit. The fact that it was adjudged and declared in such former suit that the plaintiff could not recover upon the note, for the reason that the maker of the note had paid it to one of the payees, was not an adjudication that the plaintiff could not maintain an action against the joint payee who had received the money. Upon discovering that the note had been paid to defendant, he had the right to bring an action for money had and received to his use. The statute of limitations in such case would not begin to run until the money was received by defendant. In order to constitute an estoppel, the former judgment must have been between the same parties, in the same right, in regard to the same subject-matter, and must necessarily have involved the determination of the same fact, to prove or disprove which it is introduced in evidence. Laguna Drainage Dist. v. Charles Martin Co. (Cal. App. 1st. Dist.) 89 Pac. 993.

We come now to the important question in the case, and the one which in our view necessitates a reversal. The answer, as has been shown, alleges that the money was received by the defendant as the wife of the plaintiff, and had been used by her for the necessaries of life after the plaintiff had deserted her and left her without means. In receiving the money defendant was guilty of no wrong. The note by its terms was payable to her as one of the payees. She received it as lawfully as if she had received it from the hands of her husband. She had the right to use it, because she was the wife of the plaintiff, and he was liable for her support and maintenance, and had left her without means. While the defendant was upon the stand as plaintiff's witness, and after she had testified to receiving the money, her counsel asked her in cross-examination what she did with it. Counsel for plaintiff objected to the question on the ground that it was incompetent, irrelevant, and immaterial, and not cross-examination. The court sustained the objection, to which defendant's counsel duly excepted. After the plaintiff rested, the defendant took the witness stand in her own behalf, and was again asked by her counsel the same question. The same objection was made as to the competency, relevancy, and materiality of the question, followed by the same ruling. She was then asked if she was living with plaintiff, and if plaintiff had contributed anything to her support for the past eight years. These questions were objected to by the plaintiff as being incompetent, irrelevant, and immaterial, and the objections were sustained. The ruling was thus clearly made that the defendant could not show that she had used the money for the necessaries of life after the plaintiff had willfully deserted and abandoned her, leaving her without means. It appears clear to us that if the money had come into the hands of the defendant while plaintiff and defendant were living together as husband and wife, and that the plaintiff, during the time they were so living together, necessarily used the money for the family, or for the necessaries of life, the plaintiff could not recover. There is no difference in principle between the facts of the present case as alleged in the answer. The defendant, although deserted, was still the wife of plaintiff. In law she was part of his family. He had not been released from the legal obligations resting upon him. He could not, by wrongfully deserting the defendant, take advantage of his own wrong. He certainly ought not to be in a better legal position by reason of his desertion than he would be if still living with defendant. By the marriage plaintiff contracted the obligation of supporting defendant. Civ. Code, §§ 155, 174. It was said by the Supreme Court, in Galland v. Galland, 38 Cal. 266: "Amongst other rights secured to the wife is the right to be suitably supported and maintained by the husband according to his means and station. If he fails or refuses to provide such support for her, the law authorizes her to purchase from others, on the credit of her husband, whatever is necessary for her maintenance and suitable to her station in life. There can be no diversity of opinion on this point, which is thoroughly well settled." If the law authorizes the wife, in case of the failure of the husband to provide for her, to purchase from others, and holds him responsible, is there any reason in law or morals why she could not use the money in her hands for the same purpose? Can it be said that the husband in such case may recover the money from the wife, and then in turn the merchant who furnishes her with the necessaries recover from the husband? In Livingston v. Superior Court, 117 Cal. 633,[1] it was held that, under section 155 of the Civil Code, where a husband has no separate property, and there is no community property, and the husband is unable, by reason of infirmity, to support himself, an action would lie to compel the wife to support him out of her separate property. In that case Galland v. Galland is approved and followed, and the statutory liability of the husband and wife discussed. It thus appears beyond question that if the answer is true the plaintiff was liable for the support of the defendant. The action for money had and received lies to recover money to which plaintiff is entitled, and which in justice and equity the defendant ought to refund to the plaintiff, and which defendant cannot with a good conscience retain. Bouvier's Law Dictionary, under heading "Money Had and Received" and authorities cited; Sacramento County v. Southern Pac. Co., 127 Cal. 217, 59 Pac. 568, 825. It was held in the latter case that the plaintiff could not recover money which had been paid to defendant in good faith but upon a void contract. That in equity and good conscience the plaintiff was not entitled to the money, although the defendant could not in law have recovered the money upon the illegal contract. The general principle is that in this kind of action the defendant may show any facts that entitle him to retain the money, either upon legal or equitable grounds. The right of the defendant need not necessarily be better than that of the plaintiff. If it is equal thereto, the defendant must prevail. Wait's Actions & Defenses, vol. 4, p. 511, and cases cited; Boone on Code Pleading, § 171. Our conclusion is that the defendant had the right to show by way of defense that she was the wife of the plaintiff; that plaintiff had deserted her, leaving her without means; that the money came lawfully into her possession, and was necessarily used by her for her support and maintenance. In such case equity and good conscience will not permit the plaintiff to recover.

The views herein expressed make it unnecessary to pass upon other questions argued in the briefs.

The judgment and order are reversed.

We concur: HALL, J.; KERRIGAN, J.

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5 Cal. App. 712

## GAFFEY v. MANN. (Civ. 354.)

(Court of Appeal, First District, California. June 11, 1907. Rehearing Denied by Supreme Court, Aug. 8, 1907.)

1. COSTS—JUDGMENT AFTER APPEAL—NECESSITY FOR NOTICE.

Where plaintiff filed objections to defendant's cost bill filed after plaintiff dismissed a slander action, and the Court of Appeal reversed in part an order striking out all the items of the cost bill, and after the filing of the remittitur in the lower court defendant filed his memorandum of costs on appeal, after the time for plaintiff's objection thereto had expired, without objections filed, it was proper to enter judgment against plaintiff for defendant's costs in both courts, in his absence and without notice to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 765.]

2. APPEAL—LAW OF THE CASE.

Where, after plaintiff dismissed a slander action, defendant appealed from an order striking out all the items of his cost bill, and the Court of Appeal determined that defendant was entitled to an item of $100 for counsel fees, the determination became the law of the case on a subsequent appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4358.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by W. V. Gaffey against Samuel Mann. Plaintiff appeals from a judgment against plaintiff upon the going down of remittitur of the Court of Appeal, reversing in part an order of the superior court, striking out all the items of a cost bill filed by defendant after the dismissal of the action. Affirmed.

Wyckoff & Gardner, for appellant. Chas. B. Younger, Jr., for respondent.

HALL, J. This is an appeal from a judgment entered against plaintiff upon the going down of the remittitur from this court, reversing in part an order of the superior court striking out all the items of a cost bill filed by defendant after the dismissal of an action for slander. Gaffey v. Mann, 84 Pac. 424, 3 Cal. App. —. In due time after the filing of the remittitur from this court in the lower court, the defendant filed his memorandum of costs on appeal, and thereafter, and after the expiration of the time for plaintiff to object or except thereto, and plaintiff having filed no objections thereto, the court, without notice to plaintiff and in his absence, entered judgment against plaintiff for the sum of $100, as and for defendant's costs in said court, and the further sum of $32, for his costs incurred on the former appeal.

Appellant now insists that this judgment must be reversed for the reason that it was taken against him in his absence and without notice. But we do not think that this contention is sound. Plaintiff brought the action for slander, and thereafter dismissed it, and caused the clerk to enter a dismissal thereof after defendant had incurred costs in taking steps to procure a dismissal thereof. Gaffey v. Mann, supra. Thereupon defendant filed his cost bill, containing two items, to wit, $2 for clerk's fees for his appearance, and $100 for counsel fees. Plaintiff thereupon moved to strike out each and every item thereof upon various grounds, in which were presented questions of fact as to the necessity for incurring such costs, and the validity thereof as matter of law. The court granted his motion, but upon the appeal to this court the order was reversed so far as it struck out the item in defendant's cost bill of $100 for counsel fees, upon the ground, as clearly appears from the opinion, that upon the facts and the law defendant was entitled to such costs. This left the cost bill intact as originally filed, save as to the item of $2 for clerk's fees, and there was nothing to do but enter judgment accordingly for the costs thus allowed. Costs are but an incident to the judgment. In this case judgment of dismissal had been entered, which carried with it a right to defendant to recover costs. He filed his cost bill. Plaintiff filed his objections thereto, which having been passed upon by the trial court and this court, he has had his day in court, and is not entitled to be further heard as to the amount or validity of the costs. The judgment of dismissal, to which the costs are but incidental, was entered at appellant's request.

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[1] 49 Pac. 836, 38 L. R. A. 175.

Plaintiff further urged at the oral argument that the statute allowing attorneys' fees in slander and libel cases is unconstitutional, and that for that reason the judgment should be reversed, and cites Builders' Supply Depot v. O'Connor (Cal.) 88 Pac. 982, in which it was held that the mechanic's lien law, so far as it allowed attorney's fees to a plaintiff was void. But the libel and slander law differs in several respects from the lien law. The slander and libel law allows attorney's fees to the prevailing party, whether he be plaintiff or defendant, while the lien law allows such costs only to the plaintiff. The lien law was passed after the adoption of the present Constitution, while the slander and libel act was passed before the adoption of the present Constitution. For these reasons the slander and libel act has been held constitutional in so far as it requires a plaintiff to give a bond for costs. Smith v. McDermott, 93 Cal. 421, 29 Pac. 34. But without passing upon the constitutionality of the slander and libel act in allowing attorneys' fees to the prevailing party, it is sufficient to say that the order made upon the former appeal has become the law of the case. It was then determined that defendant was entitled to be allowed as a part of his costs $100 for attorney fees, and this decision has become final. Heinlen v. Martin, 59 Cal. 182; Donner v. Palmer, 51 Cal. 637; Russell v. Harris, 44 Cal. 489.

Judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

5 Cal. App. 690

## BEKINS v. DIETERLE et al. (Civ. 372.)

(Court of Appeal, Second District, California. June 5, 1907. Rehearing Denied by Supreme Court August 3, 1907.)

1. Husband and Wife—Wife's Separate Estate—Presumption—Conclusiveness.

The presumption created by Civ. Code, § 164, declaring that, where property is conveyed to a married woman, the presumption is that the title is thereby vested in her as her separate property, is not conclusive, and may be overcome by proof that the consideration therefor was paid out of community funds.

2. Same—Evidence as to Ownership—Sufficiency.

Evidence *held* to justify a finding that property levied on was purchased with community funds, and hence to rebut the presumption created by Civ. Code, § 164, declaring that, where property is conveyed to a married woman, the presumption is that title is thereby vested in her as her separate property.

3. Same—Earnings of Wife.

The services of the wife as "the man of the family" in the active management of her husband's business are a part of the earning power of the community, and the earnings due to her services constitute community property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 911.]

4. Fraudulent Conveyances — Evidence — Sufficiency—Fraudulent Intent.

Evidence that a husband, on the day a judgment was rendered against him, executed a deed of property valued at $34,500 for an expressed consideration of $10 to his wife, unknown to her, and that such property was all he owned, warranted a finding of his intent to defraud the judgment creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 894.]

5. Same—Void Conveyance—Effect as to Creditors.

Where a conveyance is void under Civ. Code, § 3439, declaring every transfer of property, with intent to delay or defraud creditors, to be void against such creditors, a creditor may levy on and sell the property as if no conveyance had been made.

[Ed. Note.—For cases in point. see Cent. Dig. vol. 24, Fraudulent Conveyances, § 660.]

6. Same.

Under Civ. Code, § 3439, declaring every transfer of property with intent to delay or defraud creditors to be void against such creditors, where the fraudulent intent is established, the conveyance is void, notwithstanding the debtor has other property sufficient to satisfy his creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 158, 159.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Kate Bekins against Minnie Dieterle and another to enjoin the sale under execution of certain real estate, and to have her title thereto quieted. From a judgment for defendants and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

See 91 Pac. 105.

J. Marion Brooks and F. B. Guthrie (Henry E. Wills, of counsel), for appellant. E. W. Freeman and A. D. Laughlin, for respondents.

SHAW, J. Appeal from judgment in favor of the defendants, and from an order denying plaintiff's motion for a new trial.

The appellant, Kate Bekins, is the wife of M. Bekins. On December 29, 1896, Minnie and William Dieterle commenced an action against M. Bekins to recover damages for the conversion of certain personal property alleged to have been delivered to him for storage in his warehouse, and which property he refused to redeliver to the plaintiffs in said suit on demand therefor. The judgment rendered in favor of M. Bekins on the first trial was reversed (Dieterle v. Bekins, 143 Cal. 683, 77 Pac. 664), and upon a second trial, had on December 23, 1904, judgment was rendered in favor of plaintiffs therein. Execution was issued and placed in the hands of the sheriff, who duly levied upon certain real estate as belonging to M. Bekins, the judgment debtor, and proceeded to advertise the same for sale. Whereupon Kate Bekins, the appellant, who claimed ownership of the property, instituted this action to enjoin the sheriff from selling the same and have her alleged title thereto quieted as against Minnie and William Dieterle. It appears that the real estate, which is of the value of $34,500, was conveyed to M. Bekins on October 31, 1904, and stood in his name until December 23, 1904, when, for a stated consideration of $10, he executed a deed therefor to his wife, Kate Bekins, and without other delivery to her filed the same for record at 1:40 p. m. of said day. The consideration paid for the property when conveyed to M. Bekins was $34,500. This amount was paid by checks drawn upon money on deposit to the credit of Kate Bekins, who testified that she "drew it from the moneys of the Bekins Van & Storage Company." At the date of the conveyance from M. Bekins to his wife, he had no other property out of which the judgment could be made. During all of the times covered by these several transactions M. Bekins was engaged in the van and storage business, and Kate Bekins, in addition to caring for her household duties, assisted him in the active management and conduct of said business. At the date of her marriage appellant had only $100, which, she says, was long ago expended. The business was incorporated subsequently to the date of the commencement of respondents' suit against M. Bekins, and the husband placed some of the stock in the name of appellant; the reason for his doing so being unknown to her. There was other testimony to show that M. Bekins, after the commencement of suit by respondents, turned his property over to his wife when he was sick, and, as her attorney testified: "She has been the man of the family." The court found that the property levied on was community property; that the consideration for the purchase thereof, $34,500, was paid out of community funds; that the deed dated December 23, 1904, whereby M. Bekins, in consideration of $10, conveyed the property to his wife, Kate Bekins, was intended by M. Bekins to hinder, delay, and defraud his creditors, and especially the respondents herein; that at the time of making said conveyance M. Bekins had no other property out of which respondents' judgment could be made.

Appellant attacks all of these findings, asserting that they are not justified by the evidence. Section 162, Civ. Code, defines the separate property of the wife as being "all property owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits therefrom." Section 163, Civ. Code, likewise defines the separate property of the husband. All other property than that designated in said sections 162 and 163, acquired after marriage "by either husband or wife, or both, is community property." Section 164, Civ. Code. As this last section stood prior to the amendment of 1889, property conveyed to the wife during coverture was presumed to be community property. Morgan v. Lones, 78 Cal. 58, 20 Pac. 248; Davis v. Green, 122 Cal. 364, 59 Pac. 9. As such it was under the control of the husband, and might be mortgaged by him or subjected to the payment of his debts, regardless of the fact that it stood of record in the name of the wife. Davis v. Green, supra; Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719. This presumption could be overcome by evidence that the consideration paid for the property was the separate funds of the wife. The amendment of 1889 changed this presumption by adding the following provision to section 164: "But whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." This presumption, like the one existing before the amendment, is not conclusive, but may be overcome by extrinsic evidence showing the consideration for the property to have been paid out of the community funds; and when such fact is established the property, notwithstanding it stands in the name of the wife, is subject to the control of the husband and is liable for the community debts. The presumption of a separate estate created in Kate Bekins by the conveyance from M. Bekins is overcome by the evidence, which clearly shows the property to have been purchased with community funds. She testifies: "I drew it [the $34,500 paid for the lots] from the moneys of the Bekins Van & Storage Company."

"It was taken out of the business of the van and storage company." The consideration paid for the property did not represent the earnings of the wife, but of the community business. The fact that she, as the "man of the family," had active charge of the business did not affect its character as community property. Besides, her services and earning power were as much a part of the marital community capital as that of the husband. "The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property as much as do the earnings received for the services of the husband." Martin v. So. Pac. Co., 130 Cal. 285, 62 Pac. 515; Smith v. Furnish, 70 Cal. 424, 12 Pac. 392. The evidence justified the court in finding that the real estate levied on was community property.

The evidence in support of the finding that the conveyance was made with intent to defraud Minnie and William Dieterle is likewise sufficient. The uncontradicted facts are that judgment was rendered against M. Bekins on December 23, 1904, on the afternoon of which day he, unknown to his wife, voluntarily and without consideration therefor (other than $10) executed and filed for record a deed which purported to convey property of the value of $34,500, and which appellant testified was all the property he owned. Is not the inference from these facts irresistible that he intended to place the property beyond the reach of respondents' judgment? No rational mind could reach any other conclusion than that found by the court. Judson v. Lyford, 84 Cal. 505, 24 Pac. 286. Section 3439, Civ. Code, provides: "Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." The court found that prior to the execution of the deed in question respondents were creditors of M. Bekins, and that the transfer of his property to his wife was made with the intent to hinder, delay, and defraud them in the collection of their claim. Under these findings, the conveyance was void as against respondents, and as to their judgment the title and ownership of the property remained in M. Bekins as fully as though no transfer had been attempted. "A void thing is as nothing." The deed was a nullity. "As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution." 1 Freeman on Executions, § 136. In Bull v. Ford, 66 Cal. 176, 4 Pac. 1175, the court, in discussing a transfer made with fraudulent intent, said: "The conveyance to defendant being void, as against Alvarado's creditors, the creditors were authorized to levy upon and sell the property as if no conveyance had ever been made by their debtor." Judson v. Lyford, supra; First Nat. Bank v. Maxwell, 123 Cal. 360, 55 Pac. 580, 69 Am. St. Rep. 64; Hemenway v. Thaxter (Cal. Sup.) 90 Pac. 116; Bull v. Bray, 89 Cal. 300, 26 Pac. 873, 13 L. R. A. 576.

The intent to defraud existing creditors being established, the question as to the debtor having other property becomes immaterial for the reason that the attempted transfer as to such creditors is void. "Indeed, it matters not, where personal intent to defraud is shown, that the fraudulent conveyance, if allowed to stand, would not harm any one, by reason of the fact that the debtor has other property ample in amount within the reach of his creditors." Bigelow on Fraud, vol. 2, p. 393. "A rich man may make a fraudulent deed as well as one who is insolvent." Hager v. Shindler, 29 Cal. 60. It therefore follows that the ruling of the court in permitting respondents to file an amendment to their answer pending trial, whereby they alleged the insolvency of M. Bekins, was at most harmless error. Adopting appellant's view of its importance, it was clearly within the discretion of the court and no abuse of discretion appears. In support of her contention that it must be shown that the debtor had no other property, not only at the time of the transfer, but at the time of the levy of execution thereon, appellant cites Albertoli v. Branham, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200, which seems to support her contention. The point involved there, however, was the sufficiency of the allegations of an answer which did not allege the transfer to have been made without consideration, nor that the debtor did not have other property sufficient to satisfy his debts. The learned judge who wrote that opinion made no reference to section 3439, Civ. Code. In our judgment, it is opposed to direct statutory provision contained in section 3439, Civ. Code, and contrary to later judicial expression of the Supreme Court wherein it is held, in substance (First Nat. Bank v. Maxwell, supra): If the fraudulent intent is found to exist, the conveyance is void, notwithstanding the debtor has other property ample in amount to satisfy his creditors.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

151 Cal. 504

## ROBINSON et al. v. BLOOD et al.

(L. A. 1,807.)

(Supreme Court of California. July 12, 1907.)

1. JUDGMENT—BY DEFAULT—COLLATERAL ATTACK—WANT OF JURISDICTION.

Where, in an action by a judgment creditor of a corporation to subject to his judgment the amount due from a stockholder on his stock subscription, it appeared that the complaint in which the judgment was rendered sufficiently stated a cause of action to give jurisdiction of the subject-matter, that the summons was served on the president of the corporation, and that default and judgment were duly entered, the judgment was not to be *held* void because of want of jurisdiction.

2. CORPORATIONS—EMPLOYMENT OF ATTORNEY—VALIDITY—PRESUMPTIONS.

The president of a corporation, under an authority given at a meeting of the directors, employed an attorney to defend a suit brought against the corporation. The resolution authorizing the employment was regularly entered in the minutes of the corporation, which recited that the meeting was called by the president. *Held*, that a presumption that due notice was given to the directors was raised, rendering the employment valid, in the absence of evidence to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1300.]

3. SAME—DE FACTO OFFICERS.

A director of a corporation, who has ceased to be a stockholder, may continue to act as a de facto director, and his acts are not void as to third persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1241, 1242.]

4. SAME—TERMINATION OF CORPORATE EXISTENCE.

Civ. Code, § 358, as amended in 1901, provides that, where a corporation after its organization shall lose its property and shall fail for two years to elect officers and transact its business, its corporate powers shall cease. A corporation was engaged in defending a foreclosure suit on its property, which was the only business it had. The last act in the defense was had within 30 days after October 12, 1901. The attorney conducting the defense sued the corporation for its services in August, 1903, and recovered judgment in September. The corporation did not lose all of its property until June

28, 1903, at which time its right of redemption under the sale in the foreclosure suit expired. *Held*, that the corporation was in existence at the commencement of the suit and at the rendition of a judgment against it for the attorney's fees, rendering the judgment valid.

5. SAME — STOCKHOLDER'S LIABILITY — ENFORCEMENT.

The right of a judgment creditor of a corporation to pursue the stockholders thereof to compel payment of the judgment is not defeated by the subsequent termination of the corporation by reason of Civ. Code, § 358, as amended in 1901, providing that, where a corporation shall dispose of all of its property and shall fail for two years to elect officers and transact its business, its corporate powers shall cease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 892.]

6. SAME—CORPORATE EXISTENCE.

Civ. Code, § 358, as amended in 1901, provides that the incorporation of a corporation claiming in good faith to be a corporation and doing business as such shall not be inquired into collaterally in any private suit to which it may be a party, and where a company claiming in good faith to be incorporated has been doing business for 10 consecutive years as a corporation no such inquiry shall be made by any person. A corporation was organized in 1887, and it claimed in good faith to be a corporation and did business as such until 1901. Thereafter a creditor obtained judgment against it and sought to pursue a stockholder to compel payment of the judgment. *Held*, that the stockholder could not question the existence of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 77.]

In Bank. Appeal from Superior Court, Santa Barbara County; Felix W. Ewing, Judge.

Action by Martha A. Robinson and another against James A. Blood and another. From a judgment for plaintiffs, defendant James A. Blood appeals. Affirmed.

W. S. Day, for appellant. Richards & Carrier, for respondents.

SHAW, J. This is an action by the plaintiffs, as judgment creditors of La Serena Land & Water Company, a corporation, against James A. Blood, a stockholder of the corporation, in the nature of a creditors' bill, to subject to the payment of the plaintiffs' judgment the amount due from Blood to the corporation upon his subscription to the capital stock thereof. Judgment was entered in the court below against Blood, from which he appeals.

The defenses set up by Blood are that the previous judgment in favor of the plaintiffs against the corporation is void, both for lack of jurisdiction and because of fraud and collusion between plaintiffs and the president of the corporation in obtaining it; that the corporation, at the time the former suit was begun, and for a long time prior thereto, had ceased to have a legal existence; and that plaintiffs' cause of action is barred by the statute of limitations. The evidence is contained in a bill of exceptions printed in the record. The judgment against the corporation is not void upon its face. The complaint therein sufficiently states a cause of action to give the court jurisdiction of the subject-matter. The summons was duly served on the president of the corporation, and the default and judgment were duly entered. No irregularity appears on the face of the record.

On the question of fraud in procuring the judgment, the findings are against the defendant, and they are sufficiently supported by the evidence. The corporation was sued by Blood, the present defendant, to foreclose a mortgage he held against all of its property. McNulta, the assignor of plaintiffs, was employed as an attorney to defend the action for a stipulated fee. The contract with McNulta on behalf of the corporation was made by Barker, its president, in pursuance of an authority given him in that behalf at a special meeting of the directors. The suit of the plaintiffs was for the fees of McNulta for his services in defending the foreclosure suit. The services were performed by him in accordance with his agreement, and there is nothing in the evidence which indicates fraud, bad faith, or collusion on his part. It is urged that the directors were not given notice of the special meeting at which Barker was authorized to employ McNulta. Conceding, for the purposes of this case, that his would be a good defense, either to the present action or to the action against the corporation to recover the attorney's fees, it is sufficient to say that the resolution authorizing the contract with McNulta was regularly entered in the minutes of the corporation, which recite that the meeting was called by the president, and that this raises a presumption that due notice was given thereof. Granger v. O. E. M. & M. Co., 59 Cal. 681; Balfour-Guthrie Co. v. Woodworth, 124 Cal. 172, 56 Pac. 891. The evidence given does not, as a matter of law, overcome this presumption. The court below gave credit to the presumption as against the testimony. We cannot interfere with its decision upon this conflict.

The evidence that one of the directors had ceased to be a stockholder at the time of this meeting did not prevent his continuing to act as a de facto director, nor make such action void as to third persons. San Jose Sav. Bank v. Sierra Lumber Co., 63 Cal. 179.

The claim that the action was barred by the statute of limitations is not urged, and it is not supported by the evidence.

The principal defense appears to be the claim that the corporation had ceased to exist before McNulta began or performed the services, and never thereafter became a legal corporation. This claim is founded upon that part of section 358 of the Civil Code, as amended in 1901, which reads as follows: "If a corporation does not organize and commence the transaction of its business, or the construction of its works, within one year from the date of its incorporation, or if, after its organization and commencement of its business, it shall lose or dispose of all of its property, and shall fail for a period of two years to elect officers, and transact, in regular order, the business of said corporation, its corporate powers shall cease." The claim is unfounded. Before the amendment of 1901, the part of the section corresponding to the above was as follows: "If a corporation does not organize and commence the transaction of its business, or the construction of its works, within one year from the date of its incorporation, its corporate powers cease." There was no failure to organize the corporation, or to begin the transaction of its business, within the year after its incorporation. The corporation, therefore, has had a legal existence from the time of its incorporation until the present time, unless it ceased to exist after the amendment of 1901, under the provisions of that amendment.

The action against the corporation to recover the attorney's fees was begun on August 22, 1903. The corporation did not lose all of its property until June 28, 1903, at which time its right of redemption under the sale in the foreclosure suit expired. The conditions on which the corporate powers would cease, under the part of the amendment above quoted, did not occur until after the latter date, at all events. The corporation was engaged in defending the foreclosure suit upon its property, which appears to have been the only business it had. While so engaged it cannot be said that it was failing to transact its business in regular order. The last act in this defense was the filing of a petition for rehearing in the Supreme Court, within 30 days after October 12, 1901. Consequently there was not, either at the time the action for attorney's fees was begun or on September 2, 1903, when the judgment therein was rendered, a failure for 2 years to transact the business of the corporation. The subsequent expiration of the 2-year period could not affect the right of the judgment creditors to pursue the stockholders to compel payment of the judgment.

Another sufficient ground for holding that the corporation still has a corporate existence is found in the terms of the concluding clause of section 358, as amended in 1901. This clause is not included in the part above quoted. It is as follows: "The due incorporation of any company claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the Attorney General; provided, however, as to any company claiming in good faith to be, and which has been doing business for ten consecutive years as a corporation, no such inquiry shall be made either by the state or by any person whatsoever." This corporation was organized in 1887, and, so far as appears, it claimed in good faith to be a corporation and did business as such from that time until the passage of this amendment in 1901. Under this clause no inquiry as to its corporate powers can be made in this action. Furthermore, immediately after the part of the section first above quoted occurs this clause, "and the said corporation may be dissolved at the instance of any creditor of the said corporation, at the suit of the state, on the information of the Attorney General." In San Diego Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295, under a law similar in all respects to this part of section 358, it was held that the corporation continues to exist until, in a suit for that purpose, its corporate franchise is declared forfeited.

This disposes of all the points presented by the appellant in support of his appeal.

The judgment is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.

5 Cal. App. 719

## VAN HORN v. VAN HORN. (Civ. 347.)

(Court of Appeal, First District, California. June 13, 1907. Rehearing Denied by Supreme Court August 12, 1907.)

1. DIVORCE—EVIDENCE—WIFE'S CHARACTER.

Under Code Civ. Proc. § 2053, providing evidence of the good character of a party is not admissible in a civil action, until his character has been impeached, or the issue involves it, in a divorce action against a wife for adultery, evidence as to her good character was properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 365, 372.]

2. SAME—CO-RESPONDENT'S CHARACTER.

Under Code Civ. Proc. § 2053, providing evidence of a witness' good character is not admissible until the character has been impeached, etc., where, in a divorce action against a wife for adultery, the co-respondent was not a party, and had not been impeached as a witness under section 2051, authorizing impeachment, evidence as to the excellence of his character was properly rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 365, 372, 374.]

3. SAME.

Though the custody of a minor child was involved in a divorce action against the wife for adultery, it was not error to exclude evidence as to her good character; the minor being a boy 15 years old, the wife having been adjudged guilty of adultery, and the disposition of the minor being within the sound discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 365, 372, 784.]

4. APPEAL — REVIEW — EXCLUSION OF EVIDENCE—GROUNDS.

The trial court's ruling in rejecting evidence will be upheld on appeal, if correct, whether the ground upon which it was based was stated in the objection or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3406.]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Divorce action by Ross H. Van Horn against Marion V. Van Horn. Defendant appeals from a judgment awarding plaintiff an interlocutory decree of divorce, and from an order denying a motion for new trial. Affirmed.

Alfred B. Weiler, for appellant. Johnson & Shaw, for respondent.

KERRIGAN, J. Appeal by defendant from a judgment, awarding plaintiff an interlocutory decree of divorce, and from an order denying defendant's motion for a new trial.

The complaint alleges that the appellant committed adultery with one Adolph Knopf, and prays for a judgment of divorce, and that the whole of the community property and the custody of the two minor children be awarded to the respondent. During the pendency of the action one of the children reached majority. The action was tried, and an interlocutory decree was entered awarding respondent a divorce and the custody of the remaining minor child. The question of the property rights was reserved.

Among the assigned errors was the action of the trial court in refusing to permit appellant to introduce evidence of the good character of herself and the co-respondent. The general rule is that in civil actions evidence of character of neither party thereto is admissible. 5 Am. & Eng. Ency. of Law, pp. 861, 862; 1 Wigmore on Ev. § 64. There are exceptions to this rule. In actions for slander and libel, character is necessarily put in issue, as injury to character is the gist of such actions. 5 Am. & Eng. Ency. of Law, p. 865. There are a few other exceptions, and by some authorities different conclusions are reached as to whether the charge of adultery in an action for divorce is one of the exceptions. In this state, however, the question is controlled by section 2053, Code Civ. Proc., which reads: "Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character." By the allegation of adultery appellant's character was not put in issue, and evidence concerning it, under this section, was properly excluded. The co-respondent was not a party to the action, nor had he, as a witness, been impeached (section 2051, Code Civ. Proc.), so evidence of the excellence of his character was properly rejected (section 2053, Code Civ. Proc.; People v. Bush, 65 Cal. 134, 3 Pac. 590, concurring opinion).

In this connection it is further contended by appellant that the custody of the minor children was involved, and for this reason testimony of the character of the appellant was admissible. The disposition of minors, in a proceeding of this kind, is always one within the control, and subject to the sound legal discretion of the trial court. The court may modify its decree as to their custody at any time. Section 138, Civ. Code; Crater v. Crater, 135 Cal. 635, 67 Pac. 1049. "Its jurisdiction does not depend upon specific allegations as to the fitness of the respective parties, or their ability or willingness to care for their offspring, nor upon a specific prayer for the custody." Ex parte Gordon, 95 Cal. 377, 30 Pac. 561. In matters of this kind much must be left to the sound discretion of the court in accepting or rejecting evidence. We can readily conceive of instances in which the excluded evidence might very properly be admitted. In this case, however, the minor being a boy now about 15 years of age, and the appellant having been adjudged guilty of adultery, we think the contention has but little merit.

Appellant complains that the objections to the excluded evidence just considered, and to at least one other question, were too general, and not directed to defects now urged. The ruling of the trial court in rejecting evidence will be upheld on appeal, if correct, whether the ground upon which it is based was stated in the objection or not. Davey v. Southern Pac. Co., 116 Cal. 325, 48 Pac. 117.

This disposes of all the grounds urged for reversal which merit consideration.

No error appearing in the record, the judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J

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5 Cal. App. 736

## MONTIJO et al. v. ROBERT SHERER & CO. et al. (Civ. 359.)

(Court of Appeal, Second District, California. June 18, 1907. Rehearing Denied by Supreme Court August 17, 1907.)

1. JUDGMENT — VACATION — NEGLIGENCE OF PARTY.

On a motion by one of the defendants in an action for forcible entry to set aside a default judgment against him, on the ground of excusable neglect, etc., it appeared that the moving party was a laborer in the employ of his codefendants, and as such entered on the premises, and that on being served with process he called his employer's attention to the matter and was informed that a defense would be made for him. *Held*, that he had a right to rely upon such statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 280.]

2. SAME—DISCRETION OF COURT.

On a motion to set aside a default judgment on the ground of excusable neglect, etc., the discretion of the court should be exercised liberally with a view to a trial on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 265.]

3. SAME—AFFIDAVITS.

On a motion to set aside a default judgment on the ground of excusable neglect, etc., a verified answer denying all the material allegations of the complaint is sufficient in lieu of an affidavit of merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 315.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Manuel Montijo and others against Robert Sherer and others. Appeal by plaintiffs from an order setting aside a default and granting leave to answer to defendant, Mark Ryan. Affirmed.

Hugh J. Crawford and Wm. Crawford, for appellants. Bicknell, Gibson, Trask, Dunn & Crutcher (Edward E. Bacon, of counsel), for respondent.

TAGGART, J. Appeal from an order setting aside default and granting leave to answer.

Defendant Ryan was an employé of Robert Sherer & Co. and was joined with the members of that copartnership in an action for damages for forcible entry upon premises, of which plaintiffs allege themselves to have been the owners and in the actual possession, at the time of such entry, to wit, on February 2, 1906, and to and until February 14, 1906, and at divers times between said dates. Ryan was served with summons February 20, 1906, and the members of Sherer & Co. served on February 21st and 23d, respectively. Sherer & Co. answered, but Ryan failed to do so, and on March 5, 1906, the default of Ryan for not answering was regularly entered, and thereafter, on March 13, 1906, judgment was taken against him as prayed for in the complaint, to wit, for the sum of $1,500 (the same to be trebled) and for costs. On March, 17, 1906, he served notice on plaintiffs' attorney of his intention to move the court to set aside the said default and to permit him to answer the complaint filed in the action. The motion was noticed to be made on the records and files in said action and the affidavits of himself and attorney and his verified answer to the complaint, a copy of which was served with the notice. The grounds specified were that "said defendant failed to answer in time through inadvertence, mistake, and excusable neglect."

Appellants claim the order granting the motion was error for two reasons: (1) The grounds of the motion are stated conjunctively in the notice and both affidavits filed, and the showing made fails to support the conjoined reasons of inadvertence, mistake, and excusable neglect; (2) the affidavit of merits is insufficient.

The affidavits are not to be construed with the strictness applied to a pleading in matters of form, and if they show facts to justify the action of the court on the ground of inadvertence, mistake, or excusable neglect, it will be sufficient. By the affidavits and verified answer the following facts are made to appear: That the Los Angeles Interurban Railway Company was the owner and in the peaceable possession of the premises described in plaintiffs' complaint at the time of the alleged entry thereon by defendants, or, at least, that Ryan so believed. That Ryan was a laborer in the employ of his codefendants and it was in such employment he went upon said lands. That upon being served he called the attention of his employers to the service of summons upon him and was told by them that he need not bother about the matter, as the suit would be taken care of by the Los Angeles Interurban Railway Company. That he relied upon such statement and filed no answer. Under the circumstances, he had a right to rely upon the statement that the corporation whom he believed to be the real party in interest would protect him. The showing by the affidavit of Attorney Crutcher as to the reasons why he did not answer for defendant Ryan before his appearance to make the motion we do not think material.

The "records and files" upon which the motion was also based are not before us, but it does appear from the affidavit of Albert Crutcher that an answer had been filed on behalf of the defendants Sherer & Co. This was a circumstance that the court should have, and no doubt did, consider in the exercise of its discretion in the matter. That there were other pleadings before the court raising the same issues of fact as those which the defendant in default asked to have tried in his behalf might well and properly have influenced the court in case of doubt. It was authorized to examine them for the purpose of determining the motion. Lakeshore Co. v. Modoc Co., 108 Cal. 263, 41 Pac. 472. The discretion of the court in vacating the default and setting aside the judgment thereon appears to have been liberally exercised with a view to the trial of the case on its merits. This was in accordance with the universal rule. Merchants' Co. v. Los Angeles Co., 128 Cal. 621, 61 Pac. 277.

Neither of the affidavits filed contains a showing that alone would be sufficient as an affidavit of merits, but the verified answer denies every material allegation of the complaint. This has been held sufficient too often by the Supreme Court to be considered an open question. Fulweiler v. Mining Co., 83 Cal. 129, 23 Pac. 65; Merchants' Co. v. Los Angeles Co., supra; Melde v. Reynolds, 129 Cal. 314, 61 Pac. 932.

Order appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 754

## STIMSON MILL CO. v. NOLAN et al. BERG et al. v. SAME. TILDEN v. SAME. FRICK-FLEMING HARDWARE CO. et al. v. SAME. (Civ. 355.)

(Court of Appeal, Second District, California. June 19, 1907. Rehearing Denied by Supreme Court Aug. 17, 1907.)

1. MECHANICS' LIENS—CONTRACT FOR IMPROVEMENT—STATUTORY PROVISIONS — TIME OF FILING.

Under Code Civ. Proc. § 1183, providing that, when the price for a building exceeds

$1,000, the contract shall be in writing subscribed by the parties thereto and shall, before the work is commenced, be filed with the county recorder, otherwise it shall be void as to the parties, and the labor and materials furnished by the persons other than the contractor shall be deemed to have been done or furnished at the personal instance of the owner, and they shall have a lien for the value thereof, where work was commenced on a building under an oral agreement for an amount exceeding $1,000, and subsequently a written contract embodying the terms of the oral agreement was signed and filed, the contract was void, and the laborers and materialmen were entitled to a lien on the property for the full value of the labor or material furnished.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 289.]

2. Same—Time of Final Payment.

Code Civ. Proc. § 1184, provides that, where the contract price for a building exceeds $1,000, it shall in the contract be made payable in installments, etc., provided that at least 25 per cent. of the price shall be made payable at least 35 days after the completion of the contract; that as to all liens except that of the contractor the contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim, in favor of the reputed owner against the contractor; and that, if the contract does not conform substantially to the provisions of the section, labor and materials furnished by persons other than the contractor shall be deemed to have been done or furnished at the request of the person letting the contract, and they shall have a lien for the full value thereof. A building contract exceeding $1,000 provided that the final payment should be made when the building was completed and receipts in full were shown to the owner, but did not provide for payment within 35 days from completion of the building. The contractor abandoned the contract, and nearly all the unpaid balance was consumed in completing the building. *Held*, that the laborers and materialmen were entitled to a lien for the full value of their services of material furnished.

3. Same—Effect—Priorities.

The constitutional provision, which gives to mechanics, materialmen, and laborers of every class a lien upon the property upon which they have bestowed labor or furnished material, places all such parties in the same class, and the Legislature cannot give preference to one performing labor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 336–339.]

4. Same—Enforcement—Attorney's Fee.

In an action to enforce a mechanic's lien, an allowance of attorneys' fees to a claimant is erroneous.

5. Constitutional Law — Due Process of Law—Mechanics' Liens.

If Const. art. 20, § 15, providing for a mechanic's lien, were subordinate to article 1, § 1, thereof, in relation to the inalienable right to acquire, possess, and protect property, and to article 1, § 13, thereof, prohibiting depriving owners of property without due process of law, it would not affect the validity of Code Civ. Proc. §§ 1183, 1184, relating to contracts for the construction of buildings and to mechanics' liens, since the lien is primarily upon the building which the laborers or materialmen have contributed to, and, the owner having made the building a part of the realty, the whole becomes charged with the lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 940.]

6. Same—Right to Contract.

Code Civ. Proc. §§ 1183, 1184, providing the terms of valid contracts for more than $1,000 for the construction of improvements on land and for mechanics' liens thereon, are not unconstitutional as limiting the right to contract, since Const. art. 20, § 15, provides for a lien which without the statutes would be for the full value of the labor or material furnished, and the statutes merely curtail the liability under certain conditions.

7. Same—Due Process of Law.

Code Civ. Proc. §§ 1183, 1184, relating to contracts for the construction of improvements and mechanics' liens thereon, do not take property without due process of law, since the owner makes his contract with the Constitution and laws in mind, and they form part of his contract, and they do not increase the contract price, since their effect is to protect the contractor when he honestly discharges his obligations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 940.]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Actions by the Stimson Mill Company, a corporation, against M. J. Nolan and others; by C. G. Berg and others against M. J. Nolan and others, in which N. S. Wakefield and L. N. Wise were cross-complainants; by J. F. Tilden against M. J. Nolan and others, and by the Frick-Fleming Hardware Company and others against M. J. Nolan and others. From an adverse judgment, the Stimson Mill Company, L. N. Wise, J. F. Tilden, and the Frick-Fleming Hardware Company appeal. Reversed and remanded.

Borden & Carhart, W. C. Batcheller, A. L. & J. E. Stephens, and Charles L. Batcheller, for appellants. F. B. Guthrie, E. A. Meserve, Frank James, W. C. Petchner, and Scarborough & Bowen, for respondents.

**ALLEN, P. J.** Appeal from a judgment of the superior court of Los Angeles county.

It appears from the record that on or before June 22, 1903, defendant Nolan, the owner of the premises involved, and one Culver, a contractor, had concluded oral negotiations through which Culver had agreed to furnish materials and construct a house on said premises for the consideration of $3,100. That on said last-named date Culver, with Nolan's consent, commenced the work of such construction, and certain lien claimants delivered upon the premises the brick necessary for the foundation, while others delivered upon the premises the lumber necessary for the construction. Thereafter, on June 26th, Nolan and Culver entered into a written contract for the construction of a house, which was in all respects the same as the oral agreement. In this written contract the construction price of $3,100 was made payable in four equal installments, of which three were to be paid during the construction, and the last "when the house was completed and receipts in full shown to the owner." After this contract had been executed, and such contract and an accompanying bond filed in the recorder's office, other lien claimants furnished materials and performed labor upon said building. The aggregate value of all materials and labor furnished by all claimants, on October 26, 1903, amounted to $1,770. On this date the contractor abandoned the work. The court finds that on and before the abandonment the value of the work and materials furnished under the contract upon the house, estimated as nearly as may be by the standard of the whole contract price here involved, amounted to $2,520, and that the contractor had been previously paid by the owner $2,325, leaving a balance of $195 due, which the court found was the whole amount due from the owner to the contractor. The whole amount of expenditure required upon the part of the owner to complete the building is not made to appear. It appears that there was unpaid to the lien claimants on the 26th of October, 1903, on account of the materials furnished and labor performed by them, the aggregate sum of $1,062.94. It further appears that the building was completed December 1, 1903, and that thereafter and within due time all of these claimants duly perfected their liens. Various suits were instituted by these claimants upon their liens, all of which were consolidated and heard in this action. Upon the trial, the court found the contract between Nolan and Culver a valid one as to all parties furnishing materials or performing labor after its filing, but inoperative as to those who furnished labor and materials before such filing; and, further, that the omission to reserve 25 per cent. of the contract price 35 days after completion did not invalidate the contract. Judgment was accordingly rendered in favor of the lien claimants who furnished labor and materials after the filing of the contract to the full extent of their claims; that Wakefield, one of the claimants, being a laborer, and his claim being for labor, had preference and priority over the other claimants who furnished materials after the filing of the contract, and that claim, amounting to $144.25, with costs for filing the lien and attorney's fees, was adjudged a preferred claim and the full amount thereof ordered paid, which payment exhausted all the money so found in the hands of the owner, and accordingly no relief was granted any of the remaining claimants.

The judgment of the trial court is erroneous for several reasons: First, because the court erred in holding the contract between the owner and contractor valid as affecting the rights of lien claimants. Section 1183, Code Civ. Proc., provides: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and the said contract, or a memorandum thereof, setting forth * * * the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder of the county or city and county, where the property is situated; * * * otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." No surreptitious commencement of work is involved. Hence we have a deliberate violation of the provisions of this section, the effect of which is declared by the statute. To hold such a contract valid, under the circumstances of this case, is to ignore the plain provisions of a statute. The contract being void, those entitled to liens under the Constitution are unrestricted in their rights to have a lien for the full value of materials and labor furnished. Laidlaw v. Marye, 133 Cal. 174, 65 Pac. 391.

Again, section 1184, Code Civ. Proc., provides: "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work; provided, that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. * * * In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." In this contract so executed and filed after the commencement of the work there is an entire omission to provide for the final payment of 25 per cent. 35 days after completion, which is intended for the benefit of lien claimants, and the mere statement in the contract, inserted for the benefit of the contractor, that the owner might pay the whole amount when receipts were produced, cannot be construed as a substantial compliance with the statute, or even an attempt in that direction. The whole contract price was made payable upon completion, and the last payment was treated by all parties to the contract as the completion payment; for the amount of such payment was depleted by the expenses of completion made necessary by abandonment. In Hampton v. Christensen, 84 Pac. 203, 148

Cal. 729, Mr. Justice Henshaw, speaking for the court, says: "Whatever may be said of other payments, this amount of money (35-day payment) cannot lawfully be depleted or reduced to the injury of any such claimant"—that out of the completion payment the necessary cost to the owner on completion, in case of abandonment, must be taken. "If such completion payment be more than exhausted by the demands of the owner, * * * the excess of such demand cannot be carried over and made a charge against the 25 per cent. final payment, to the injury of any lien claimant thereon. * * * This final payment is the only fund which the Legislature has sequestered to meet the demand of the lien claimants. To permit this (its depletion) would be to deprive them of their constitutional right to a lien." The court erred in refusing to award a lien for the full value of the material and labor to those who bestowed the same after the contract was filed.

The court erred in awarding Wakefield preference over other lien claimants furnishing materials and performing labor. The constitutional provision which gives to mechanics, materialmen, artisans, and laborers of every class a lien upon the property upon which they have bestowed labor or furnished materials, places such parties in the same class. Their equality is established by the Constitution and cannot be impaired or destroyed by the Legislature. Miltimore v. Nofziger Bros. L. Co. (Cal.) 90 Pac. 114. The allowance of an attorney's fee to the various claimants is also erroneous. Builders' Supply Depot v. O'Connor (Cal.) 88 Pac. 982.

Respondent Nolan, in a supplemental brief, contends for the validity of the contract and urges in support thereof that section 15, art. 20, of our state Constitution, which guaranties to every laborer and materialman a lien upon a structure for the value of labor bestowed or materials furnished in its construction, is subordinate to section 1, art. 1, of the same Constitution, which declares that "all men are by nature free and independent, and have certain inalienable rights, among which are those of * * * acquiring, possessing and protecting property"; and that it is subordinate, also, to section 13, art. 1, which declares that "no person shall be deprived of life, liberty or property without due process of law."

Respondent properly insists that the inalienable right to acquire and possess property includes the right of contracting with reference thereto. Were we to concede the subordinate character of section 15, still we are unable to appreciate the conflict, one with the other, which is suggested by respondent. The constitutional lien to the laborer and materialman is given upon the structure as the principal thing. Humboldt Lumber Co. v. Crisp, 146 Cal. 686, 81 Pac. 30, 106 Am. St. Rep. 75. The right to declare such lien is based upon the theory that the materialman and laborer produce the thing upon which the lien is declared. Tuttle v. Montford, 7 Cal. 359. In Jones v. Hotel Company, 30 C. C. A. 108, 86 Fed. 370, it is said by the court, in relation to statutes creating similar rights of lien: "But the validity of the statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that every one who by his labor or materials has contributed to the preservation or enhancement of the property of another thereby acquires a right to compensation." It is no infringement upon an existing right of property to require one who has procured another to create a structure to pay for the work and materials involved in such creation. When the owner of land makes such structure a part of the land previously owned by him, it is not inequitable or destructive of his rights to say that, having by his own act made this labor and material of another an inseparable portion of his land, the lien upon the building should extend to the land necessary for its use. Having made the building a part of his land, it became as such charged with the lien upon the structure. Linck v. Meikeljohn, 2 Cal. App. 508, 84 Pac. 309.

It is next contended that sections 1183 and 1184, Code Civ. Proc., which provide the terms of valid contracts as affecting those in excess of $1,000, are unconstitutional as an attempt to circumscribe the right of private contract within the usual pursuits of business, and are an unreasonable restriction upon the owner of his rights in regard to its use and upon his power to make contracts concerning the same; this contention being based largely upon the decisions of our own Supreme Court in Stimson Mill Co. v. Braun, 136 Cal. 123, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116, and Gibbs v. Tally, 133 Cal. 373, 65 Pac. 970.[1] We do not accept either of these decisions as determinative of the questions here involved. Assuming, as we do, the validity of section 15, art. 20, of the Constitution, which guaranties the lien, we find that this constitutional right of the laborer and materialman extends to the full value of all labor and materials bestowed or furnished; and, without legislation, such value is the measure of recovery. The Legislature has seen fit, under the authority given it by the Constitution, to provide by the sections complained of certain conditions, upon the observance of which the constitutional measure of lien and recovery is restricted to the sum specified in the contract between the owner and contractor. There is no attempt to enlarge the rights of lien claimants under any circumstances, for under the sections mentioned, where a valid contract is made, the value of the thing furnished measures the extent to which any claim can be found. The effect, therefore, of these sections is not to impair any existing right of the owner, but, in effect, to confer a right not previously existing by which his liability may, under certain circumstances, be curtailed. The owner's liberty of action in relation to this property is not invaded by the statute. He need not employ an intermediary to erect his building; but, if he does the law ingrafts upon his act certain consequences. Henry v. Evans, 10 S. W. 872, 97 Mo. 47, 3 L. R. A. 332. There is no taking of property without due process of law. The contract by the owner is made voluntarily and with the Constitution and laws in mind, and they form part of such contract, and he must be taken to have consented to the effect of such enactments. That similar rights are not conferred by the sections upon those who make improvements of nominal value and under $1,000 is a matter of which respondent cannot complain. Ramish v. Hartwell, 126 Cal. 451, 58 Pac. 920. Nor can it be said that this statute can have the effect to increase the necessary cost of the structure simply because the contractor who bids thereon does so under provisions of the law which require reasonable restrictions as to the time and manner of his payment, for this same law insures to him a lien for his contract price which he otherwise would not have. Hence it would be unreasonable to say that because of such a statute a contractor is injured when the only effect thereof can be to afford him security, when he honestly discharges the obligations imposed upon him by its terms.

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[1] 60 L. R. A. 815.

Judgment reversed, and cause remanded for further proceedings in accordance herewith.

We concur: SHAW, J.; TAGGART, J.

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5 Cal. App. 715

## CAYFORD v. METROPOLITAN LIFE INS. CO. (Civ. 272.)

(Court of Appeal, First District, California. June 13, 1907. Rehearing Denied by Supreme Court August 12, 1907.)

1. Insurance — Life Insurance — Stipulations—Payments of Premiums in Arrears.

A stipulation in a life policy that no premiums in arrears shall be received, except by agreement in writing signed by either the president, vice president, secretary, or actuary of the insurer whose authority will not be delegated, is valid.

2. Same—Contract of Insurance—Knowledge of Insured.

An insured in a life policy is charged with knowledge of the stipulations therein.

3. Same—Nonpayment of Premiums—Waiver.

A life policy stipulated that no premiums in arrears should be received except by agreement signed by either of designated officers of the insurer. An agent with authority to collect premiums called to collect the premium on a policy two days before it fell due. On being informed by the beneficiary that payment could not be made, he stated that he would call on a date after the premium became due. On that day he again called, and the beneficiary, not having all the money, asked him to call later in the same day, when she expected to have it all; but he replied that he would call again four days later. Before he called again, the insured died. The agent had the insurer's premium receipt containing no limitation with respect to its validity if delivered after the due date. The beneficiary did not know that fact. No knowledge of the extensions of time to pay the premium was brought home to the insurer. *Held*, that the insurer did not waive a forfeiture of the policy for nonpayment of the premium when due.

4. Same — Agent — Authority to Collect Premiums — Authority to Extend Time for Payment of Premiums.

An agent of an insurer, with authority to collect premiums, has no authority to extend the time for the payment of premiums or to waive a forfeiture resulting from nonpayment.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Hannah Cayford against the Metropolitan Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Page, McCutchen & Knight, for appellant. L. A. Redman and Van Ness & Redman, for respondent.

KERRIGAN, J. This is an action brought to recover upon a policy of life insurance. The jury returned a verdict for the plaintiff, upon which judgment was entered. The defendant's motion for a new trial was denied, and from the judgment and order denying its motion for a new trial the defendant prosecutes this appeal.

This case has once been before the Supreme Court upon an appeal taken from an order sustaining a demurrer. 144 Cal. 763, 78 Pac. 258.

The policy in question was issued on the life of Richard N. Cayford, plaintiff's husband, payable to plaintiff as beneficiary. It was issued March 20, 1902, and called for the payment of a semiannual premium on the 20th of March and September in each year. The policy provided that the failure to pay any premium when due would render the policy void. The second semiannual premium fell due September 20, 1902, and was not paid. On October 5, 1902, the insured died. The testimony disclosed that J. N. Pittman had solicited the insurance, and had collected the first premium. On the 18th of September, two days before the second premium fell due, he called to collect this premium. Mrs. Cayford told him that they were not prepared to pay it. Pittman said that that would be all right; that he would call again on October 4th. On that day he accordingly called and saw Mrs. Cayford. She said she did not then have all the money, and asked him to call later in the afternoon, when she expected to have it; but he replied that he would call again on the 8th of the month. On the 5th of October the insured died. Pittman had with him on his visits of September 18th and October 4th the company's premium receipt for the second annual premium, executed as therein required by both the secretary of the company and its superintendent. One of the provisions of the policy declares: "The contract between the parties hereto is completely set forth in this policy and the application therefor taken together, and none of its terms can be varied or modified, nor any forfeiture waived or premiums in arrears received except by agreement in writing signed by either the president, vice-president, secretary or actuary, whose authority for this purpose will not be delegated; no other person has or will be given any authority."

Respondent claims that the events just narrated bring this case within the doctrine laid down in the case of Knarston v. Manhattan Life Ins. Co., 124 Cal. 74, 56 Pac. 773, and Id., 140 Cal. 57, 73 Pac. 740. In that case a certain premium became due November 15, 1895. On that day and the next day the general manager of the company sent its collector to the insured to collect the premium. It was not paid. Through the efforts of one Gilmore, representing Knarston, the insured, two extensions of time within which to make payment were granted by the general manager. Within the extended time Knarston was killed in a railroad accident. The policy contained the usual forfeiture clause. The Supreme Court, in the two appeals in that case, held that an attempt by the company to collect a premium after default is a waiver of the forfeiture which might have otherwise been claimed; that, where the insured died while the company was still trying to collect the premium, the policy would be treated as still in force. The decision turned expressly on the fact that the waiver was the act of a general agent of the insurance company, and that the insured had no notice of any limitation on his authority.

There is no doubt that this case, as claimed by the respondent, would be within the doctrine of the Knarston Case if the acts of Pittman were the acts of the company. Counsel for the respondent argues that the possession of the receipt after its due date by Pittman, the collector of the company, implied the power to deliver it after that date; that there appeared on the face of the receipt no limitation of its validity if delivered after the due date of the premium; that accordingly, if it had been in fact delivered by Pittman, though after the due date, his act would have been the act of the company, and the forfeiture would have been waived. We cannot agree with this view. Mrs. Cayford did not know that Pittman had the premium receipt, and she knew nothing of its contents. No knowledge of the extensions of time to pay the premium, granted by Pittman to the insured, was brought home to the company. The limitation, in the conditions of the policy, on the authority of subordinate agents to waive forfeitures, or collect overdue premiums is valid. Shuggart v. Lycoming Fire Ins. Co., 55 Cal. 408; Enos v. Sun Ins. Co., 67 Cal. 621, 8 Pac. 379; Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 77, 5 Pac. 92, 61 Pac. 667. The assured knew of this provision, or what is the same thing, is charged with knowledge of it. Westerfeld v. New York Life Ins. Co., supra. Under the circumstances of this case, it cannot be held that the company waived the forfeiture caused by the failure to pay the premium when due. Authority to collect premiums does not imply authority to extend the time for the payment of such premiums, or to waive a forfeiture resulting from nonpayment. Bryan v. National Life Ins. Ass'n, 21 R. I. 149, 42 Atl. 513; Mutual Life Ins. Co. v. Abbey, 88 S. W. 950, 76 Ark. 328; Metropolitan Life Ins. Co. v. McGrath, 52 N. J. Law, 358, 19 Atl. 386.

In the case of Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204, the policy contained a clause similar to the one referred to in the policy in this case, restricting the power of the agents of the company in the matter of waiving forfeitures. In that case it was claimed that, conceding the validity of such a clause, the clause itself had nevertheless been waived by the company. A premium note had been placed in the hands of an agent for collection. He had extended the time for its payment, and it was allowed to remain in his hands after maturity. It was held, nevertheless, that his act was unauthorized, and that the company was not estopped from relying on the forfeiture.

In the case of Bank of Commerce v. New York Life Ins. Co., 54 S. E. 643, 125 Ga. 552, it was held that the acceptance of money by a collecting agent upon an overdue premium note did not bind the company as a waiver of the forfeiture resulting from nonpayment of the note at maturity.

The following cases tend more or less to support the conclusion we have reached in this case: Collins v. Metropolitan Life Ins. Co., 32 Mont. 329, 80 Pac. 609, 1092, 108 Am. St. Rep. 578; Fidelity Mut. Life Ass'n v. Bussell, 86 S. W. 814, 75 Ark. 25.

The judgment and order are reversed.

We concur: COOPER, P. J.; HALL, J.

151 Cal. 499

## ARWINE v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.

(L. A. 2,009.)

(Supreme Court of California. July 8, 1907.)

1. Physicians and Surgeons—License to Practice—Certificates of Foreign Medical Boards.

St. 1901, pp. 57, 59, c. 51, §§ 5, 6, authorize the board of medical examiners to license an applicant to practice after examination, or without examination on presentation of a certificate from the medical examining board of the District of Columbia or any state or territory whose legal requirements at the time of issuing the certificate were not less than those of California at the time such certificate was presented for registration to the California board. *Held*, that certificates or licenses to practice medicine and surgery granted by the board of examiners of the District of Columbia and the state of Indiana, in the absence of proof that the requirements of such boards were not less than those of California at the time the certificates were presented for registration, were insufficient to entitle the applicant to a license in California.

2. Mandamus—Burden of Proof.

On an application for mandamus against a medical board to compel petitioner's registration as a physician and surgeon within the state, the burden is on the petitioner to prove such material allegations on behalf of his claim as are denied by the answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 372.]

3. Constitutional Law—Delegation of Legislative Power.

St. 1901, p. 56, c. 51, authorizes the state medical board to accept from an applicant for registration as a physician and surgeon only such a diploma as is issued by some legally chartered medical school, the requirements of which shall have been at the time of granting the diploma in no particular less than those prescribed by the Association of American Medical Colleges for that year, was not void as an improper delegation of legislative power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 99.]

4. Physicians and Surgeons—License—Qualifications—Proof.

St. 1901, p. 56, c. 51, authorizing issuance of licenses to practice medicine within the state, declares that, when any applicant has shown himself possessed of the qualifications required "and" has successfully passed the examination by the board, the certificate must be issued, etc.; and section 5 (page 57) requires the production of the diploma issued by some legally chartered medical school, the requirements of which shall have been in no particular less than those prescribed by the Association of American Medical Colleges of that year, or satisfactory evidence of having possessed such diploma or a license from a legally constituted institution granting medical and surgical licenses only on actual examination or satisfactory evidence as having possessed such a license. *Held*, that such act required both a diploma or license and an examination by the board.

In Bank. Application by James T. Arwine for writ of mandamus against the board of medical examiners of the state of California and the members of the board, etc. An order was entered granting the relief prayed by the District Court of Appeal, and the case was transferred to the Supreme Court for hearing in bank. Writ denied.

Wallace W. Wideman and Benjamin P. Welch, for plaintiff. William C. Tait, George B. Becke, and Charles S. Wheeler (J. F. Bowie, of counsel), for defendants.

ANGELLOTTI, J. This is an application for a writ of mandamus directed to the defendants requiring them to issue to the plaintiff a certificate to practice medicine and surgery in the state of California. The application was originally made to the District Court of Appeal for the Second District. The matter was submitted for decision to that court upon the affidavits filed by plaintiff at the institution of the proceeding and the verified answer of the defendants thereto. That court gave judgment for plaintiff, directing the issuance of the writ as prayed. In its opinion that court found as a fact that plaintiff had successfully passed the examination required by the provisions of the act for the regulation of the practice of medicine and surgery. St. 1901, p. 56, c. 51. On petition for a hearing in this court, an order was made by us vacating such judgment and directing that the proceeding be heard and determined by this court. The matter has now been submitted to us for decision, as it was to the District Court of Appeal, upon the affidavits and answer, and the stipulation of counsel for defendants, made upon the oral argument, that as to the facts of the case the opinion of the District Court of Appeal may be accepted as correct.

The right of the plaintiff to the certificate sought by him was dependent upon his compliance with the provisions of the act already referred to. That act required that, in order to procure such certificate, he must produce before the board of medical examiners, in addition to satisfactory testimonials of good moral character, a "diploma issued by some legally chartered medical school, the requirements of which medical school shall have been at the time of granting such diploma, in no particular less than those prescribed by the Association of American Medical Colleges for that year, or satisfactory evidence of having possessed such a diploma, or a license from some legally constituted institution which grants medical and surgical licenses only upon actual examination, or satisfactory evidence of having possessed such a license." It further required that, in addition to the presentation of such credentials, the applicant must be personally examined by such board of medical examiners and successfully pass such examination. It further provided that such board might, in its discretion, accept and register, without examination of the applicant, any certificate which shall have been issued to the applicant by the medical examining board of the District of Columbia or any state or territory of the United States, provided that the legal requirements of such medical examining board shall have been, at the time of issuing such certificate, in no degree or particular less than those of California at the time when such certificate shall be presented for registration to the board created by this act. Sections 5, 6, pp. 57, 59, of said act. The affidavits filed by plaintiff in instituting this proceeding contained allegations showing a sufficient compliance with these provisions to entitle him to a certificate. These allegations were denied by the answer in two material matters, viz.: As to the sufficiency of the credentials presented by him with his application for a certificate, and as to the satisfactory character of his examination as to qualifications.

Upon the question as to the satisfactory character of the examination, we shall assume that the issue must be determined in favor of plaintiff under the stipulation of defendants' counsel as to the effect to be given to the opinion of the District Court of Appeal relating to the facts of the case. In this regard, the ultimate fact was as to whether or not the plaintiff had successfully passed the examination, and the District Court of Appeal explicitly found "that the plaintiff's examination was successful."

In the matter of credentials, the only documents alleged by the affidavits to have been produced to the board of medical examiners were, first, a diploma issued to plaintiff from the medical department of the University of the South at Sewannee, Tenn., which was alleged to be a legally chartered medical school, the requirements of which at the time of granting the diploma were in no material particular less than those prescribed by the Association of American Medical Colleges for that year; and, second, certificates or licenses to practice medicine and surgery granted by the boards of examiners of the District of Columbia and the state of Indiana. As to the latter, it was not alleged nor does it otherwise appear that either of such boards granted licenses "only upon actual examination," or that the legal requirements of either of said boards were, at the time it issued the certificate, in no degree or particular less than those of California at the time when such certificates were presented for registration. So far as the record before us shows, these certificates were, therefore, insufficient under the requirements of the act, and could not authorize the granting of a license by defendants.

Concerning the diploma from the medical department of the University of the South, the allegations as to the requirements of the school were such, as we have seen, as to require acceptance of the diploma issued to plaintiff as satisfactory, viz., that those requirements were in no particular less than those prescribed by the Association of American Medical Colleges for that year. This allegation is, however, denied by defendants in their answer. The issue of fact thus made was not determined by the District Court of Appeals; that court saying in its opinion that upon the evidence before it that question of fact could not be determined. That opinion does not state any evidence which enables us to determine this question, and no evidence was introduced before us upon the issue. The burden is, of course, upon the plaintiff, in a proceeding of this character, to prove such material allegations in behalf of his claim as are denied by the answer.

The finding upon this issue must, therefore, be against plaintiff, and it follows that, upon the case made before us, the diploma must be held insufficient under the requirements of the act.

It is suggested that the provision of the act authorizing the acceptance of only such a diploma as is issued by some legally chartered medical school, "the requirements of which medical school shall have been at the time of granting such diploma, in no particular less than those prescribed by the Association of American Medical Colleges for that year," is void, because the effect thereof is to delegate to this association a power which, it is claimed, can be exercised only by the Legislature itself. This court has recently decided to the contrary, in a case where a similar contention was made and fully considered. Ex parte Gerino, 143 Cal. 412, 417, 419, 77 Pac. 166, 66 L. R. A. 249. It is urged that what was said upon this point in that case was dictum. We do not so consider it; but, even if it were, we see no reason for receding from or modifying the views there expressed, and we adhere thereto.

It is further urged that the act should be construed as rendering an applicant entitled to a certificate upon his passing a satisfactory examination, even though he fails to produce the required diploma or license; in other words, that the act entitles him to a certificate either upon the production of a proper diploma or license, or upon passing a satisfactory examination. Clearly the act will bear no such construction. The language of the provision as to production of diploma or license is such as to necessarily make it applicable to every case, and no exception thereto is declared in any other part of the act. This provision is immediately followed by the provision as to examination, which declares: "In addition to the requirements above set forth, each applicant for a certificate must be personally examined as to his qualifications to practice medicine and surgery," etc. The next section (6) provides: "When any applicant has shown himself to be possessed of the qualifications herein required, and has successfully passed the said examination, a certificate must be issued," etc. In the face of such clear and unambiguous language, there can be no doubt as to the proper construction of the act in this regard. A diploma or license coming up to the requirements of the act is essential in every case to the right to a certificate, however well qualified the applicant may be in other respects.

We are forced to the conclusion that, notwithstanding the long experience of plaintiff as a practicing physician and surgeon, extending over a period of more than 10 years, and notwithstanding that he may have successfully passed the examination as to his qualifications to practice, it must be here held that he has failed to comply with the provisions of the act in the matter of producing a proper diploma or license, and, therefore, that he must fail in this proceeding.

The application for a writ of mandamus is denied.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

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(151 Cal. 558)

## LITTLE v. THATCHER. (L. A. 2,005.)

(Supreme Court of California. July 26, 1907.)

1. APPEAL—INSUFFICIENT UNDERTAKING.

A notice of appeal from an order denying a new trial is not supported by an undertaking reciting only the judgment, stating that it was rendered on the date when the motion for a new trial was overruled, the judgment having been rendered several months before, and reciting a desire to appeal therefrom, the surety only undertaking that appellant will pay such costs and damages as may be awarded against her on "said appeal."

2. SAME—RIGHT TO CURE ERROR.

The recitals in an undertaking on appeal must identify the appeal it is intended to support, and, if they do not do so, the error is not curable under Code Civ. Proc. § 954, prohibiting the dismissal of an appeal for insufficiency of the undertaking, if a good one be filed before the hearing of the motion to dismiss.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by W. E. Little against Catherine M. Thatcher. From an order denying a new trial, defendant appeals, and plaintiff moves to dismiss the appeal. Appeal dismissed.

Hahn & Hahn and Gavin McNab, for appellant. James P. Clark, M. M. Meyers, Borden & Carhart, Chas. L. Batcheller, E. E. Mellette, J. R. Wilder, Lawler, Allen & Van Dyke, A. L. & J. E. Stephens, and John W. Shenk, for respondent.

**BEATTY, C. J.** This is a motion to dismiss an appeal based upon the grounds, first, that the transcript was not served on the respondents; second, that no sufficient transcript was filed; and, third, that the notice of appeal is not supported by an undertaking. As to the first ground, it is now admitted that the printed transcripts were duly served. As to the second, the objection is obviated by the filing of a supplemental transcript by leave of the court. The only question remaining relates to the $300 undertaking on appeal. The judgment in the action was rendered and entered February 20, 1906. A motion for a new trial was denied October 12, 1906, after the time for appealing from the judgment had expired. On the 22d of October two of the defendants gave notice of an appeal from that order, and within the time allowed by law filed the following undertaking: "Whereas, in an action in the superior court of the county of Los Angeles, state of California, judgment was on the 12th day of October, 1906, rendered by the said court in favor of the defendants and against the plaintiffs for the sum of $1700 principal;

and, whereas, the said defendants are dissatisfied with the said judgment and desirous of appealing therefrom to the District Court of Appeals of California: Now, therefore, in consideration of the premises, and of such appeal, the National Surety Company of New York, a corporation having its principal place of business in the city of New York, state of New York, and having complied with all the requirements of the laws of the state of California respecting such corporations, does hereby undertake in the sum of three hundred dollars ($300) and promises on the part of the appellant that said appellant will pay all damages and costs which may be awarded against them on said appeal, or on a dismissal thereof not exceeding the aforesaid sum of three hundred dollars $300.-00, to which amount it acknowledges itself bound."

The undertaking, it will be observed, recites only the judgment, and states that it was rendered on the date when the motion for a new trial was overruled. It recites the desire of the said defendants to appeal therefrom, and the surety only undertakes that the appellants will pay such costs and damages as may be awarded against them on "said appeal." Clearly it is insufficient in terms to support the appeal from the order; but, since an undertaking in proper form, approved by one of the justices of this court, was filed before the hearing of the motion to dismiss, the question to be decided is whether the undertaking originally filed was merely insufficient within the meaning of section 954 of the Code of Civil Procedure, and the fault curable by the approval and filing of a new one, or whether with respect to the appeal from the order it was in effect no undertaking at all. In a number of cases heretofore decided this court has held that the recitals in an undertaking on appeal must identify the appeal which it is intended to support, and that if they fail to do so the error is incurable. See Estate of Heydenfeldt, 119 Cal. 347, 51 Pac. 543, and cases there cited. See, also, Pac. Pav. Co. v. Bolton, 89 Cal. 154, 26 Pac. 650, Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657, and cases cited under this case in the notes to California Decisions. I have never yielded a willing assent to this strict construction of the statute, but the rule is settled, and there does not seem to be any ground upon which this case can be distinguished from those in which the undertaking has been held to be fatally defective. The fact that when the undertaking was executed the time for appealing from the judgment had expired and that the only appeal by which the judgment might be set aside was an appeal from the order, the fact that the date of the judgment as recited shows that the surety confused the judgment and the order, and all the extraneous facts in the case amount to nothing in the face of the doctrine upon which the rule is founded; the doctrine, that is to say, that the recitals in the undertaking must identify the particular appeal which it is intended to perfect.

The appeal is dismissed.

We concur: ANGELLOTTI, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

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151 Cal. 544

## BELL v. STAACKE et al. (L. A. 1,852.)

(Supreme Court of California. July 22, 1907.)

1. Appeal — Dismissal — New Trial — Effect on Judgment.

Where an appeal from a judgment is dismissed, the judgment is vacated by a subsequent order granting a new trial on appeal from an order denying the same.

2. Same — Specification of Errors — Form.

Appellant's motion for a new trial contained 285 specifications of errors of law occurring at the trial as to which appellant's brief contained only a reference to pages "685–703" of the transcript, making such pages and each and all of the specifications of errors of law therein set forth a part of its specifications, designating each of the errors as grounds for reversal of the order denying a new trial. The transcript merely contained bare specifications of alleged errors, and there was neither in the transcript nor brief any reference to the page or folio of the transcript where any ruling complained of was shown nor any argument in support of the alleged errors appeared. *Held*, that such specifications were fatally defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3093.]

Department 1. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by John S. Bell against George Staacke and others. From a judgment in favor of defendants and from an order denying plaintiff's motion for a new trial, he appealed. Appeal from judgment dismissed. Order affirmed.

See 83 Pac. 245.

Richards & Currier and J. L. Crittenden, for appellant. T. Z. Blakeman, for respondents.

ANGELLOTTI, J. Plaintiff brought this action against defendant Staacke, and the representatives of the estate of Thomas Bell, deceased, to obtain a decree declaring that a tract of land in Santa Barbara county containing 10,000 acres, the title to which stands of record in the name of said Staacke, is held by him in trust for plaintiff, and requiring a conveyance thereof to him by Staacke. The defendants, by answer and cross-complaint, alleged that, while the title to the land was held by Staacke in trust for plaintiff, it was also held by him as security for certain advances made by Thomas Bell in his lifetime, at the instance and for the benefit of plaintiff, and asked that the claim of the estate against the land be enforced by a sale thereof. Upon a former trial the trial court, while finding that plaintiff was indebted to the estate of Thomas Bell in the sum of $52,120.15 for money advanced and loaned him by Thomas Bell, also found that the land was held by Staacke in trust solely for plaintiff, and not as security for any indebtedness due from him to the estate. It therefore gave personal judgment only in favor of the estate against plaintiff for the said amount, and directed a conveyance of the land by Staacke to plaintiff. The defendants appealed from the judgment and from an order denying their motion for a new trial. The appeal from the judgment was dismissed on the ground that the same had been prematurely taken. Bell v. Staacke, 137 Cal. 307, 70 Pac. 171. On the appeal from the order denying the motion for a new trial, which was subsequently heard, it was decided by this court that the evidence was insufficient to sustain the conclusion of the trial court that the land was not held as security for the payment of the indebtedness due Thomas Bell from plaintiff; it being declared after a careful view of the evidence contained in the record that such evidence showed without substantial conflict that the land was conveyed to Staacke to be held by him as security for the payment by plaintiff to Thomas Bell of all sums of money theretofore advanced or thereafter to be advanced to plaintiff by said Thomas Bell. The order denying defendants' motion for a new trial was reversed, except as to the issues relative to the amount of indebtedness due the estate from plaintiff, and the cause remanded for a new trial except as to the issues last referred to. Bell v. Staacke, 141 Cal. 186, 74 Pac. 774. Upon the new trial, which was had on the same pleadings, without change or amendment of any kind therein, the court found in favor of defendants upon the issues tendered by the answer and cross-complaint, and determined that Staacke holds the land in trust, first, as security for the payment of the sums due the estate, amounting with interest accrued on the $52,120.15 indebtedness to $95,101.07; and, second, in trust for the use and benefit of plaintiff. Judgment was given for the sale of the land for the payment of the indebtedness, together with costs and accruing interest. Plaintiff appealed from such judgment and from an order denying his motion for a new trial, but the appeal from the judgment has heretofore been dismissed.

It is contended that the evidence on the retrial was insufficient to sustain any of the material findings in favor of defendant. An examination of the 466 pages of the printed transcript containing the evidence given on the retrial shows that the evidence before the court was practically the same as that given on the former trial. Most of the testimony given consisted, by stipulation, of transcriptions of the reporter's notes taken at the former trial, and the additional evidence introduced did not materially affect the situation. The evidence was amply sufficient to support all the material allegations.

The brief of counsel for plaintiff contains a statement of facts which they claim were admitted by the pleadings, and which, they further claim, are in some respects contrary to the findings. This matter was available to plaintiff on the former appeal in support of the decision on the facts there under review; there having been no change in the pleadings. We have examined the record in the light of this statement of counsel, and find no admission in the pleadings contrary to any finding of fact, unless the pleadings show an admission that on or about March 6, 1889, the plaintiff and Thomas Bell by consent rescinded the agreement relating to the holding by said Thomas Bell, as security for plaintiff's indebtedness, of the Grover notes and mortgages, which agreement is described in the former opinion. 141 Cal. 197. The allegation to this effect was made in one of plaintiff's amendments to plaintiff's amended and supplemental complaint, and it is claimed that the allegation was not denied. It was apparently treated at the trial as denied, and evidence was received thereon, the trial court finding against the allegation. This matter is, however, of no importance on this appeal. It may be assumed that the rescission of this agreement as to the Grover notes and mortgages was made as alleged, and there is still ample evidence to support the material findings of the court as to the terms and conditions upon which the land in dispute was placed in the name of Staacke. If the court had found in accord with such allegation of rescission, instead of against it, such finding would have been simply a finding as to a specific fact not necessarily inconsistent with the findings as to the agreement and understanding upon which the land was placed in the name of Staacke. What we have said on this point sufficiently disposes also of the claim that, by reason of said alleged admission, the decision is against law, and the claim that, for the same reason, the findings do not support the judgment. It should be observed, however, that questions as to the sufficiency of the findings to support the judgment cannot be considered on an appeal from an order granting or denying a motion for a new trial.

A claim that the superior court had no jurisdiction to retry this case, notwithstanding that it was remanded by this court for a new trial, is based on the fact that the appeal from the former judgment in favor of plaintiff was dismissed. This, it is said, constituted an affirmance of the judgment, preventing the subsequent giving of any other judgment. But a judgment, even although expressly affirmed on appeal, is vacated by an order granting a new trial. See Swett v. Grey, 141 Cal. 83, 88, 74 Pac. 551.

There are 285 specifications of errors in law occurring at the trial made in the statement on motion for a new trial. As to these all that is said in their brief by counsel for plaintiff is that they "hereby specially and respectfully refer to pages 685 to 703 of the transcript as to the specification of errors in law occurring at the trial and excepted to by the plaintiff, and hereby make said pages of the transcript, and each and all of the specifications of errors of law therein set forth a part of this point and of these points and authorities as if set forth at length herein, and we hereby point out and designate each of said errors so specified as one of the grounds upon which appellants claim the right to a reversal of said order denying a new trial." The portions of the transcript thus referred to contain simply the bare specifications of alleged errors. There is neither in transcript nor brief any reference to the page or folio of the 723-page transcript where any ruling complained of is shown, or any argument in support of the claim that the trial court erred to plaintiff's prejudice in any of these rulings. Under such circumstances we are justified in disregarding such claim altogether. See People v. Wo, 120 Cal. 294, 297, 52 Pac. 833; Whyte v. Rosencrantz, 123 Cal. 634, 642, 56 Pac. 436, 69 Am. St. Rep. 90; People v. Gibson, 106 Cal. 458, 475, 39 Pac. 864; People v. Daniels, 105 Cal. 262, 264, 38 Pac. 720; Wheelock v. Godfrey, 100 Cal. 578, 589, 35 Pac. 317; Neylan v. Green, 82 Cal. 128, 23 Pac. 42; West v. Crawford, 80 Cal. 19, 33, 21 Pac. 1123. It is proper to say, however, that in our examination of the evidence contained in the record we have discovered no erroneous ruling on the part of the trial court.

The order denying plaintiff's motion for a new trial is affirmed.

We concur: SLOSS, J.; SHAW, J.

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151 Cal. 509

## CHAPMAN v. MOORE et al. (L. A. 1,881.)

(Supreme Court of California. July 16, 1907.)

1. ABATEMENT AND REVIVAL—OTHER ACTION PENDING.

Evidence that a prior suit to quiet title to the same lot against the same parties had been brought by plaintiff's predecessor in interest, and was pending as to defendants S. when the present action for the same relief was brought against them and others, was sufficient to entitle them to the abatement of the present action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 73, 76.]

2. PROCESS—PUBLICATION — SUMMONS — AFFIDAVIT.

An affidavit for publication of a summons against nonresidents recited that they had been sought for to obtain service, but after diligent search and inquiry could not be found within the state. It then proceeded to show the kind of search and inquiry that had been made; that the affiant had made inquiry of all persons from whom he could expect to obtain information as to the residence of the defendants, together with the names of the persons of whom he made inquiries, and why he expected them to know of the defendants' whereabouts. *Held*, that the affidavit constituted a substantial compliance with Code Civ. Proc. § 412, authorizing service by publication where the person sought to be served "cannot after due diligence be found within the state," though the affidavit failed to expressly state the result of the affiant's inquiries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 118.]

3. JUDGMENT — QUIETING TITLE — EFFECT AS EVIDENCE.

Where a judgment in a suit to quiet title determined that a party to the action was the owner of the property in controversy, such judgment was admissible in evidence in behalf of a party claiming under the judgment and subsequently asserting a claim to the property affected by it, as a link in his chain of title as against persons not parties nor privies claiming an interest in the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1233.]

Department 2. Appeal from Superior Court, Los Angeles County; P. Conrey, Judge.

Action by William Chapman against O. A. Moore and others. From a judgment in favor of defendants, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed as to defendants Strohm and reversed as to defendant Moore.

Charles Lantz, for appellant. William Chambers, for respondents.

LORIGAN, J. This action was originally commenced by M. M. Davis as plaintiff, and subsequent to its commencement the present plaintiff, William Chapman, was substituted in the superior court for said Davis as plaintiff. The action was brought to quiet title to lot 4 in block C of the Sunset tract, in the city of Los Angeles; the plaintiff making the usual allegations of ownership of the property, and the defendants asserting claims thereto adverse to him. The defendant O. A. Moore, in her answer, denied the alleged ownership of plaintiff, and asserted ownership of the lot to be in herself. The defendants Strohm, in a separate answer, also denied the ownership of plaintiff, and asserted that the defendant Susan Strohm was the owner of the property. These latter defendants also pleaded in abatement of the present action the pendency of a prior action brought against them by M. M. Davis to quiet title to this same lot. Upon the trial the court found in favor of the defendants Strohm on their plea of abatement, found also that plaintiff was not the owner of the property, and entered judgment that the action abate as to the Strohms, and in favor of O. A. Moore for her costs. Plaintiff appeals from the judgment and an order denying a motion made by him for a new trial. On the trial of the cause the only evidence presented upon the issue of ownership of the property was that offered by the plaintiff. No evidence was offered by the defendants at all save by the Strohms in support of their plea in abatement.

As grounds for a reversal it is insisted by appellant that the court erred in sustaining the plea of abatement interposed by the Strohms, that it erred also in rejecting certain evidence offered by plaintiff, and that the finding of the court that plaintiff was not the owner of the property in dispute was not justified by the evidence.

As to the plea in abatement: This was the first issue tried by the court. In support of it the Strohms offered in evidence the record in the suit of M. M. Davis v. B. E. Ninde, Samuel Strohm, Susan Strohm, William Patterson et al., which showed that a suit to quiet title to the same lot involved in the action then on trial was commenced February 3, 1903 (the complaint in this action was filed August 27, 1904), and was then pending as to the said defendants Strohm. This was the only evidence offered, and at its conclusion a motion was made on behalf of said defendants Strohm, on such showing, to have this action as to them dismissed, which was granted. The showing was sufficient to sustain the plea and upon it the Strohms were entitled to have the subsequent action against them abated. Section 430, subd. 3, Code Civ. Proc., and section 433, Code Civ. Proc. The Strohms by this order of the court having been dismissed from the case, the trial then proceeded between the plaintiff and the defendant Moore. To sustain his title against her, plaintiff offered in evidence, among other documents, a certificate of sale of said property made July 3, 1895, to the state of California for state and county taxes for the year 1894, a deed of said property, dated July 6, 1900, from the county tax collector to the state of California for said taxes, also a deed of said property from said tax collector to plaintiff dated September 21, 1901, made pursuant to an authorization of the State Controller to sell said land. The court refused, upon defendants' objection, to admit such instruments in evidence, and this ruling is assigned as error. In the briefs of respondent no grounds are suggested in support of the ruling and no specific objections are urged against the validity of these several tax-sale instruments. Counsel for respondent simply says: "The questions as to the validity of this state deed involved in this action are the same as those now before the Supreme Court in the case of Barrett (which should have been Baird) versus Munroe, Los Angeles No. 1623 * * *." The case of Baird v. Munroe, 89 Pac. 352, had not been decided by this court, when the briefs in this present appeal were filed, but it has been since, and the various grounds urged against the validity of a tax deed there involved, similar to the one in question here, were deemed untenable, and the validity of the deed sustained. It is unnecessary to refer here to the objections urged against the deed considered in that case, or to restate the grounds upon which the court sustained its validity, as they will fully appear from an examination of the decision rendered. Baird v. Munroe, 89 Pac. 352. See, also, Carter v. Osborn, 89 Pac. 608. It follows, therefore. that the trial court erred in refusing to admit in evidence the tax deed offered by plaintiff.

The only other questions presented upon this appeal involve the validity of a certain judgment and its effect, if valid. It was stipulated on the trial that a certain deed dated and recorded in October, 1887, conveyed title in fee to the lot of land in controversy here to one Walter Patterson. Such admission being made, the plaintiff offered in evidence a judgment roll in a suit brought by M. M. Davis, the predecessor of plaintiff, versus B. E. Linde, Samuel Strohm, Susan Strohm, and Walter Patterson (the same action heretofore referred to as pleaded in bar by the Strohms), which showed that an action to quiet title to this same property was commenced by Davis against the defendants by complaint filed February 3, 1903; that an affidavit and order for publication of summons on one of the defendants—Walter Patterson—were subsequently made and filed and service of the summons made upon said Patterson by publication; that the default of Patterson was subsequently entered and thereafter on April 4, 1904, a decree was entered quieting the title of said Davis to said lot against the said defendant Patterson. No objection was offered to the admission of the judgment roll, and it was received in evidence. The plaintiff supplemented this offer by proof of a conveyance of the lot in controversy from M. M. Davis to himself, and rested his case.

It is insisted by appellant that this showing—the admission of title in Patterson at a given date, the decree quieting title subsequently obtained against Patterson by plaintiff's predecessor Davis, and the conveyance of Davis to himself—sustained his claim of ownership to the property against the defendant Moore, and the finding of the court that he was not such owner was not justified by the evidence. This claim of appellant is in our judgment unquestionably true, unless, as insisted by respondent, the decree quieting title to the lot in question against Patterson in the case just referred to is void, or unless there is some merit in the position of respondent, that, even if valid, the decree was not available to plaintiff as a muniment of title against her.

Now, as to the validity of the decree: The order for service of summons upon the defendant Patterson by publication was based on an affidavit of the attorney for Davis purporting to make out a sufficient showing that defendant Patterson, at the time when the service of summons was sought to be made uopn him, could not, with due diligence, be found in the state of California. It is contended by respondent, and this is the only point made as to the sufficiency of the affidavit, that, while it shows that the affiant made inquiries to ascertain the whereabouts of Patterson, it does not appear what information he got from those of whom he made the inquiries; that for all the affidavit shows these persons may have informed him that Patterson was residing in Los Angeles, or somewhere in the state; that a statement of the result of his inquiries in the affidavit was essential to warrant an order of publication; that without it the court had no jurisdiction to make the order, and the order for the service of summons and the service under it and the decree were all void. It is true, as claimed by respondent, that the affidavit fails to state what information the affiant received concerning the whereabouts of Patterson from those of whom he inquired concerning him. But in the case of Ligare v. Cal. S. R. R. Co., 76 Cal. 610, 612, 18 Pac. 777, it was held that such an omission was not fatal, if from the other facts stated in the affidavit it could be reasonably inferred that such inquiries to ascertain the whereabouts of the defendant were unavailing. In the case at bar the affidavit, in so far as it bears upon the point involved, stated that Walter Patterson could not be found in the state of California after diligent search made therein for him by affiant; that such diligent search consisted of making inquiries of each and every person from whom he had reason to believe he would receive knowledge of the whereabouts of Patterson. Then follows a statement of the persons of whom he made inquiries, and why he expected them to know of his whereabouts. In the case cited the affidavit under consideration there contained the same statements, but, like the case at bar, failed to state what the result of the inquiries was. It was held, however, that the affidavit was sufficient; the court saying: "It is argued that the affidavit for publication was insufficient on the question of diligence. The Code provides that service may be made by publication (among other cases) where the person on whom it is to be made 'cannot, after due diligence, be found within the state.' Code Civ. Proc. § 412. The affidavit in question first states that certain defendants, among whom is the plaintiff here, 'have been sought for to obtain service of summons thereon, but, after diligent search and inquiry, cannot be found within the state.' It then goes on to show what kind of search and inquiry have been made, viz., that the affiant 'has made inquiry of all persons from whom he could expect to obtain information as to the residence of said defendants.' It is not expressly stated what was the result of these inquiries. But the statement must be read in connection with what preceded it, viz., that after inquiry the said defendants 'cannot be found within the state.' And, so reading it, we think it is to be inferred that the inquiries were fruitless." The court held the decree attacked in that case for insufficiency of the affidavit of publication valid against a collateral attack such as is made here, and upon the authority of that case the affidavit here must be held sufficient and the decree quieting title to the lot in question in favor of Davis and against Patterson to be valid.

Now, as to the effect of the decree: While respondent has contended here, though ineffectually, that the decree is void, he also insists that, even if valid, the trial court properly rejected it when offered as constituting a muniment of title in behalf of plaintiff against the defendant; that the decree was only conclusive against Patterson and parties in privity with him having notice of the judgment (subdivision 2, § 1908, Code Civ. Proc.), and did not affect the rights of the defendant Moore. And it is asserted by respondent in his brief that this was the view taken by the trial court. If so, it was incorrect. While the general rule undoubtedly is that judgments bind only parties and privies, still there is an exception to the rule universally recognized which sustains their admissibility against third parties who are not parties or privies to the judgments for certain purposes. This exception is that the judgment rendered in an action involving title to property, and in which it is determined that the title is in one of the parties to the action, is admissible in evidence in behalf of the party claiming under the judgment, and subsequently asserting a claim to the property affected by it as a link in his chain of title, although such judgment would not be conclusive on the party against whom it is offered because he was not a party or privy thereto. It is admissible in evidence, not for the purpose of defeating or affecting any claim or title of a party who was not a party or privy to such judgment, but solely as a muniment in an asserted title. In Barr v. Gratz's Executors, 4 Wheat. (U. S.) 213, 4 L. Ed. 553, the rule is stated: "It is true that in general judgments or decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case where the decree is not introduced as per se binding upon any rights of the other party, but as an introductory fact to a link in the chain of plaintiff's title and constituting a part of the muniments of his estate. * * * To reject the proof of the decree would be, in effect, to declare that no title derived under a decree in chancery was of any validity except in a suit between parties and privies, so that in a suit by or against a stranger it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were res inter alios acta." To the same effect are the cases of Kurtz v. St. Paul & D. R. Co., 65 Minn. 60, 67 N. W. 808; Gage v. Goudy, 141 Ill. 215, 30 N. E. 320; Railroad Equip. Co. v. Blair, 145 N. Y. 607, 39 N. E. 962; Bussey v. Dodge, 94 Ga. 548, 21 S. E. 151; Skelly v. Jones, 70 N. Y. Supp. 447, 61 App. Div. 173. Also 24 Am. & Eng. Ency. of Law, p. 757; Freeman on Judgments, § 416. These authorities declare the exception to the general rule to be well established that a party claiming under a judgment is entitled to prove it as a muniment in his chain of title, and we content ourselves simply with a reference to them as nothing to the contrary is cited by respondent.

Applying this rule, then, to the effect of this judgment considered with the other proofs of title made by appellant, and it is clear that the finding of the court complained of was not justified by the evidence. It was conceded on the trial that in 1887 the legal title to the lot in controversy was in Walter Patterson, and the presumption is that the legal title continued in him until it was shown that he had conveyed it, or that in some way it had become extinguished, or his title defeated or barred. It was defeated and barred by the judgment obtained by Davis, the predecessor of plaintiff, against Patterson in 1894. As between these two, it was there adjudged that the legal title, conceded, and theretofore presumed to continue in Patterson, was, as against him, in Davis, and such adjudication was as effective evidence of title to the property in the latter, and as conclusive of any claim of Patterson, or his privies, as if Patterson had made him a conveyance of it by deed. A deed from Patterson to Davis would have been conclusive evidence against Patterson that legal title had in fact been transferred to Davis by him, and, of course, would be admissible as a link in the asserted claim of plaintiff of title to the property. So with the judgment. As it was effective as against Patterson's claim of title as if he had made Davis a deed to the property, it was, under the rule heretofore stated, admissible for the same purpose that his deed would have been—as a muniment of title. Being so admissible, it, with the previous concession of legal title in Patterson, and the presumption arising therefrom, together with the conveyance from Davis to plaintiff, established in him prima facie title to the property, which in the absence of any evidence of title in the defendant would have warranted a judgment in his favor against the defendant Moore, and the finding of the court in the face of this prima facie showing, that plaintiff was not the owner, was not justified by the evidence.

These are the only points made in the case, and for the reasons given the judgment and order denying the motion of appellant for a new trial are reversed with costs on appeal to appellant, and affirmed as to the Strohms, with costs in their favor.

We concur: McFARLAND, J.; HENSHAW, J.

151 Cal. 520

## HIMMELS v. SENTOUS et al. (L. A. 2,019.)

(Supreme Court of California. July 20, 1907. Rehearing Denied Aug. 20, 1907.)

1. CHATTEL MORTGAGES—MORTGAGED PROPERTY—REMOVAL—EFFECT.

Civ. Code, § 2965, provides that, where mortgaged chattels are removed to another county, they are relieved from the operation of the mortgage, except as between the parties, unless the mortgagee within 30 days after such removal causes the mortgage to be recorded in the county to which the property is removed or takes possession. *Held* that, where mortgaged property is removed to another county by the mortgagor, the mortgage remains a subsisting lien, of which the original record is constructive notice to all the world during the 30 days after such removal within which the mortgagee is authorized to continue the lien by re-recording the mortgage or taking possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 166, 167.]

2. SAME—FAILURE TO RECORD.

Where, after the removal of mortgaged hogs to another county, the mortgagor sold them to defendants, who slaughtered them and sold the meat within 30 days after such removal, the mortgagee's failure to re-record the mortgage in the county to which the hogs were removed after they had been killed did not impair his lien nor his right to recover against defendants for the conversion of the hogs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 167, 269.]

3. SAME.

In the absence of specific statutory provisions regarding the removal of mortgaged chattels, the regular original record of a chattel mortgage is constructive notice to all the world, and the mortgage continues a valid lien, notwithstanding the removal of the property to another town, county, or state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 166.]

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by James G. Himmels against Louis Sentous and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Hutton & Williams, Henry T. Gage, and W. I. Foley, for appellants. Powers & Holland, for respondent.

SLOSS, J. This is an action to recover damages for the conversion of personal property. Plaintiff had judgment for $660, and the defendants appeal.

On November 22, 1904, one E. M. Coe made and delivered to plaintiff, in the county of San Diego, his promissory note for $1,750, and, as security therefor, executed and delivered to plaintiff a chattel mortgage upon 41 head of dairy heifers and 169 head of hogs, then situated in said San Diego county. The mortgage was duly acknowledged and was accompanied by the affidavit of the parties, as required by Civ. Code, § 2957. On december 2, 1904, it was recorded in the office of the recorder of San Diego county. At all the times named the mortgagor, E. M. Coe, resided in San Diego county, and the mortgaged property was in said county. On January

4, 1905, Coe, without the knowledge or consent of the plaintiff, removed 86 head of hogs, a part of the mortgaged property, from the county of San Diego, and had them shipped to Los Angeles county. There, on the following day, the 5th of January, 1905, he sold and delivered said hogs to defendants, who, within 10 days thereafter, slaughtered the hogs and sold and disposed of their meat. The defendants had no actual notice of plaintiff's mortgage, and bought the hogs in the belief that Coe was the owner, as he represented himself to be. The plaintiff on the 4th of March, 1905, shortly after he had learned of the removal of the hogs from San Diego county, demanded possession of them from defendants, and was informed that the hogs had been killed and sold. The chattel mortgage has never been recorded in Los Angeles county. The mortgaged property, other than that here involved, has been sold, leaving a deficiency in excess of the value of the hogs. The judgment is for such value, with interest and costs. The decision of the case depends upon the construction of section 2965 of the Civil Code, reading as follows: "When personal property mortgaged is thereafter by the mortgagor removed from the county in which it is situated, it is, except as between the parties to the mortgage, exempted from the operation thereof, unless either: (1) The mortgagee, within thirty days after such removal, causes the mortgage to be recorded in the county to which the property has been removed; or, (2) the mortgagee, within thirty days after such removal, takes possession of the property, as prescribed in the next section." So long as the property remained in the county of San Diego, the mortgage was a valid lien. What was the effect of removal to another county? The appellants contend that, by the removal, the property was at once relieved of the lien of the mortgage, and that such lien could again attach to the property only upon the recording of the mortgage in the new county (or the taking of possession by the mortgagee) within 30 days. Until such recording, the mortgagor was in a position to convey a clear title to a bona fide purchaser. The respondents, on the other hand, take the position that the mortgage remains a valid and subsisting lien, of which the original record is constructive notice to all the world, notwithstanding the removal of the property, but that, unless one of the two steps specified by section 2965 is taken during the thirty days after removal, the validity of the mortgage ceases, except as between the parties, at the expiration of such 30 days. In applying the section in question to the facts of the present case, it is immaterial, under either construction, that the mortgage was never, in fact, recorded in Los Angeles county; for, if the mortgage was suspended by the removal, and was not in force when the defendants purchased the hogs, a good title passed by such purchase, and nothing was added to it by the fact that plaintiff did not subsequently record his mortgage in Los Angeles county. On the other hand, if the mortgage was a valid and subsisting lien for 30 days after removal, the defendants were guilty of conversion in appropriating the property and destroying it during such period. Wilson v. Prouty, 70 Cal. 196, 11 Pac. 608. The plaintiff had a complete cause of action when such conversion was committed, and did not lose this cause of action by failing at a later date to comply with the useless form of recording a mortgage of property no longer in existence.

We think the construction of section 2965 urged by respondent is the proper one. The section declares that, when mortgaged property is removed from the county in which it is situate, it is exempted from the operation of the mortgage, unless, within 30 days, the mortgagee does one of two things. To express the same idea in slightly different words, the property is exempted from the operation of the mortgage if the mortgagee does not, within 30 days, record the mortgage in the county in which the property is removed, or take possession of it. By necessary implication from the language used, the property is not exempted if, within 30 days, the mortgagee does do either of the prescribed acts. Whether or not he will do one of them cannot be determined until the 30 days shall expire. In the interval the condition upon which the statute has made the loss of his lien depend has not taken place. Until he has failed to do what is required of him for the preservation of his mortgage—and he cannot be said to have so failed until thirty days after the removal of the property—the mortgage is unaffected by the removal, and the exemption declared by section 2965 has not arisen. But, apart from the mere question of grammatical interpretation, the position of respondent is supported by considerations of reason and justice. The lender, who has taken a mortgage of personal property, and has had it executed and recorded as required by law, has acquired a right of property. The statute evidently contemplates that this right may be preserved, notwithstanding a removal to another county of the mortgaged chattels. If it be held that, upon removal, the mortgage is at once suspended until there is a new record of the mortgage, or a seizure, and that a purchaser in the interim takes free of the mortgage, the mortgagee loses his lien, notwithstanding the fact that he may, immediately upon learning of the removal, and within the 30 days allowed him, record his mortgage in the new county. Such construction would work a practical forfeiture as against one who had not been guilty of the slightest want of care or vigilance—a result that should not be held to follow unless it is demanded by the plain letter of the statute. In the absence of any specific statutory provision regarding the removal of mortgaged property, the record of a chattel mortgage in the town or county where it is required to be originally filed for record is held to be constructive notice to all the world, and the mortgage is valid, even though the property may be removed to another town or county, or even to another state. Pease v. Odenkirchen, 42 Conn. 415; Barrows v. Turner, 50 Me. 127; Brigham v. Weaver, 6 Cush. (Mass.) 398; Whitney v. Heywood, 6 Cush. (Mass.) 82; Hoit v. Remick, 11 N. H 285; Hicks v. Williams, 17 Barb. (N. Y.) 523; Kanaga v. Taylor, 7 Ohio St. 134; Greenville Nat. Bank v. Evans, 60 Pac. 249, 9 Okl. 353; Hornthal v. Burwell, 13 S. E. 721, 109 N. C. 10, 13 L. R. A. 740, 26 Am. St. Rep. 556; Shapard v. Hynes, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675

It is said in Hoit v. Remick, supra: "The object of the statute was to give publicity to such conveyances, and to provide sources of information common to all persons, in order to enable purchasers and creditors and all others to determine with some degree of facility, convenience and certainty the question of title to property, which they may be interested to know, while, at the same time, it was not among the purposes of the act to subject the bona fide mortgagee, who is, of course, a creditor, to the inconvenience, if not impracticability, of the constant vigilance and ceaseless watching which would be requisite to guard and secure his interests, if he were obliged to record his mortgage in every town into which the mortgagor might see fit to remove with the property to reside." Our statute, it is true, goes further than those considered in the foregoing cases. It does require the mortgagee to exercise some degree of vigilance in order to protect his right in case of removal of the property; but it allows him 30 days after such removal in which to perform the acts essential to the continuance of the mortgage lien. During those 30 days he cannot be said to have fallen short of full compliance with every duty imposed upon him by the law, and should not therefore be held to have lost any of the rights vested in him by the due execution and registration of his mortgage.

The appellants urge that the rule invoked by respondent would work a hardship upon innocent purchasers of mortgaged property in a county in which no record of the mortgage exists. Such hardship may result, but it is no more burdensome than the injury which would be sustained by a bona fide mortgagee who, on the contrary construction, would be held to have lost his lien by a surreptitious removal and sale of the property before he could know of the removal, and before the lapse of the time allowed him by the statute within which to protect his right in the county to which the property had been removed. The question is purely one of legislative policy, and we think the policy intended to be declared in section 2965 is the same as that adopted in other states which require a mortgage to be re-recorded after removal of the property. While the language of the statutes in those states is somewhat different from that of the section in question, it is instructive to note that such statutes are held to declare an intention that the mortgage shall remain in force after removal of the property and until the expiration of the time allowed for re-registration. Wilkinson v. King, 8 South. 189, 81 Ala. 156; Malone v. Bedsole (Ala.) 9 South. 520, 93 Ala. 41; Ames Iron Works v. Chinn, 38 S. W. 247, 15 Tex. Civ. App. 88. The cases cited by appellants do not conflict with these views. In Fassett v. Wise, 115 Cal. 316, 47 Pac. 47, 1095, 36 L. R. A. 505, the mortgage had not been recorded, before removal of the property, so as to make it valid as against creditors or subsequent purchasers. The prevailing opinion of Temple, J., expressly points out that section 2965 is not applicable to such a case as the one there presented. So far as there is any discussion of section 2965 in Fassett v. Wise, both the majority and the dissenting opinions tend to sustain the views here expressed. Ruggles v. Cannedy, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371, merely declares that a chattel mortgage must be recorded promptly in order to make it valid as against certain creditors of the mortgagor. The case throws no light on the question here presented.

We are satisfied that the court below properly entered judgment for the plaintiff upon the facts found.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

151 Cal. 550

## In re CORNELIUS' ESTATE. (Sac. 1,555.)

(Supreme Court of California. July 24, 1907.)

1. Escrows—Delivery—Intent.

A finding of intent to make an absolute delivery is authorized, where one, being ill and expecting to die, presently signed and acknowledged a deed to her stepsons of her interest in her deceased husband's estate, and delivered it to a third person, telling him to keep it till after her death, and then to give it to said sons.

2. Same—Return of Deed.

Where one being ill and expecting to die presently signed and acknowledged a deed to her stepsons, and delivered to B., a third person, telling him to keep it till after her death, and then to give it to said sons, her intent being to make an absolute delivery to B., the deed became an executed conveyance on the delivery to B., so that the subsequent return thereof to the grantor by B., without the consent or knowledge of the grantees, and its destruction by the grantor, did not destroy its effect as a conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Escrows, § 10.]

Department 1. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of H. P. Cornelius, deceased. From an order of distribution, S. B. Smith, administrator of Margaret Cornelius, deceased, appeals. Affirmed.

S. Solomon Hall, for appellant. Hopkins & Hinsdale, for respondent.

SHAW, J. Appeal from an order distributing the estate of H. P. Cornelius, deceased. The question presented concerns only the distribution of the interest in the estate which, upon the death of the deceased, descended to his widow, Margaret Cornelius.

After the death of her husband she signed and acknowledged a deed purporting to convey to her two stepsons, Robert P. Cornelius and John B. Cornelius, her interest in said estate, and delivered it to Charles V. Bartholomew, telling him at the time to keep it until after her death and then to give it to the grantees. She was at that time very ill and expecting to die presently. She recovered from that illness and lived more than three years thereafter. Two years and six months thereafter, Bartholomew, of his own volition and without any request from her, and without the knowledge or consent of the grantees, delivered the deed to her, and some four months thereafter she destroyed it. The court finds from the evidence that at the time of the delivery to Bartholomew Margaret Cornelius parted with all dominion and control over the deed and reserved no right to recall or alter it. The intent of the grantor to make an absolute delivery of the deed to Bartholomew is a question of fact, to be decided largely by inference from the circumstances proved to have occurred at the time. The decision of the court below in regard to this fact is, under the evidence in the case, conclusive.

Upon the facts stated the deed became an executed conveyance upon the delivery to Bartholomew for the grantees. He was thereafter holding for them as their trustee, and for the grantor as her trustee. His duty to her was to withhold it from the grantees during her lifetime, and thus preserve to her, in effect, a life estate in the property. His duty to the grantees was to hold the deed in his possession until her death, and then deliver it to them. His delivery of the deed to the grantor without their consent did not affect the validity of the deed, nor deprive them of their prospective estate in the property. Civ. Code, §§ 1057, 1058. The principles governing this case are fully discussed and decided in Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186. The grantor in that case endeavored to defeat the grant by an unsuccessful attempt to regain possession of the deed by devising the property to another. This difference in the facts does not distinguish that case from the present one. If, after such a conveyance is so delivered that the grantor has no dominion or control over it or right to recall it, he gains possession of it and wrongfully destroys it, there can be no doubt that he cannot profit by his wrongful act, nor deprive the grantees of their interest thereby, without their consent. The doctrine applicable to the case is further illustrated by the decisions in Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304. The cases of Standiford v. Standiford, 97 Mo. 231, 10 S. W. 836, 3 L. R. A. 299, and Williams v. Latham, 113 Mo. 165, 20 S. W. 99, are to the same effect as Bury v. Young. There are inconsistent cases in other states, but the rule in this state is settled by the decisions above cited.

The part of the decree of distribution appealed from is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

151 Cal. 488

## DOEHLA v. PHILLIPS. (L. A. 1,893.)

(Supreme Court of California. July 8, 1907.)

1. JUDGMENTS—DORMANT JUDGMENTS—REVIVAL.

Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33, providing that judgments may be enforced after the lapse of five years from entry by leave of court, on motion, or by judgment for that purpose, founded on supplementary pleadings, but that nothing in the section should be construed to revive a judgment for the recovery of money which was barred by limitations prior to the passage of the act, whether technically retroactive or not, was applicable to all judgments existing at the time the amendment was passed, which were not then barred by limitation.

2. EXECUTION—LEAVE TO ISSUE—NOTICE.

Notice of the time and place of the hearing of an application for leave to have an execution issued on a judgment more than five years after the entry thereof, as authorized by Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33, is not required to be given to the judgment debtor.

3. SAME—LIMITATIONS.

An application for leave to have an execution issued on a judgment more than five years after the entry thereof, as authorized by Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33, is not an action or special proceeding of a civil nature, but a motion in the original action to which the general statutes of limitations do not apply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 161.]

4. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACT—LIMITATIONS.

A judgment debtor having no vested right to a particular statute of limitation until the period fixed has completely run and barred the action, Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33, authorizing the enforcement of judgments after the expiration of five years from the entry thereof, was not invalid as impairing the obligation of contracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 506, 507.]

5. EXECUTION—LEAVE TO ISSUE—APPLICATION—LACHES—DISCRETION.

Where a judgment recovered for money loaned the defendant had never been satisfied, and no reason was shown why in equity and good conscience defendant should not be compelled to pay, it was not an abuse of the trial court's discretion to authorize the issuance of an execution thereon, under Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33, authorizing the enforcement of judgments after 5

**years from the date of entry, though more than 13 years had elapsed since the entry of the judgment in question.**

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 161.]

6. JUDGMENT — REVIVAL — CONSTRUCTION OF ORDER.

Where, on an application for the enforcement of a judgment after the expiration of five years from the date of its entry, the court ordered that the judgment be revived and enforced in the sum of $518.35, with interest from December 30, 1891, a further provision that the total amount due was $995.70, and that plaintiff should recover that amount from the defendant, should be construed merely as an adjudication of the amount of principal and interest then due, and not as requiring payment of interest on anything but the original amount.

7. EXECUTION—VARIANCE.

Where a revived judgment provided for the recovery of the original sum of $518.35, with interest from December 30, 1891, and recited the total as $995.70, an execution requiring the collection of the latter sum, "with interest on the whole thereof" from March 10, 1905, while irregular as requiring the collection of interest from that date on the interest then accrued, was not fatally defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 179.]

8. APPEAL—QUESTIONS REVIEWABLE—PRESENTATION TO TRIAL COURT.

A specification in a notice of motion to withdraw an execution that there was a material variance between the judgment and the execution was insufficient to present an objection to the trial court that the execution was irregular, in that it provided for the collection of compound interest or justify a review thereof on appeal.

9. EXECUTION—LEAVE TO ISSUE—JOINT DEFENDANTS.

Where at the time an execution was granted on a judgment against two defendants one of them had died leaving no property, the other was not prejudiced by the fact that the court did not revive the judgment and authorize execution against the deceased defendant's estate.

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Annie Doehla against T. F. Phillips. From an order granting plaintiff's application for leave to issue execution for the enforcement of a judgment in her favor after the expiration of five years from the entry thereof, defendant appeals. Affirmed.

John W. Kemp, for appellant. Louis Luckel, for respondent.

ANGELLOTTI, J. These are appeals from an order directing the enforcement of a judgment as against appellant, and from an order denying a motion to recall the execution and vacate the former order.

The judgment was made December 30, 1891, and entered December 31, 1891, in favor of plaintiff and against appellant and one Carrie D. Phillips, for $518.25, then due under the terms of a promissory note given by the defendants as joint makers. Nothing was done in the matter of enforcing said judgment until March 10, 1905, when ex parte application was made to the superior court for an order allowing the enforcement thereof. The affidavit of plaintiff was filed on said application. This affidavit showed that no part of the judgment or interest thereon has ever been paid, and that such judgment is wholly unsatisfied. The court thereupon, without notice to appellant, made an order which is substantially one under section 685, Code Civ. Proc., allowing the original judgment to be enforced and carried into execution for the amount then due, as against appellant. An execution was accordingly issued on March 14, 1905. On April 12, 1905, appellant gave notice of his motion to vacate said order and recall said execution on various grounds, which will be noticed hereafter so far as may be necessary. The motion was heard upon the records and the affidavits of plaintiff and appellant. The affidavits before the superior court showed without conflict that the judgment was wholly unsatisfied, that the note upon which the judgment was based was given for money loaned to appellant, and that the other defendant, Carrie Phillips, had died without leaving any property. They were also sufficient to sustain a conclusion that plaintiff is the owner of the judgment, and that she did not know until about March 6, 1905, that either of the defendants owned any property except a certain lot of land which was protected from execution by a homestead declaration. The affidavits failed entirely to show any prejudice resulting to appellant from the delay in enforcing the judgment, of which he can rightly complain.

Prior to the amendment of section 685, Code Civ. Proc., a judgment for the recovery of money could not be revived or enforced in any way after the expiration of five years from the time the judgment became final. Section 681, Code Civ. Proc., restricted the absolute right to an execution to the five years after entry of judgment, the time within which an action could be brought upon a judgment was fixed at five years by our statute of limitations (section 336, Code Civ. Proc.), the writ of scire facias had been abolished (section 802, Code Civ. Proc.), and section 685, Code Civ. Proc., authorizing the judgment to "be enforced or carried into execution after the lapse of five years from the date of its entry," was, by its terms, applicable only to cases "other than for the recovery of money." By amendment taking effect March 9, 1895 (St. 1895, p. 38, c. 33), section 685 was made to read as follows: "In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act." The only change made by this amendment in the original section was the striking out of the words "other than for the recovery of money" after the words "In all cases," and the addition of the proviso as to judgments for money barred by limitation at the time of the adoption of the amendment. The effect of this change was to make the section applicable to every character of case, including actions for the recovery of money.

As has been seen, the judgment here was entered prior to this amendment, but it was not at the time of the passage thereof barred by limitation. It is urged that the amendment should not be held to apply to any judgment for money rendered before its adoption. There can be no question as to the power of the Legislature to make it applicable to all judgments already rendered, and not barred by limitation at the time of their action. The constitutionality of statutes establishing or altering a period of limitation as to contracts then in force is beyond question. Subject always to the limitation that a reasonable time must be allowed for prosecuting a proceeding after the passage of an act establishing or shortening such a period, the power of the Legislature is absolute in such matters. There is in such legislation no forbidden impairment of the obligation of any contract. As said in Terry v. Anderson, 95 U. S. 628, 24 L. Ed. 365, the parties to a contract "have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced, and, as to the forms of action or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain." It was said by this court in Swamp Land District v. Glide, 112 Cal. 85, 44 Pac. 451, that "a man has no vested right in the running of the statute of limitations until it has completely run and barred the action." See, also, 19 Am. & Eng. Ency. of Law (2d Ed.) pp. 167, 168, 171. We think it equally clear that the amendment to section 685 was intended to be applicable to all judgments not then barred by limitation. In addition to the inclusive character of the language used, we have the proviso excepting judgments for the recovery of money then barred by limitation. The making of this sole exception under well-settled rules of construction excludes any other exception, and leaves the amended section applicable to every judgment not included within the exception made. In the case of Mann v. McAtee, 37 Cal. 11, cited by appellant, the question before the court was as to whether section 214 of the practice act as enacted in 1866 (St. 1865-66, p. 704, c. 534), which was the same as section 685, Code Civ. Proc., prior to the amendment, was applicable in the case of a judgment barred by limitation at the time of the enactment of the section. The court said that it could not believe that the Legislature intended in reviving section 214 in its amended form to give new vitality to old judgments long since defunct, and the remedy on which had already been barred by the lapse of time, and therefore construed the act as prospective only in operation, and applicable only to judgments thereafter to be rendered. The distinction between that statute and the one now under consideration is that in the latter there is a provision excepting one class of judgments already rendered, viz., such judgments as are already barred, as was the one involved in Mann v. McAtee, supra, which obviously shows that the amendment was intended to apply to all other judgments already rendered. In Pignaz v. Burnett, 119 Cal. 157, 51 Pac. 48, also cited by appellant, the amendment shortening the time within which an appeal might be taken from 12 to 6 months was construed as not intended to be retrospective in effect. No time whatever was given by this amendment to appeal in those cases in which judgments had been entered for six months or more. The court said that, unless it was absolutely necessary, no intent to thus cut off the right of appeal from judgments already given should be attributed to the Legislature, and concluded that such intent did not necessarily appear. Neither of these cases is applicable here.

It is further claimed that, conceding the applicability of section 685 to money judgments rendered before the passage of the amendment, the relief thereby afforded is barred in this case by the provisions of section 343, Code Civ. Proc., which provides: "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued." We are satisfied that neither this nor any other section of our general statute of limitation is applicable to the procedure contemplated by section 685, Code Civ. Proc. That procedure constitutes neither an "action" nor a "special proceeding of a civil nature" within the meaning of those terms as used in such statute, nor is it in the nature of either. It is a mere subsequent step in an action or special proceeding already commenced, which is governed entirely, so far as the time within which the same may be taken is concerned, by the provisions of the statute specially relating thereto. No limitation of time whatever is prescribed by such provisions; the plain effect of section 685, Code Civ. Proc., being to empower the court to authorize the issuance of an execution upon a judgment at any time after its entry; the time within which the court may so act being without limitation. This was the view expressed by this court in Harrier v. Bassford, 145 Cal. 529, 532, 78 Pac. 1038, where the question was not directly involved. Section 336, Code Civ. Proc., in the general statute of limitations, provides the period within which an independent action may be commenced on a judgment, an action in which the plaintiff upon proving his judgment and its nonsatisfaction is entitled, as a matter of right, to a new judgment. It has no relevancy to the question under consideration here. It may be argued that it is inconsistent that a judgment which is barred by limitation so far as the maintenance of a new action thereon is concerned can, by leave of the court, be enforced by execution, but the Legislature may so provide, and we cannot construe the language of the statute before us otherwise than as showing such provision. Courts are not authorized to make exceptions not reasonably sustainable by the language of a statute. As we have seen, the only exception made by the statute is as to judgments barred by limitation "at the time of the passage of this act." What was said in Merguire v. O'Donnell, 139 Cal. 6, 72 Pac. 337, 96 Am. St. Rep. 91, as to the applicability of section 343, Code Civ. Proc., to the remedy provided by section 708, Code Civ. Proc., the revival of a judgment in the name of the purchaser at sheriff's sale thereunder where he has failed to recover possession of the property purchased in consequence of irregularity in the proceedings, etc., was dictum. The question there presented was as to the applicability in such a case of section 336, Code Civ. Proc., the five-year statute as to judgments, which period had elapsed. The court, in holding the purchaser entitled to the relief sought, declared that it had no application, saying: "There is nothing to indicate that the Legislature intended to control the effect or operation of section 708 of the Code of Civil Procedure, or the remedy under it, by said section 336." So far, at least, as section 685, Code Civ. Proc., is concerned, the same is undoubtedly true as to section 343, Code Civ. Proc. The order for execution is not invalid for want of previous notice of the application. The statute does not require any notice to be given, and the failure of the statute to require notice does not render it void. This is settled by at least two decisions of this court, in each of which the question was directly presented for determination. Bryan v. Stidger, 17 Cal. 270; Harrier v. Bassford, supra. As was pointed out in Bryan v. Stidger, supra, if the defendant has a good defense, or any cause to show against the enforcement of process, he has a plain and speedy remedy in a motion to vacate the order and recall the execution.

We see no force whatever in the contention that in making the order for the issuance of the execution, under the circumstances here appearing, the lower court was guilty of an abuse of the discretion confided to it. Admittedly the judgment, which was for money loaned to the appellant, had never been satisfied in whole or in part, and no reason whatever appeared why, in equity and good conscience, he should not be compelled to pay the same. The failure of plaintiff to earlier enforce the judgment which appellant should and could have at any time voluntarily paid was entirely without prejudice to any of his legal rights, and did not render the granting of the order an abuse of discretion. Under such circumstances it would appear that the exercise of a sound discretion would require the enforcement of the judgment. Wheeler v. Eldred, 121 Cal. 28, 53 Pac. 431, 66 Am. St. Rep. 20, relied on by appellant, was a case where there was no question as to whether there had been an abuse of discretion, the sole contention there being that the court had no discretion to refuse to grant an application under section 685, Code Civ. Proc., for the execution of a decree of foreclosure as to real property, where the decree had not been executed. The court held that the statute was permissive as regards the power given to the court in actions where title to real property is involved, "and that the court must determine in the exercise of a sound discretion whether the dormant judgment shall be enforced." It may be conceded for the purposes of this decision that this is equally true as to judgments in cases not involving title to real property.

What we have said upon the claim as to abuse of discretion sufficiently disposes of the claim that plaintiff was not entitled to the remedy afforded by section 685, Code Civ. Proc., for the collection of his judgment, by reason of laches.

As contended by appellant, the lower court had no power without notice to enter a new judgment against him, but we do not read the order made on March 10, 1905, as doing this. It is ordered thereby "that the said judgment be revived and enforced * * * in the sum of $518.35, with interest from December 30th, 1891." The further provision therein, "that the total amount now due is the sum of $995.70, and that plaintiff do recover of and from said named defendant the said sum of $995.70," was evidently intended simply as an adjudication of the amount of principal and interest then due, and for which execution should issue, and cannot reasonably be construed as requiring payment of interest on anything but the original $518.35. The amount so named was a trifle less than the amount due, as a calculation will demonstrate.

The execution as issued, however, requires the collection by the sheriff of said sum of $995.70, with interest on the whole thereof from March 10, 1905. In this respect the execution was not in accord with the order or judgment, requiring, as it did, the collection of interest from March 10, 1905, on the interest that had accrued on that date. This variance as to the amount to be collected did not, however, render the execution void, but only irregular. 1 Freeman on Execution, § 43; Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404. The only specification in the notice of motion touching the matter was the general specification that there is a material variance between the judgment and the execution heretofore issued pursuant to the said order of this court, and it does not appear that any more particular specification was made on the hearing in the court below. This was not a sufficiently definite specification to bring the matter now complained of to the attention of the lower court and the adverse party at a time when the same might perhaps have been remedied and plaintiff's lien saved for the proper amount due, and we are of the opinion that the appellant should not now be heard upon that matter here.

It is urged that the court had no right to direct the enforcement of the judgment against the appellant without doing the same as to his codefendant. Passing without deciding other arguments made in support of this action of the lower court, it is sufficient to point out that appellant could not be prejudiced thereby in view of the fact that the codefendant had died, leaving no property.

The orders appealed from are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

151 Cal. 497

## BREDFIELD v. HANNON et al. (L. A. 1,890.)

(Supreme Court of California. July 8, 1907.)

MOTIONS—AFFIDAVITS IN OPPOSITION—SERVICE ON MOVING PARTY—NECESSITY.

Where plaintiff obtained leave to have execution issued on a judgment, and defendant filed an affidavit on motion to set aside the order, the court properly permitted plaintiff to file a counter affidavit at the hearing without previous notice or service on defendant; her remedy being an application for time to file an affidavit in rebuttal if desired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Motions, § 42.]

In Bank. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by Jennie Bredfield against J. Hannon and others. From an order granting plaintiff's application for execution on a judgment in her favor, defendant Laura Hannon appeals. Affirmed.

Valentine & Newby, for appellant. F. B. Guthrie, for respondent.

SHAW, J. On September 26, 1891, the plaintiff recovered judgment in the superior court against J. Hannon, Laura Hannon, and E. W. Reid, for $560. Nothing was paid on the judgment, and thereafter, on June 19, 1905, upon application of plaintiff, made without notice to the defendants, or either of them, the court made an order that an execution issue upon the judgment against the defendants, and upon the same day an execution was issued in accordance with the order. Thereafter, upon notice duly given, the defendant Laura Hannon moved the court to set aside the order for the issuance of the execution. The motion came on for hearing upon affidavits and a counter affidavit, and was denied by the court. From this last order, the defendant Laura Hannon appeals.

It is not claimed that the judgment has been paid. At the time it was rendered and for a long time afterward, the defendants had no property, and the issuance of an execution would have been fruitless and would have entailed useless expense. The plaintiff did not discover that the defendant Laura Hannon had acquired any property until a short time before the execution was issued. The following propositions are established in the case of Doehla v. Phillips (this day decided) 91 Pac. 330: (1) The amendment of 1895 to section 685 of the Code of Civil Procedure, whether technically retroactive, as that word is used in section 3, Code Civ. Proc., or not, is applicable to all judgments then existing, and not barred by the statute of limitations at the time the amendment was passed. (2) Notice to the defendants of the time and place of the hearing of the motion for leave to have the execution issued was not necessary. See, also, Harrier v. Bassford, 145 Cal. 532, and Bryan v. Stidger, 17 Cal. 270. (3) The general statutes of limitations apply only to actions and to special proceedings of a civil nature, and they do not apply to motions of this character, under section 685, for leave to issue an execution. The right to make the motion was not barred by any of the provisions of the statute of limitations. (4) The amendment does not impair the obligation of contracts and is not unconstitutional. (5) No abuse of discretion by the court is shown, nor did the delay, under the circumstances, constitute such laches on the part of the plaintiff as to defeat her right to the execution. We will add that there was no error in permitting the plaintiff at the time of the hearing to file a counter affidavit without previous notice or service upon the defendant. If the defendant so desired, she might have asked for further time to file an affidavit in rebuttal, and, if good reason for delay was shown, doubtless the court would have given her time. She did not make any application.

These propositions are decisive of this case, and fully support the action of the court below. We refer to Doehla v. Phillips for a full discussion of the above questions.

The order is affirmed.

We concur: BEATTY, C. J.; SLOSS, J.; ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

151 Cal. 517

## Ex parte MOGENSON. (Cr. 1,314.)

(Supreme Court of California. July 17, 1907.)

HABEAS CORPUS—PROCEDURE—HEARING BEFORE JUSTICE OF SUPREME COURT.

Pen. Code, § 1475, as amended by St. 1907, c. 286, p. 560, provides that, if a prior writ of habeas corpus has been returned or made returnable before a district court of appeal or any justice thereof, no writ shall be issued on a second or other application, except by the Supreme Court or some justice thereof returnable before the Supreme Court or some justice thereof.

*Held* that, if a single justice of a District Court of Appeal has remanded a prisoner on habeas corpus, a single justice of the Supreme Court may not overrule such decision on the return of a new writ issued by him, but the new writ, if issued at all, must be made returnable before the Supreme Court in banc.

Habeas corpus on petition by J. P. Mogenson before the Chief Justice of the Supreme Court. Writ denied.

See 90 Pac. 1063.

A. H. Jarman, for petitioner. R. R. Bell, City Atty., and Beasley & Fry, for respondent.

BEATTY, C. J. The petitioner was convicted upon a charge of violating an ordinance of the town of Los Gatos prohibiting the sale of intoxicating liquors. He sued out a writ of habeas corpus from the District Court of Appeal for the purpose of testing the validity of the ordinance, the sufficiency of the complaint to state a case within the terms of the ordinance, and the sufficiency of the judgment to show a conviction of the offense, if any offense was charged. After a hearing upon the return of the writ that court, in an opinion filed May 27, 1907, overruled all the objections to the validity of the ordinance and the regularity of the proceedings under it, and remanded the prisoner to the custody of the sheriff of Santa Clara county, by whom he was detained in execution of the judgment. 90 Pac. 1063. Subsequently a petition was presented to me, based upon the same objections to the legality of the imprisonment that had been considered and overruled by the District Court of Appeal. Counsel, however, in presenting the petition to me, as Chief Justice of the Supreme Court, did not intend or expect that I should by myself review and overrule the decision of the District Court of Appeal. His desire and request was that I should issue the writ and make it returnable before the court in banc, as I have the power to do under section 4 of article 6 of the Constitution, and section 1475 of the Penal Code. See section as amended March 18, 1907. St. p. 560, c. 286.

For the future guidance of the profession in similar cases, I have deemed it important to state the reason why this course was not pursued. The authority of one justice of this court to make a writ of habeas corpus issued by himself returnable before the whole court was formerly exercised with great freedom—so much freedom, indeed, as to result in a serious detriment to the more important business of the court. It was a favorite method with certain practitioners to present their petitions to some one justice, and often to several different justices in succession, asking for a writ returnable before the court, and, if they could get the writ allowed in that way, the whole court would be compelled, on the day named in the writ, to drop all other business for the purpose of hearing the return to a petition which would never have been granted if the court, or a quorum of the justices, had been consulted beforehand. The evil consequences of this practice were, not alone the interruption to more important business of the court, but the unnecessary expense to counties involved in the production of prisoners at the bar of the court in response to writs issued upon petitions insufficient on their face and often utterly frivolous in the light of the facts developed at the hearing.

In view of these inconveniences, it was long ago agreed among the members of the court that, if a petition was addressed to one justice, he should, if he issued the writ, make it returnable before himself and not before the court, and that, if the party desired a hearing before the court, he should be required to address his petition to the court, so that a majority of the justices could determine whether, upon the matters alleged, it was proper to issue the writ at all, and, if so, when the matter could be conveniently heard. Ever since this agreement was reached I have consistently adhered to the practice indicated. But long as the practice has prevailed it seems not to have been generally understood, and petitions are still, in many instances, addressed to the Chief Justice alone, with the expectation of having a hearing before the court. Heretofore such mistakes have not involved any serious trouble or inconvenience, as they could always be corrected by merely changing a few words in the caption of the petition. But since the amendment to section 1475 of the Penal Code, above cited, it has become more important that the practice in these cases should be generally understood. The effect of that amendment, as I understand it, is to put an end to the practice heretofore prevailing of going from one judge to another of no greater authority, with the same petition for a writ of habeas corpus, in order to secure from one relief that has been denied by another. Among its provisions is the following: "In the event, however, that the prior writ was returned or made returnable before a District Court of Appeal, or any justice thereof, no writ can be issued upon a second or other application except by the Supreme Court or some judge thereof, and such writ must be made returnable before said supreme court or some judge thereof." As I construe this clause of the section, it does not mean that after the District Court of Appeal has, by the unanimous decision of the three judges, remanded a prisoner on habeas corpus, a single justice of this court may issue a new writ upon a similar petition, returnable before himself, and, upon the hearing, overrule the decision of the District Court of Appeal and discharge the prisoner. It means only that, when a single judge of the District Court of Appeal has remanded a prisoner, a single justice of this court may overrule his decision upon the return of a new writ issued by him, but, when the order of remand has been made by the District Court of Appeal, the new writ, if issued at all, must be made returnable before the Supreme Court in banc, where alone rests an authority superior to that of the District Court of Appeal, and where alone its decisions can with any propriety be corrected or reviewed.

Entertaining these views, I very reluctantly issued the writ in this case, making it returnable before myself, but upon an understanding with counsel for petitioner that, unless the court would consent to hear the matter, the proceeding would necessarily be dismissed. My associates having, upon due consideration of the matter declined to order a hearing of the petition before the whole court, the writ was discharged, and the prisoner remanded.

6 Cal. App. 52

## FAIRCHILD v. WHITMORE. (Civ. 343.)

(Court of Appeal, First District, California. June 25, 1907. Rehearing Denied by Supreme Court Aug. 23, 1907.)

Attorney and Client—Claim for Compensation—Evidence.

Defendant, seeking to defeat a claim of an attorney for services on the theory that the services were rendered for a corporation, may show in evidence that the attorney had filed claim for the services rendered against the corporation, which was insolvent.

Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by C. H. Fairchild against Welles Whitmore. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Welles Whitmore and M. C. Chapman, for appellant. William P. Hubbard, for respondent.

KERRIGAN, J. This is an action brought to recover upon a promissory note. The defendant in his answer admitted the execution of the note, and set up in defense a counterclaim for services performed as an attorney and counselor at law. The jury brought in a verdict for the plaintiff, upon which judgment was entered. This appeal is from the judgment and order denying defendant's motion for a new trial.

It is claimed that the trial court erroneously admitted in evidence a certified copy of the claim of the defendant presented to the referee in the matter of the Richards Pump Company, an insolvent debtor. Among other items of services contained in this claim is the following: "Also services and preparation of papers in removal of two directors of said company" (Richards Pump Company). The appellant supported by his own testimony all the items of his bill of particulars, except one, which reads: "Feb. 5, 1904, assisting Wm. P. Hubbard in removing John J. Meyers and C. H. Humphreys as directors of the Richards Pump Company, and electing C. H. Fairchild and H. J. Piersol in their place, $50." This bill of particulars itself, however, was offered and read in evidence. The claim was admitted to meet this item of the bill of particulars, and to show that the appellant for this service had presented a claim against the insolvent corporation. It was respondent's theory that the services of appellant, for which the latter sought, by his counterclaim, to recover compensation, were rendered not for him, but for the Richards Pump Company, insolvent. This claim against that insolvent company, so far as that item was concerned, carried out this theory, and was clearly admissible.

It is also asserted that the court erred in overruling the objection of appellant to the testimony of C. H. Humphreys. This witness was an attorney at law. In answer to a hypothetical question he testified as to the value of the services rendered by appellant. This and other instances, in which it is claimed the trial court erred in admitting evidence, are without merit. The evidence was amply sufficient to support the verdict.

The bill of exceptions was originally settled upon stipulation of counsel by the judge before whom the case was tried. Subsequently, upon motion under section 473, Code Civ. Proc., an amendment to the engrossed bill of exceptions was allowed and settled by the successor of the judge who presided at the trial. The judge who heard the cause was not requested to settle the amendment. It is the contention of the appellant that, until he was requested to do so and refused, his successor was without authority in the matter, and that the amendment must be disregarded. Code Civ. Proc. § 653. It is needless to pass on this question, for we have carefully examined the points discussed in the briefs without reference to the amendment, and from such examination we are satisfied that the judgment and order should be affirmed. It is so ordered.

We concur: COOPER, P. J.; HALL, J.

6 Cal. App. 44

## In re WELCH'S WILL. (Civ. 323.)

(Court of Appeal, First District, California. June 24, 1907. Rehearing Denied July 24, 1907; Denied by Supreme Court Aug. 23, 1907.)

1. Wills—Contest—Motion for Nonsuit.

In determining the question of the sufficiency of the evidence of contestant in a will contest to require the submission of the case to the jury, the court must concede to the jury the right, not only to regard all the testimony of contestant as true, but to draw all reasonable inferences therefrom, and, where the evidence so considered is susceptible of two constructions, contestant is entitled to have the case go to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 769, 773.]

2. Same—Undue Influence.

Undue influence to avoid a will is the use, by one in whom a confidence is reposed by another, of such confidence for the purpose of obtaining an unfair advantage of the weakness of the mind of the latter or of his necessities or distress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 375, 383.]

3. Same—Confidential Relations.

In a suit to set aside a will on the ground of undue influence exercised by the wife of the testator, the confidential relation between husband and wife, though not raising a presumption of undue influence, is important in weighing the evidence in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 383.]

4. Same—Evidence—Question for Jury.

In a suit to set aside a will on the ground of undue influence, evidence examined, and *held* to require the submission to the jury of the question of undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 769.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Petition by Mary Ellen Aston for the revocation of the probate of the will of Richard R. Welch, deceased, in which Bridget Welch, the widow, appeared and filed answer. From a judgment of nonsuit, petitioner appeals. Reversed.

H. C. Wyckoff, for appellant. Charles B. Younger, Jr., and David F. Maher, for respondent.

COOPER, P. J. The last will of deceased was admitted to probate, and Bridget Welch, the widow, appointed executrix thereof. The appellant, Mary Ellen Aston, the daughter of the deceased and the executrix, within the year filed a petition for the revocation of the probate of the will upon the ground of undue influence. The respondent, who is the mother of appellant, filed an answer to the petition, denying the allegations as to undue influence. The case came on for trial upon such issue before the court with a jury. After appellant had introduced her testimony and rested, respondent made a motion for a nonsuit, which was granted, and judgment accordingly entered. The appeal is from the judgment, and presents the question as to the ruling on the nonsuit.

The case presented is entirely different from one in which the lower court has granted a new trial on conflicting or insufficient evidence. Here the jury was a part of the machinery of the trial. It was, in the first place, subject to the revisory power of the court, the judge of the facts. The evidence introduced must, for the purposes of this motion, be all considered as true. It must be given the greatest probative force to which, according to the law of evidence, it is fairly entitled. We must concede to the jury the right, not only to regard all the testimony as absolutely true, but to draw all reasonable inferences therefrom. In Estate of Arnold, 147 Cal. 583, 82 Pac. 252, the rule is thus stated: "In determining whether or not, in a proceeding to contest a will, the evidence produced by the contestants is sufficient to require the submission of the case to the jury, the same rules apply as in civil cases. Every favorable inference fairly deducible, and every favorable presumption fairly arising, from the evidence produced, must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and, if contradictory evidence has been given, it must be disregarded. If there is any substantial evidence tending to prove in favor of contestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits." With the above rule in mind, we will briefly examine the evidence tending to prove that the will was procured by undue influence, or, in other words, that it was not the free and voluntary act of the deceased.

Undue influence has been defined by our court to be the use, by one in whom a confidence is reposed by another, who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage of his weakness of mind, or of his necessities or distress. Dolliver v. Dolliver, 94 Cal. 646, 30 Pac. 4. It must be borne in mind that the undue influence is alleged to have been by the wife, and the relation between husband and wife is confidential. While such confidential relation does not, perhaps, of itself, in this state raise a presumption of undue influence in regard to making a will, yet it is important in weighing the evidence in all cases of this character. In fact, it has been held in some jurisdictions that there is a presumption of undue influence in such cases when such confidential relations exist. The question as to the boundary of legitimate influence must be determined by consideration of the relation between the parties, the character, strength, and condition of each of them, the circumstances of the case, and the application of sound practical sense to the facts of each given case. The mental and physical condition of the testator, and the provisions of the will itself, may be considered. The deceased was 70 years old, and during the last few years of his life was in the habit of using intoxicating liquors at times to excess. He had been in feeble health for some time. The respondent appears to have been the stronger of the two, either mentally or by force of her will power. She took charge of the money of the community, deposited it in banks in her own name, and superintended the affairs generally. The appellant was the only living child, and there were no grandchildren. She married Joseph F. Aston in December, 1882, and has ever since lived with him, but they have no children. The mother opposed the marriage of her daughter to Aston, would not consent to it, and stated that, if she married Aston, he would never get any of the property. She never forgave the daughter for marrying Aston. The deceased was always friendly with his daughter, and often visited her at her home. The will gives the property—quite a little estate—to the respondent for life, making her executrix without bonds, with remainder to appellant for life, and, in case of her death without issue, "all of my said property shall go to the heirs of my said beloved wife." Deceased did not know his wife's relatives, who they were, nor where they resided. The appellant testified that during their married life and up to the time of her father's death her mother controlled him in everything; that her mother insisted upon, and her father did, turn over all the money he earned and all rents to her; that her mother told him what to do and how to do it; that some four or five years before his death he sold some property in Santa Cruz for about $2,400, and her mother deposited the money in the Pajaro Valley Bank in her name; that on an occasion when visiting her father, and when her father was kissing her, the mother told her that she came too often; that her mother would always be present when she visited her father; that her father had blood relations living; and that two of his nephews visited him at his home in Watsonville. The witness Romine, who was a tenant of deceased, testified that, when he paid his rent, the respondent would reach over and take it, and on one occasion she grabbed the money from deceased; that respondent would always direct how the work should be done on the place; that deceased asked the witness at one time when deceased sat down to rest not to mention it to respondent; that on one occasion, when deceased borrowed $3 of witness, he asked him not to mention it to respondent. The witness McCallum testified that a short time before the death of deceased the respondent told witness that she was very anxious that her husband should make his will, and in the same conversation the respondent said she did not wish Mr. Aston to get a dollar. The witness Murphy testified that she was at the Welch home a short time before his death; that Mrs. Welch said he was in a very bad condition, and expressed a desire that he should arrange his business; that in the conversation Mrs. Welch said she wanted control of the property during her life, and then to have it go to her daughter, and then to her people, and used the expression "If it is not that way, I will not have it;" that on one occasion deceased came into the home of witness, and asked for a pen and ink, stating that he wanted to sign a note for a saloon bill, but did not want his wife to know about it.

Respondent was called as a witness for appellant, and testified that deceased never saw any of her relations, and that none of them ever visited at her home. When asked if she was present when the will was signed, she answered, "I certainly was when that will was signed." When asked by her own attorney (Mr. Maher) in cross-examination to state what occurred at the time of making the will, the respondent answered: "You drew the will out and he signed it; after he signed you read it twice to him, and he asked me, 'Are you satisfied with the will, mamma?'" When respondent was asked if she knew beforehand what was going to be put in the will, she said she never heard that he was going to make a will till three hours before. "I was as innocent as a child in the cradle, he said when Mr. Maher read it." When asked if she suggested leaving the property to her relatives, she answered, "Oh, no, no, no; I never spoke to him about them." If deceased never saw any of his wife's relatives, and she never spoke to him about them, or about making the will, it might have appeared to the jury a little singular that the fee of the property should be left to her relatives. The will was made three days before the death of the deceased. The witness Mary Aston testified that the deceased and respondent stopped at her place of business in the afternoon after the will had been made, and respondent told witness about the will having been made and "he had it fixed to suit her."

The witness Faustino testified that Mr. and Mrs. Welch stopped at his store about 5 o'clock in the afternoon of the day the will was drawn; that deceased came up to the counter, put his elbow on the counter, and laid his head on his hand, and witness gave him a little wine; that Mrs. Welch told witness about the will having been made, and said, "I got the will just the way I wanted it."

The appellant testified that she was at the home of her parents on the evening of January 27th, just after the will had been made; that nothing was said to her about a will in any way; that she heard a part of an expression made by her mother to her father which was "don't tell"; that she did not hear of the making of the will until after the death of her father, which occurred January 30, 1904.

About three weeks before his death the testator had a serious attack of neuralgia of the heart, and could not put on his shoes without assistance. No disinterested party appears to have been present when the will was executed. Deceased does not appear to have had any but the most affectionate feeling for his daughter. While feeble and near dissolution, he went with the respondent to the lawyer's office, and was with her and in her presence when the will was executed. Who can say as matter of law that the act was the free and voluntary act of deceased under the circumstances? When the respondent said that the will was as she desired, might not the jury infer and find from all the evidence that it was in fact the will of respondent, acting through the signature of a feeble, dying old man? In a case like thi where a will is made by one in feeble health, just before death, in the hearing and presence of a person of dominating mind, and to suit the interests and purposes of such person, courts and juries should carefully scrutinize every act and circumstance in connection with the matter. In many cases it is utterly impossible to prove the exercise of the influence directly upon the testamentary act, but this is not necessary. The question in all cases is as to whether or not such influence produced the act. It may have been the result of a long course of conduct, fear, or persuasion. A party exerting such influence would not take along witnesses to prove that she had no such influence. Such influence has been exerted in many cases where the party whose influence produced the act was not present at the making of the will. The fact that such a party was present, both in going to, remaining in, and returning from the lawyer's office, is certainly a very potent circumstance.

In Estate of Arnold, supra, the order granting a nonsuit in a will contest was reversed, although the facts and circumstances tending to show undue influence were not of a convincing nature. The court said: "There were circumstances from which it might have been inferred that Leonard had, by these means, obtained great control over the mind and actions of the testatrix, and that he was acting in bad faith, for the purpose of procuring the new will to be made in order to supplant Rosenheim and promote his own advantage. Some of the evidence, it is true, was capable of a different construction, and there was little, if any, direct evidence as to the motives of Leonard, or as to the actual operation of the undue influence. If a jury had, upon the evidence given, found in favor of the disputed will, we might not be disposed to disturb the verdict. Questions involving motives, and inferences to be deduced from circumstances, are, within reasonable bounds, exclusively within the province of the jury, or the trial court when sitting without a jury, and, under the rules regarding the granting of a nonsuit, they must all be resolved so far as possible in favor of contestants. It would not be unreasonable to conclude upon all the facts and evidence before the jury that the will in question was not the natural result of the uncontrolled will of Mrs. Arnold, but the direct result of the fears exerted, false beliefs engendered, and sinister influences exercised over her to that end by William H. Leonard. In such case it is error to grant a nonsuit." It certainly would not be unreasonable to conclude, upon all the facts and circumstances before the jury in this case, that the will was not the natural result of the uncontrolled mind of the old man Welch. In Estate of Tibbetts, 137 Cal. 123, 69 Pac. 978, the verdict of a jury, finding that the will of deceased was the result of undue influence, was upheld. In that case the mother of the testatrix was unfriendly to the contestant, and went with her daughter, the testatrix, to have the will signed, but gave no directions as to its terms at the time. The court said: "After mature consideration of the case at bar we have reached the conclusion that the evidence was not so entirely insufficient to support the finding of undue influence as to warrant us in disturbing the verdict." In Estate of Kendrick, 130 Cal. 360, 62 Pac. 605, it was held that the evidence was sufficient to uphold the verdict of the jury that the will was procured by undue influence. The evidence did not show that the influence was exerted at the very time of the making of the will, but that whispered conversations had occurred between the deceased and her niece. The court, after referring to the facts, and the fact that at the conclusion of the conversations the deceased seemed to have put herself unreservedly in the hands of her niece, and to have been dominated by her, said: "These facts and circumstances, taken with the admittedly mental and physical condition of the testatrix, we think must be held sufficient to justify the verdict of the jury."

In the case at bar the facts that the deceased was feeble, and somewhat addicted to the use of intoxicating liquor; that he was dominated by the respondent; that he made his will just three days before he died; that respondent was with him at the time and the will was made in her favor; that respondent said to third parties that she had the will to suit her; that deceased left the fee of the real estate to his wife's relatives, whom he did not know and had never seen, to the exclusion not only of his own relatives but to the exclusion of his only daughter; that respondent entertained a strong dislike to the husband of the daughter; that deceased had always been friendly to the daughter and her husband; that the daughter was not spoken to about the will, and respondent desired to keep the fact of its having been made from the daughter—in our opinion would amply sustain a verdict finding that the will was produced by undue influence.

The judgment is reversed.

We concur: HALL, J.; KERRIGAN, J.

(6 Cal. App. 67)

GABLE et al. v. PAGE et al. (Civ. 324.)

(Court of Appeal, Second District, California. June 26, 1907. Rehearing Denied by Supreme Court Aug. 23, 1907.)

1. APPEAL—TIME OF TAKING.

An appeal from a judgment taken 10 months after entry thereof cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1879.]

2. JUDGMENT—RES JUDICATA.

The validity of the trust cannot be questioned by defendants in an action to quiet title to land held by plaintiff under a trust established in a prior action brought by one to whom defendants are privies.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Mary A. Gable, trustee, and others, against Elias C. Page and others. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Dismissed and affirmed.

E. T. Cosper, for appellants. T. E. Clark, for respondents.

SHAW, J. This is an action to quiet plaintiff's title to lands which she holds under a trust established by a final judgment and decree rendered several years prior to the institution of this suit. The appeal from the judgment herein was taken 10 months after the entry thereof; hence cannot be considered. Hunter v. Milam, 133 Cal. 601, 65 Pac. 1079.

It is not urged that any errors of law occurred at the trial to which exception was taken, nor are the findings attacked as being unsupported by the evidence. Appellants' argument is confined to an attack upon the validity of the trust, the existence of which it is conceded was found and adjudged by the court. Admitting its establishment by this adjudication, the point becomes one of law to be considered upon an appeal from the judgment only. Hunter v. Milam, supra; Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62. Thus considered the grounds upon which it is claimed the trust is void might properly have been, and presumably were, urged in the suit wherein it was made an issue. The court there having, by its decree, established it, appellants, who are privies to the plaintiff in that action, must be held bound by such judgment. "The judgment may be grossly unjust or erroneous, but the decision of the court as to all issues involved in the action stands as a finality between the parties and their privies until set aside in some mode recognized by law." Page v. Garver (Cal.) 90 Pac. 481.

The appeal from the judgment is dismissed, and the order denying appellants' motion for a new trial is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 708

## BAKER & HAMILTON v. LAMBERT. (Civ. 348.)

(Court of Appeal, First District, California. June 11, 1907.)

Pleading — Evidence—Admissible Under—Nonjoinder of Parties—Waiver.

Under Code Civ. Proc. § 433, providing that, when a defect of parties defendant does not appear from the complaint, objection must be taken by answer, and section 434, providing, if no objection be taken, the defendant is deemed to have waived the same, the allegations of a complaint against a single defendant as to an individual indebtedness may, in the absence of a plea of nonjoinder by defendant, be supported by evidence of a partnership indebtedness, defendant being one of the partners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1237.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Baker & Hamilton against G. W. Lambert. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Reversed.

Page, McCutchen & Knight, for appellant. William H. Johnson, for respondent.

COOPER, P. J. This is an appeal from a judgment in favor of defendant, and from an order denying the plaintiff's motion for a new trial.

The complaint contains the common counts, alleging in various forms that the defendant is indebted to the plaintiff in the sum of $575.28 for goods, wares, and merchandise, sold and delivered by plaintiff to defendant at his special instance and request. Upon the trial the evidence showed that a partnership had existed between the defendant and one Lipsett. Plaintiff then offered testimony tending to show a sale of the goods and merchandise to the partnership. The defendant objected to the offered testimony, on the ground that under the pleadings the proof of a partnership indebtedness was inadmissible, and the court sustained the objection.

The question presented for decision is as to whether the allegations of the complaint as to an individual indebtedness can, in the absence of any plea of nonjoinder by defendant, be supported by evidence of a partnership indebtedness; the defendant being one of the partners. The precise question does not appear to have been decided in this state, and is an important one. We are of opinion that the evidence was admissible. The indebtedness was the joint indebtedness of both the partners. The complaint, therefore, should have been against both, as they are united in interest. Code Civ. Proc. § 382. The Code provides (Code Civ. Proc. § 430) that the defendant may demur to the complaint when it appears upon the face thereof that there is defect of parties defendant. It does not appear upon the face of the complaint that there is such defect, and hence the point could not have been raised by demurrer. It is further provided (section 433) that in such case the objection may be taken by answer. Then follows section 434, which provides: "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same." The defendant, knowing the fact that his partner was not joined, should have raised the question of such nonjoinder by his answer, if he desired to rely upon it. The provisions of the Code in regard to the matter are simple and easily followed. The object is to require the parties in good faith to state the matters and things relied upon so as to inform the adversary of the issues to be tried, with a view of disposing of cases upon their merits. It is with this object in view that courts must construe pleadings with reference to the Code, so that neither party may gain an unfair advantage over his adversary. With the provisions of the Code cited before his eyes, the defendant cannot be allowed to lull his adversary into repose, and, for the first time, raise the point which was at all times within his knowledge, but which he waived by not alleging in his answer. Having remained silent when he should have informed the plaintiff, he will be precluded from speaking afterwards. The rule was the same at common law.

In Rice v. Shute, 5 Burr. 2611, the judgment of the King's Bench was given by Lord Mansfield. On the trial evidence was given that one Cole, who had not been made defendant, was a partner of Shute, and thereupon on motion of the defendant the lower court gave judgment of nonsuit against the plaintiff. The nonsuit was set aside, and the court held that, as the defendant had not pleaded the matter in abatement, he had waived it. The above case was followed by Chief Justice Marshall in Barry v. Foyles, 1 Pet. (U. S.) 311, 7 L. Ed. 157. It was there said: "If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it at the trial. The course of decisions since the case of Rice v. Shute has been so uniform that the principle would have been considered as too well settled for controversy had it not lately been questioned by a judge from whose opinions we ought not lightly to depart." Rice v. Shute was again followed and approved by the Supreme Court of the United States in Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. Ed. 783. The opinion was by Judge Field, and it is there said: "It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the nonjoinder of his copartners, a recovery may be had against him for the whole amount due upon the contract." In 15 Encyclopedia of Pleading and Practice, p. 98, the rule is stated as follows: "Where one partner is declared against, and nonjoinder is not pleaded in abatement, proof of a partnership contract is not a variance, as partnership obligations are to this extent regarded as joint and several." See, further, Abbott v. Smith, 2 W. Black. 925; Woodworth v. Spafford, 2 McLean, 168; Fed. Cas. No. 18,020; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Wilson v. McCormick, 86 Va. 995, 11 S. E. 976; Smith v. Cooke, 31 Md. 174, 100 Am. Dec. 58. In the cases of Williams v. Southern Pacific R. R. Co., 110 Cal. 457, 42 Pac. 974, it was held that, in the absence of a plea of misjoinder, one member of a copartnership may recover in his individual name the whole amount due the firm of which he was a member. That case was approved and followed as to the same point in Ah Tong v. Earle Fruit Co., 112 Cal. 679, 45 Pac. 7. It would seem upon principle that if, in the absence of a plea of misjoinder, in abatement, an individual as plaintiff can recover upon a liabilty due a partnershp of which he is a member, a recovery could under like circumstances be had against him as defendant upon a partnership liability due from a partnership of which he is one of the partners. A case very much like the case at bar is Kerry v. Pacific Marine Co., 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65. The action was there brought against one of the part owners upon a contract relating to the ship, which should have been brought against all the owners jointly, and it was held that the action would lie in the absence of a plea by the defendant of the misjoinder of the other part owners. It would require a great deal of imagination to give a reason why, if a part owner of a vessel cannot claim a misjoinder because he has not availed himself of it by proper plea in abatement, a member of a partnership can under like circumstances claim such misjoinder.

We have examined the cases cited by defendant; and, while there are in many of them expressions which tend to support his position, we do not think any one of them is direct authority for the proposition contended for by defendant here. The one upon which most reliance is placed is McCord v. Seale, 56 Cal. 264. It was stated there in broad terms that the proof of a partnership contract would not sustain the allegation of the complaint as to an individual contract; but the report of the case shows that the answer contained, besides a general denial, "a separate defense of a partnership existing between the plaintiffs under the firm name of McCord & Malone at the time of the alleged transaction between them and the defendant." The case is decided upon the theory that the point was properly raised in the answer. The question of waiver is not mentioned in the opinion.

It follows that the judgment and order should each be reversed; and it is so ordered.

We concur: KERRIGAN, J.; HALL, J.

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5 Cal. App. 702

## HERCULES OIL REFINING CO. v. HOCKNELL et al. (Civ. 345.)

(Court of Appeal, Second District, California. June 7, 1907.)

1. Corporations — Officers — Liability — Constitutional Provisions.

Const. art. 12, § 3, providing that directors of corporations shall be liable for "all moneys embezzled or misappropriated" by the officers thereof, etc., makes the directors sureties of officers who are guilty of misappropriating corporate moneys, and the liability created is that of suretyship only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1350–1355.]

2. SAME.

An officer of a corporation having no authority to sell stock, and having no stock belonging to the corporation to sell, and owning stock, sold stock at 20 cents a share, and received the money therefor without accounting to the corporation. He used treasury stock for which he had paid 2 cents per share to make delivery on such sales. *Held*, that the directors of the corporation were not liable for the officer's act under Const. art. 12, § 3, providing that the directors of corporations shall be liable for all moneys misappropriated by the officers thereof, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1350–1355.]

3. TRIAL—NONSUIT—WHEN AUTHORIZED.

A nonsuit should be denied, where the evidence and the presumptions arising therefrom are legally sufficient to prove the material allegations of the complaint, and in other cases it should be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 332–344, 360, 373.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the Hercules Oil Refining Company against George Hocknell and others. From a judgment for defendants, plaintiff appeals. Affirmed.

E. B. Drake and Jones & Drake, for appellant. A. M. Cates and Geo. A. Corbin, for respondents.

TAGGART, J. This is an action to recover from defendants, as directors of the corporation plaintiff, moneys of the corporation alleged to have been embezzled and misappropriated by an officer of the corporation during the term of office of said directors. The officer who was charged with the misappropriation (defendant Hocknell) was not before the court, but the other defendants appeared and defended, and, as to them, and each of them, the court granted a motion for a nonsuit. Plaintiff appeals from the judgment and presents a bill of exceptions on the ruling of the court granting the nonsuit.

The charge against Hocknell, as president, rests upon the following facts, to wit: On November 25, 1902, the board of directors of plaintiff adopted a resolution authorizing and empowering the defendant B. L. Vickrey, as secretary of the company, to sell and dispose of all the remaining treasury stock of plaintiff (being 130,000 shares of the par value of $1 per share) at the best price obtainable in the market. November 26, 1902, 13 certificates (Nos. 1,718 to 1,730, inclusive) of said stock for 10,000 shares each, were issued to C. Walton Cannon, a broker in New York city, and forwarded to him for sale. He did not sell any of the stock, but under date of August 31, 1903, an entry was made in the books of the company by the bookkeeper, at the direction of Hocknell, in the name of W. H. Cannon (conceded to be intended for C. Walton Cannon): "To capital account, 130,000 shares of the capital stock of Hercules Oil Refining Company, two cents. See minutes of meeting of board of directors, 11, 25, 1902. $2,600.00." Hocknell procured the stock certificates from Cannon personally while in New York city at least as early as June 15, 1903, and "when he returned from the East" told the secretary of the company that he (Hocknell) had bought the stock at two cents a share and "turned in $2,600 for the stock." He did not say who he bought it from, but the secretary (who was empowered to sell) testified that he considered he (the secretary) had sold the stock to Hocknell at two cents per share; that being the best price obtainable at the time, and because the company needed the money. He further testified: "I felt I was doing the company a favor to get two cents for the stock," and that "there would soon be an assessment on the stock of 10 or 15 cents a share." There was no transfer of any of the Cannon stock to Hocknell on the books of the corporation. In the latter part of 1902, or the first of 1903, Hocknell sold to Alexander Campbell 25,000 shares of the capital stock of the Hercules Oil Refining Company and received $5,000 cash therefor. On June 15, 1903, Hocknell forwarded from Ocean Park three certificates of stock, one (No. 1,762) for 7,105 shares in the name of George Hocknell, two (1,718 and 1,719) for 10,000 shares in the name of Walter Cannon. Later, September, 1903, three certificates in the name of Campbell for 5,000, 10,000, and 10,000 shares, respectively, were substituted for the original certificates. About the same time Campbell purchased, Fred A. Pennell also bought from Hocknell 1,000 shares, for which he paid $200 cash, and by letter dated at Ocean Park on June 15, 1903, received a certificate for it in the name of George Hocknell. Later, on September 10, 1903, he received a certificate in his own name in lieu of the Hocknell one. Thomas B. McPherson, on October 25, 1901, bought 6,250 shares of stock from George Hocknell and paid him $1,250 for them, and again on the 23d day of January, 1903, made another purchase of a similar amount for the same price. The first certificates of stock sent to him were in his name and bore date September 3, 1903. Each block of stock was paid for on the date of its purchase. Mr. J. W. Hupp bought 10,000 shares of stock from Hocknell, and paid $2,000 cash for them, but does not give the date of purchase. The stock certificate was issued in his name and received about September 6, 1903. The circumstances appear to justify the inference that this purchase was made about the same time that Campbell and Pennell purchased. All of these purchasers bought from Hocknell and knew nothing, apparently, of whether the stock purchased was treasury stock or stock belonging to Hocknell. The evidence does not disclose how much of the residue of the 600,000 shares of the capital stock of the corporation was held or owned by Hocknell, either at the time of sale or the time of delivery of the stock sold by him. The books of the company show that the certificates for the 48,500 shares issued to these four purchasers in their respective names in September, 1903, were all by transfer and cancellation of the Cannon certificates to that amount, and that the residue of the 130,000 shares, 81,500 shares, was sold to one B. M. Frees. The latter sale is not material to this action. The time at which the secretary accepted Hocknell's declaration that he had bought the stock, as a sale thereof, is stated with much uncertainty in the testimony. "Sometime in July, if I remember correctly," and "after he returned from the East with the stock," cover Mr. Vickrey's recollection of the matter. The letter from Hocknell to Campbell shows he had the Cannon certificates at Ocean Park as early as June 15, 1903, and was assuming to deal with them as his own. There was nothing on the books of the company until August 31, 1903, to show that he (or any one else) had bought them.

It is admitted that the motion for a nonsuit was properly granted upon the first cause of action, which counted on a participation of the other defendants with Hocknell in the transactions complained of; but appellant claims that there was a sufficient showing made of the liability of the defendants other than Hocknell, under section 3 of article 12 of the Constitution of the state of California, to avoid the granting of a nonsuit as to such defendants on the second cause of action. The section of the Constitution invoked merely makes the directors sureties for their fellow directors and for the officers of the corporation for "moneys," when so misappropriated as to make the officer misappropriating liable, and authorizes the creditors and stockholders to sue. * * * The section is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss. But the liability created is that of suretyship, in which the innocent always suffers for the guilty, and therefore the surety may always stand upon the very letter of his bond. For this reason the liability must be limited strictly to moneys misappropriated. Winchester v. Howard, 136 Cal. 444, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153.

The allegation of the complaint is to the effect that said defendant Hocknell did, on or about January 15, 1903, misappropriate the sum of $8,730 of plaintiff's funds. The evidence to support this shows that in the latter part of 1902, or the first part of 1903, Hocknell received from Campbell $5,000, from Pennell $200, and from Hupp $2,000. That he received $1,250 from McPherson in October, 1901, and $1,250 in January, 1903. The October, 1901, payment by McPherson is apparently not included in the sums alleged to have been misappropriated. At this time the Cannon stock was in New York city in the hands of Cannon for sale, subject to the direction of the secretary of the company. The first connection between Hocknell and this stock appears when he, on June 15, 1903, assumed to send two of the certificates therefor (1,718 and 1,819) from Ocean Park to Campbell on account of the sales of stock made to the latter about five or six months before. If Vickrey's fixing of dates is correct, the next is when he told Vickrey he had bought the Cannon stock, and the latter accepted him as the purchaser thereof, after his return from the East about July. The circumstances surrounding these transactions might justify a finding that the return mentioned was at least as early as June 15, 1903, thus accounting for the stock being in Hocknell's possession on that date after he had purchased it. Giving the inconsistency between the assumption of ownership of the stock by Hocknell June 15, 1903, and Vickrey's testimony that it was in July, all the consideration rationally possible, and it cannot to be said that the trial court should have done more than to hold for the purpose of the nonsuit that Hocknell took control of the Cannon stock as early as June 15, 1902. We find, then, that he sold stock of the Hercules Oil Company at 20 cents in January, and that about five months thereafter he used the treasury stock of the corporation, for which he paid but 2 cents per share to the company, to make delivery on such sales. The date of the purchase from the secretary was either in June or July, and some uncertainty exists as to whether he made this purchase before or after he had used the stock for the purpose named. This stock was never registered in the name of Hocknell in the books of the company, but transferred to Hocknell's vendees upon cancellation of the Cannon certificates, and a record of the purchase of the stock in Cannon's name did not appear upon the books until August 31, 1903.

Conceding that the lack of certainty in the evidence as to the transactions from June to September was sufficient to arouse a suspicion or put the company upon inquiry as to these matters, there is no evidence to justify an inference that the money received in January belonged to the company. At that time the Cannon stock was in New York. Hocknell had no stock of the corporation to sell, and was not authorized to sell any on the company's account. There was no stock belonging to the company under his control that he could have fraudulently sold. The company could not have been compelled to deliver any stock to make good these sales. There is nothing in the evidence to show that the transactions were anything more than sales by Hocknell for future delivery made on his own individual account. A misrepresentation to his purchasers as to the stock he had or was authorized to sell would have been a fraud upon them, and not upon the company, and the taking of funds so received would not have been a misappropriation of moneys of the corporation. There is not a scintilla of evidence from which the inference can be reasonably drawn that when the sales were made in January Hocknell expected to acquire the Cannon stock to make delivery therefrom on these sales. If there were, the transaction would have been good as to the company, if it be shown that Hocknell paid the full value of the stock at the time of purchase. The transactions as to the stock after Hocknell's return from the East appear from Mr. Vickrey's testimony to have been carried out in good faith, and the company's interest properly looked after, and the full value of the stock at the time of sale obtained. Even the burden put upon accounting trustees was fairly met, and this all appears as part of plaintiff's case. Mr. Vickrey's testimony was uncontradicted and was entitled to, and no doubt did, receive full weight and credit from the trial court in granting the defendants' motion for a nonsuit.

A nonsuit may be granted by the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. Code Civ. Proc. § 581, subd. 5. The rules as to nonsuit are the same whether the trial is by the court or by a jury. Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392, 394, 73 Pac. 172. The motion admits the truth of all the plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and the evidence should be interpreted most strongly against the defendant. Goldstone v. Merchants', etc., Co., 123 Cal. 625, 56 Pac. 776; Hanley v. California, etc., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597. Whatever facts relevant to the issue the evidence tended to prove on plaintiff's behalf must be regarded as proved (Ferris v. Baker, 127 Cal. 520, 59 Pac. 937), and the sufficiency or insufficiency of the evidence tending to sustain plaintiff's case cannot be considered (Zilmer v. Gerichten, 111 Cal. 77, 43 Pac. 408). All of these shadings of the rule, we think, mean simply that a nonsuit should be denied where the evidence, and the presumptions reasonably arising therefrom, are legally sufficient to prove the material allegations of the complaint, and that it should be granted where they are not. Goldstone v. Merchants', etc., Co., supra. To avoid a nonsuit, the evidence of the plaintiff must be sufficient to raise more than a mere surmise or conjecture that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists. Janin v. London & S. F. Bk., 92 Cal. 27, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82.

Measured by these rules, the evidence failed to show any misappropriation of moneys belonging to the plaintiff by Mr. Hocknell, and the nonsuit was properly granted.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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5 Cal. App. 748

## HIGGINS et al. v. LOS ANGELES RY. CO.

(Civ. 357.)

(Court of Appeal, Second District, California. June 18, 1907.)

1. APPEAL—REVIEW—TRIAL—JUDGE'S OPINION.

The reasons assigned by a trial judge for his conclusions upon the final determination of a case embodied in an opinion constitute no part of the record on appeal, and, though such an opinion may be cited and referred to in argument as a means of assisting the court in reaching a correct solution of the questions submitted, a proper ruling will not be disturbed because the court reaches its conclusions by erroneous reasoning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3408.]

2. SAME—RECORD—INSUFFICIENT PRESENTATION.

Supreme Court rule 29 (78 Pac. xii), requiring appeals from superior court orders, that the papers and evidence used on the hearing of a motion for new trial to be authenticated by incorporation in a bill of exceptions, etc., provides the only method by which affidavits used on a motion for new trial may be presented on appeal from the order on the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2416.]

3. SAME—REVIEW—CONCLUSIVENESS OF FINDING.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3983.]

4. STREET RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

Decedent was guilty of contributory negligence barring recovery for his death, where at night he attempted to cross a street railway track in front of a moving car, when it was from 8 to 15 feet distant, the headlight plainly visible, and the gong ringing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 207.]

5. APPEAL—REVIEW—HARMLESS ERROR.

Any error in excluding testimony was cured by its admission afterwards.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4200.]

6. SAME.

In an action for a pedestrian's death caused in collision with a street car, any error in excluding evidence for plaintiff as to the car's speed was harmless, where the death resulted from contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4187.]

7. TRIAL—INTRODUCTION OF EVIDENCE—REBUTTAL.

Where, in an action for the death of a pedestrian attempting to cross a street car track at night, plaintiff offered testimony as to the absence of signal lights at the place, at the close of defendant's case, it was not error to exclude similar testimony; the evidence being not in rebuttal, and no reason being given tending to appeal to the discretion of the court, nor excuse given for not offering the testimony when the other was given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 151.]

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by Linna A. Higgins and others against the Los Angeles Railway Company. Plaintiffs appeal from a judgment for defendant. Affirmed.

A. D. Warner and Ansel Smith, for appellants. Bicknell, Gibson, Trask, Dunn & Crutcher (Norman S. Sterry, of counsel), for respondent.

SHAW, J. On the night of December 6, 1904, John T. Higgins, while crossing Central avenue at its intersection with Sixth street in the city of Los Angeles, was struck by an electric street car operated by the Los Angeles Railway Company, receiving injuries which caused his death on the following morning. His widow in her own right and as administratrix of his estate, and also as guardian ad litem of his minor children, instituted this action against said railway company to recover damages claimed to have been sustained on account of his death. Judgment was rendered for defendant, from which, and an order denying a motion for a new trial, plaintiff prosecutes this appeal.

The complaint charges that the death of the deceased was due to the negligence of said railway company in making and leaving unprotected certain excavations along its tracks at the intersection of said Central avenue and Sixth street, into one of which excavations said Higgins stepped while attempting to cross said avenue in the nighttime while the same was unguarded by signal lights and in the absence of any warning as to its dangerous condition, and from which he was unable to extricate himself before being struck by a car operated over the track at said point at a high, dangerous, and reckless rate of speed, and thereby received injuries which caused his death. The answer is a general denial, with an allegation that the death of said Higgins was due to his own carelessness and negligence, which directly contributed to the collision which caused his death.

The transcript contains certain affidavits which purport to embody the opinion of the trial judge, delivered orally at the close of the trial. It is claimed that these affidavits incorporating this opinion were used in support of the motion for a new trial, and the reasoning of the trial judge in determining the case in favor of respondent is assigned as error and here strenuously urged as a ground for the reversal of the order denying appellant's motion for a new trial. The reasons assigned by the trial judge for his conclusions upon the final determination of a case constitute no part of the record on appeal. However erroneous the reasoning may be, error cannot be predicated thereon. Such an opinion may be cited and referred to in argument, and thus be the means of assisting the court in reaching a correct solution of the questions submitted; but a proper ruling will not be disturbed because the court reaches its conclusions by a process of erroneous reasoning. "If this court finds that upon any ground or for any reason the action of the court below was correct, such action will be affirmed, regardless of the reason which the court may have given for it." White v. Merrill, 82 Cal. 14, 22 Pac. 1129; Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. 448. The affidavits cannot be considered on appeal from the order denying the motion for a new trial, because they are not incorporated in a bill of exceptions as required by rule 29 of this court (78 Pac. xii), which provides: "In all cases of appeal from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law." The law provides no other mode. Hence, their incorporation in a bill of exceptions is the exclusive method of presenting such affidavits to this court for its consideration upon an appeal from an order denying a new trial. Skinner v. Horn, 144 Cal. 278, 77 Pac. 904. The affidavits in question, as printed in the transcript (after title of court and cause) are entitled: "Affidavits of A. D. Warner, Linna A. Higgins, Joseph Tilley, on Motion for New Trial." And are indorsed "Used on Motion for New Trial. G. A. Gibbs, Judge." Following these affidavits there is printed in the transcript a counter affidavit entitled, "Affidavit of Geo. A. Gibbs on Motion for New Trial," with a like indorsement. While it is reasonably certain that these affidavits were used at the hearing of the motion for a new trial, it does not appear that such affidavits were the only ones so used. Shain v. Eikerenkotter, 88 Cal. 13, 25 Pac. 966; Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491.

Counsel for appellant, while contending in a general way that the evidence is insufficient to justify the findings, does not direct our attention to any specific finding thus unsupported, or point out wherein the evidence is insufficient. His argument is directed to a vigorous attack upon what he terms the "system of ratiocination" by means of which the learned trial judge arrived at his conclusion in deciding the case. As we have seen, this "system" is not a subject of review by this court.

The court, in effect, finds that the excavations made by the defendant in repairing its track were not large, deep, or dangerous; that defendant placed lights at each excavation to warn travelers of its presence; that defendant was not negligent in making or leaving said excavations, nor in the manner of placing its lights to warn persons of the existence of the same; that the deceased did not step or stumble over or into any excavation; and that none of said excavations caused or contributed in any manner to the collision between deceased and the defendant's car. As to all of these findings there was, taking the most favorable view to appellant, a substantial conflict of evidence, and hence the finding of the court will not be disturbed. Having made the above finding, the court further found, upon the issue of contributory negligence alleged in the answer, "that said collision between the said John T. Higgins and the said car of said defendant, and his death resulting therefrom, were caused wholly and entirely by the fault, carelessness, and negligence of said John T. Higgins, and without any fault, carelessness, or negligence upon the part of the said defendant or any of its servants, agents, or employés"; and further, by finding 8, "that the said John T. Higgins was guilty of negligence which directly and proximately contributed to the collision between himself and the said car, and his death resulting therefrom." In support of these findings, one Newton, who was walking north on Central avenue, testifying on behalf of plaintiff, says: "When I got within about 50 feet of Sixth street, I saw a car coming towards me on Central avenue, and I saw a man coming diagonally across Sixth street. I saw the man by the light of the headlight. I think I was about 50 feet from him when he was hit." He further said that he could see the hole into which the man stepped from that distance, and that deceased was in as good a position to see the hole as he was. "His range of vision," says the witness, "was better than mine, and he ought to see it better than I did. The car was anywhere from 8 to 10 feet from the man when I first saw him." He further says that the man stumbled across a pile of dirt when he was 8 or 10 feet from the car; that the man seemed to stumble over a pile of dirt between the two tracks, there being double tracks on Central avenue, and the deceased having crossed the east track, the injury occurring on the west line of track upon which the car was traveling south. No other evidence was offered upon this point by plaintiff. The uncontradicted evidence of the motorman is that he rang the gong twice as the car came into Sixth street; that the deceased was 10 to 15 feet in front of the car when he first saw him; that upon seeing him he rang the gong and shouted and applied the air hard to his brake; that deceased paid no attention, but jumped on the track in an attempt to cross, without increasing his pace, and when he reached the west rail of the west track the car hit him. Another witness, who was in the car, testified that he saw deceased suddenly walk into the rays of the headlight about 10 to 15 feet from the car and in the act of stepping across the east rail of the west track. Other uncontradicted evidence was to the effect that deceased seemed preoccupied and apparently unconscious of the near approach of the car; that "he didn't seem to see or hear anything. He seemed to be in deep thought. That was the appearance to me when he went between the tracks."

It thus conclusively appears by appellant's testimony the car was 8 to 10 feet, and by that of defendant, 10 to 15 feet, distant from the point where deceased first stepped upon the east rail and was struck by the car when he had reached the west rail of the track. The headlight, plainly visible, and the ringing of the gong, was notice and warning of the approach of the car, and the court might well conclude from the evidence that the deceased failed to exercise that degree of care and prudence ordinarily exercised by men possessing those qualities. The evidence justified the finding of the court as to contributory negligence on the part of appellant's intestate. Bailey v. Market Street Ry. Co., 110 Cal. 320, 42 Pac. 914; Portsmouth Street Ry. Co. v. Peed's Adm'r (Va.) 47 S. E. 850; Jewett v. Paterson Ry. Co., 41 Atl. 707, 62 N. J. Law, 424; Schwanewede v. North Hudson Ry. Co., 51 Atl. 696, 67 N. J. Law, 449.

As to errors excluding testimony, the court sustained defendant's objection, upon the ground that he was not an expert, and no foundation was laid, to a question asked of witness Newton as to how fast the car was running at the time deceased was struck. Later the witness testified that the car was running 25 to 30 miles per hour. Conceding that the court erred in sustaining defendant's objection to the question asked as to the speed of the car when the collision occurred, it was cured by the fact that he subsequently answered it. Harrington v. Los Angeles Ry. Co., 140 Cal. 525, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. Witness Rowe was asked a similar question, to which the court sustained defendant's objection made upon like grounds. Admitting, but not holding, this ruling to be error, it could not have prejudiced appellant, in view of the finding that the injury resulting in the death of deceased was due to his own negligence. Wolfskill v. Los Angeles Ry. Co., 129 Cal. 114, 61 Pac. 775; Sego v. Southern Pac. Co., 137 Cal. 405, 70 Pac. 279. Five witnesses testified that the car was running at a speed not to exceed eight miles per hour. Had the testimony of Rowe upon this point been admitted, and conceding that his evidence and that of Newton had justified the court in finding that the car was running at a speed of 25 or 30 miles per hour, could such fact have warranted the court in finding otherwise than it did upon the question of contributory negligence? Assuming the evidence tendered by plaintiff as to the speed of the car, of the exclusion of which appellant complains, had been admitted, deceased would still have been guilty of contributory negligence. It is manifest that the reception of this evidence could not have changed the result, and therefore appellant suffered no injury by reason of said ruling. Code Civ. Proc. § 475; Est. of Morey, 147 Cal. 495, 82 Pac. 57.

At the close of defendant's evidence, plaintiff called Alex Geddis in rebuttal and asked: "Was there any lights or lamps or lanterns anywhere at the intersection of Sixth and Central avenue at that time (7:30 p. m.) that night?" The court sustained respondent's objection thereto upon the ground that the testimony sought to be elicited by the question was not rebuttal. In presenting her evidence in chief, appellant offered several witnesses who testified to the absence of signal lights at the point in question. No excuse was suggested for not calling this witness at that time. The evidence tendered was not in rebuttal, and no reason was offered calculated to appeal to the discretion of the court, or which would warrant any other ruling than that made. Patterson v. San Francisco, etc., Ry. Co., 147 Cal. 178, 81 Pac. 531.

The order and judgment appealed from are affirmed

We concur: ALLEN, P. J.; TAGGART, J.

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5 Cal. App. 722

### NEWSOM v. WOOLLACOTT. (Civ. 347.)

(Court of Appeal, Second District, California. June 14, 1907.)

1. Pleading—Judgment on Pleading.

In an action for services performed, where defendant pleaded an accord and satisfaction, and inserted in his answer a check, which he alleged was given to defendant as payment of his claim, the failure of plaintiff to serve and file an affidavit denying the check, as provided in Code Civ. Proc. § 448, was only an admission of the genuineness of the check, and not an admission of accord and satisfaction, or that the check related in any way to the transaction sued on, all of which, under the express provisions of Code Civ. Proc. § 462, must be deemed to be controverted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 864–879.]

2. Pleading — Answer — Written Instrument—Failure to Deny Execution.

Code Civ. Proc. § 448, makes the failure of a party to deny by affidavit the genuineness and due execution of a written instrument, a part of an adverse pleading, an admission of the same. In an action to recover for services in connection with a certain building, defendant pleaded accord and satisfaction, and set forth in his answer a check given plaintiff, on which was written that it was in full for fees in connection with the building. Plaintiff did not deny by affidavit the execution of the check. *Held* an admission of the same, and, where plaintiff offered no evidence to controvert the instrument, or to show that it had no connection with the demand sued upon, he was presumed to have had knowledge of the memorandum on the check, so that it was error to instruct that, notwithstanding the jury found the check was intended to apply to the demand sued upon, they must also find, in order to render a verdict for defendant, that plaintiff was aware of the memorandum on the check at the time of its delivery to him, or that he knew of it before the check passed out of his possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 864–879.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by J. Cather Newsom against H. J. Woollacott to recover for services as an architect. From a judgment for plaintiff and an order denying defendant's motion for new trial, defendant appeals. Reversed.

Tom C. Thornton, for appellant. Drew Puritt, Morton, Houser & Jones, for respondent.

SHAW, J. The respondent, who is an architect, alleges that he was employed by appellant to prepare certain plans and specifications and receive estimates for, and superintend the erection of, a three-story hotel on the southwest corner of Ninth street and Grand avenue, in the city of Los Angeles, of the estimated cost of $64,000; that the reasonable value of the services agreed to be performed by respondent for appellant was the sum of $2,560; that respondent entered upon said employment, prepared the necessary plans and specifications for said building, and received estimates for the erection thereof; that, notwithstanding the fact that respondent at all times was ready and willing to perform his part of said agreement, he was, about June, 1904, wrongfully discharged by appellant. In his answer, appellant denies all of said allegations, and sets up another agreement, under which respondent was to submit plans for a building which should not involve an expenditure to exceed $25,000; that the plans submitted called for the expenditure of an amount largely in excess of said sum; that respondent admitted that such plans were not in conformity with their agreement; that thereupon plaintiff and defendant, after a full discussion of plaintiff's claim for compensation, had a full accounting and accord and satisfaction, wherein it was agreed that defendant should pay plaintiff the sum of $150 in full of all demands which plaintiff might have or claim against defendant by reason of his negotiations, labors, or otherwise, in connection with the proposed building on Ninth street and Grand avenue, which sum appellant paid to respondent in full satisfaction of all his demands in the premises; that said payment was made by a check, payable to the order of plaintiff, in the lower left-hand corner of which was a memorandum in the words and figures following, "In full for Ninth and Grand avenue fees," which check was duly indorsed and cashed by plaintiff. A copy of this check, with the indorsement thereon, is made a part of defendant's answer. No affidavit denying the check was served or filed by plaintiff, as provided in section 448, Code Civ. Proc. Defendant's motion for judgment on the pleadings was denied. The case was tried before a jury, which gave a verdict for plaintiff, and judgment was entered accordingly. The appeal is from the judgment and an order denying defendant's motion for a new trial.

There was no error in the denial of appellant's motion for judgment on the pleadings. Admitting the execution and genuineness of the check was not an admission of the new matter set up in the answer by way of accord and satisfaction, or that the check related in any way to the transaction set forth in the complaint; all of which, under section 462, Code Civ. Proc., must be deemed to be controverted. It therefore devolved upon defendant to connect this check with the transaction upon which plaintiff based his action and prove that it was given and received as alleged in the answer. In the absence of evidence establishing such facts, it did not in itself constitute sufficient evidence in support of the new matter alleged in the answer. While plaintiff admitted receiving the check, and that it was genuine and duly executed, he did not admit that it was received as set forth in the answer. "The effect of an admission of the genuineness and due execution of an instrument pleaded by a defendant, and not denied, as provided by section 448 of the Code of Civil Procedure, is to avoid the necessity of proof of its genuineness and due execution, and nothing more; and whether it is proven, or its execution is admitted, its terms and legal effect are to be determined by an inspection of the instrument." Carpenter v. Shinners, 108 Cal. 362, 41 Pac. 473.

At the trial the appellant offered no evidence whatever. He now contends that the evidence was insufficient to justify the verdict, and that the court erred in its charge to the jury. The court instructed the jury as follows: "If you find that the check was intended to apply to the demand here sued upon, and that plaintiff accepted the check with words written thereon indicating that it was to be in full payment of all of such demands, and that he was aware of the presence of such words, then the check should be received by you as evidence of a complete settlement of such demand." In another part of the charge the jury were instructed upon the theory that it was for them to find from the evidence whether or not plaintiff had knowledge of the presence of the memorandum at the time of the delivery of the check to him, or knew of the writing upon such check, before it passed out of his possession.

Having failed to file the affidavit of denial required by section 448 of the Code of Civil Procedure, respondent is deemed to have admitted the execution and genuineness of the instrument. Notwithstanding this admission, he may controvert the instrument by evidence of mistake, fraud, and like defenses, or show that it had no connection with the demand sued upon. Moore v. Copp, 119 Cal. 429, 51 Pac. 630. He offered no evidence touching the question, and, in the absence of any testimony, the instrument stands as an exponent of the facts therein set out, and its terms and legal effect are to be determined by an inspection of the instrument. Carpenter v. Shinners, supra. In the absence of any evidence to the contrary respondent is chargeable with what the instrument purports on its face to be, and it must be taken for just what it appears to mean. Petersen v. Taylor (Cal.) 34 Pac. 724; Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423. Having failed to controvert it, respondent must be presumed to have had knowledge of the existence of the memorandum on the check at the time of the delivery thereof to him, and to have known of the writing thereon before it passed out of his possession. No proof of this fact was necessary. It was therefore error to instruct the jury, in effect, that, notwithstanding they found the check was intended to apply to the demand sued upon, they must nevertheless, in order to render a verdict for defendant, find the further fact that respondent was aware of the presence thereon of the words, "In full for Ninth and Grand avenue fees," and that respondent "had knowledge of the presence of the memorandum written on the check at the time of its delivery to him," or that "he knew of the writing upon such check before it passed out of his possession." All that can be claimed for this check is that it constituted a receipt for money paid to respondent pursuant to the alleged settlement. As such, it is open to contradiction or explanation by parol testimony. In the absence of such contradiction or explanation, respondent is bound by what it purports on its face to mean. Simmons v. Oullahan, 75 Cal. 508, 17 Pac. 543; Snodgrass v. Parks, 79 Cal. 55, 21 Pac. 429. There is nothing in Greer v. Laws, 18 S. W. 1038, 56 Ark. 37, or in Rapp v. Giddings, 4 S. D. 492, 57 N. W. 237, cited by respondent, inconsistent with the general rule.

The judgment and order are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

6 Cal. App. 20

## YORDI v. YORDI. (Civ. 300.)

(Court of Appeal, Third District, California. June 20, 1907. Rehearing Denied by Supreme Court Aug. 19, 1907.)

1. DEEDS—ACTIONS TO SET ASIDE—EVIDENCE—SUFFICIENCY.

Evidence examined, and *held* to show that a deed executed by a wife to her husband was procured by undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 641.]

2. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—ADMISSION.

Code Civ. Proc. § 1962, subd. 2, provides that the presumption of the truth of the facts recited in a written instrument shall be deemed conclusive between the parties thereto or their successors in interest. A wife reconveyed to her husband premises which had been conveyed by him to her before their marriage by a deed wherein she was described as his wife. *Held*, in an action to set aside her deed for undue influence, that evidence that the deed to her was delivered before the marriage ceremony was performed, though on the same day, was without prejudice to defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4153.]

3. WITNESSES—CROSS-EXAMINATION.

Where, in an action by a widow to set aside a deed executed to her husband in his lifetime of premises he had previously conveyed to her, the notary who prepared her deed merely testified on direct examination that the husband instructed him to prepare a deed similar to another given him, statements on his cross-examination that the husband had told him that the deed to his wife should not have been recorded, was recorded by mistake, and that they were going to change it were properly stricken out as improper cross-examination.

4. EVIDENCE—DECLARATIONS—SELF-SERVING.

In an action by a widow to set aside a deed to her husband in his lifetime of premises he had previously conveyed to her, evidence by the notary who prepared her deed as to statements by the husband that the deed to his wife should not have been recorded, was recorded by mistake, and that they were going to change it, not made in the wife's presence, were properly stricken out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1068, 1069.]

5. WITNESSES—EXAMINATION—REDIRECT.

Where, in an action by a widow to set aside a deed executed to her husband in his lifetime, she was cross-examined as to whether she had told her defendant stepchildren that the property was hers, to which she replied that she had not, she was properly permitted to explain on redirect examination why she was silent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1000.]

6. EVIDENCE — OPINION EVIDENCE — CONCLUSION OF FACTS—DEEDS—WANT OF CONSIDERATION.

In an action by a widow to set aside a deed executed to her husband in his lifetime of premises he had previously conveyed to her, she was properly permitted to state that the same was executed without consideration, and such answer was not equivalent to permitting her to testify that she did not hold the premises on an implied trust for the benefit of her husband.

7. DEEDS — VALIDITY — UNDUE INFLUENCE — PLEADING—SUFFICIENCY.

A complaint in an action by a widow to set aside on the ground of undue influence, a deed to her husband in his lifetime, alleging the marriage relation, intimidation by the husband, the exertion of his predominating influence over her, the taking advantage by him of the confidence reposed in him, and that she acted without independent advice, stated a cause of action, though not setting out the acts constituting the alleged intimidation or undue influence.

8. PLEADING — DEMURRER—GROUNDS—UNCERTAINTY.

Uncertainty is not a good ground of general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 409.]

9. APPEAL—REVIEW—HARMLESS ERROR—RULING ON DEMURRER.

Error in overruling a demurrer for ambiguity or uncertainty is not ground of reversal, unless a party shall have been misled, to his prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4089.]

10. PLEADING — COMPLAINT — AMENDMENT—TIME FOR.

Under Code Civ. Proc. § 473, providing that the court may in its discretion after notice to the adverse party allow an amendment to any pleading, a complaint may be amended in the discretion of the court after submission of the cause, but before entry of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 664, 666.]

Appeal from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Action by Sarah J. Yordi against Flora I. Yordi and others. From a judgment for plaintiff, and from an order denying their motion for a new trial, defendants appeal. Affirmed.

William B. Bosley, for appellants. John O'Gara, for respondent.

CHIPMAN, P. J. Action to compel a reconveyance of real property from defendants to plaintiff. Plaintiff had judgment, from which and from the order denying their motion for a new trial defendants appeal.

Plaintiff and Fred Yordi, father of defendants, intermarried on July 5, 1898. On their wedding day, and before the wedding ceremony, Yordi conveyed the premises in dispute to plaintiff by deed of gift. At that time Yordi was a widower and occupied the premises together with his children, three sons and three daughters (the latter defendants). Thereafter he continued to reside thereon with plaintiff and defendants at the town of Cloverdale, until his death, May 22, 1901. Plaintiff's deed was not recorded until November 14, 1900, and on November 20. 1900, plaintiff reconveyed the premises to her husband, which was recorded November 21, 1900, and on May 3, 1901, he conveyed the said premises by deed of gift to defendants, which was not recorded until May 22d, on the day of his death. The deed from plaintiff to Yordi purports to be a grant, bargain, and sale conveyance, and recites a consideration of $10, but the uncontradicted evidence was, and the court found, that it was without consideration. About June 22, 1901, plaintiff notified defendants that she rescinded the conveyance made by her to said Fred Yordi and demanded that defendants convey to her the said premises, which, being refused, plaintiff on July 3, 1901, filed her complaint herein. The ground of the action was undue influence of plaintiff's husband in procuring the deed from her to him of date November 20, 1900. The defendants in their answer denied the allegations of undue influence, and averred that the deed from their father to plaintiff was given in trust with the promise to hold the legal title to said premises for his use and benefit, and that she would, whenever requested so to do, reconvey the same to him, and that meantime she would refrain from recording said deed. Upon the issues the court found the facts in favor of plaintiff and against defendants. Appellants challenge the sufficiency of the evidence to support the findings. Certain errors of law are assigned in the admission or exclusion of testimony. It is also contended that the demurrer to the second amended complaint should have been sustained, and also that the court erred in permitting plaintiff to so amend the complaint, after the cause was submitted, as to offer what are claimed to have been issues of fact differing materially from the issues on which the cause was tried.

1. Much of the discussion in the briefs is directed to the inquiry whether a presumption of undue influence arises out of the marriage relation alone in a transaction where the wife conveys real property to the husband; and, assuming that there is no such presumption, does the evidence establish undue influence? There is printed in the record the written opinion of the learned trial judge which holds with appellants as to the presumption referred to above. But his conclusion was that the evidence was sufficient to establish undue influence. In its main features we are impressed with the correctness of the conclusions reached upon the evidence and have adopted the opinion as our own. It is as follows:

"Sarah J. Yordia, a resident of San Francisco, prosecutes this action to have a certain deed of conveyance executed by her to her husband, Fred Yordi, on the 20th day of November, 1900, canceled and set aside. The defendants are her stepchildren, and they reside in Cloverdale. The property involved was the home of the plaintiff and her husband from the time of their marriage on July 5, 1898, to the time of his death in May, 1901. It has always been the home of the defendants, and they claim to own the property by deed of gift made to them by Fred Yordi, their father, on the 3d day of May, 1901. Fred Yordi and the plaintiff, Sarah J. Yordi, were married in San Francisco between 5 and 6 o'clock p. m. on the 5th day of July, 1898. After their marriage they went to Cloverdale, and resided there with six children by a former wife. Prior to the marriage he made and executed to her a deed of his home in Cloverdale. The consideration of this deed was love and affection. Its value was about $4,000, and he handed the deed to her in the presence of her aunt, Mrs. Duffy, with the words, 'Here, my dear, this is yours.' The presentation and delivery of this deed vested her with the absolute title to the property in fee simple. This deed was not recorded at the time, and the reason therefor, fairly deducible from the facts proved, was to keep peace in the family. They lived happily together for two years and three months, when Mr. Yordi died of consumption after a lingering illness. During their married life she always reposed great confidence in him. A few months before his death, when it became manifest to Mrs. Yordi that her husband was commencing to settle up his worldly affairs and had converted his mercantile store at Cloverdale into a corporation and had given the shares thereof to his children, she had her antenuptial deed recorded. Its existence had never been known to the children. The recording of this deed becoming known to one of the sons through the newspapers, a condition of affairs arose that was unpleasant to the Yordi family. The recording of the deed first became known to Carl Yordi. He informed his father thereof. The next day, when Mr. Yordi went home to his dinner, he had an interview with his wife. What was said in that conversation was privileged, and not permitted to be stated by her as evidence in the case. After this conversation Mr. Yordi went down town and employed a notary to prepare a deed to be signed by his wife conveying this property to him. About an hour afterwards Mrs. Yordi went down to Mr. Yordi's store, into his office, and met her husband and notary there, and, amid profound silence, she signed the deed and went back home.

"From these facts plaintiff contends that the transaction was one between husband and wife, and when this is shown she has made out a prima facie case and the fairness of the transaction must be proven by the defendants, and a failure on their part to do so would entitle her to judgment. The defendants take issue with plaintiff upon this principal of law, and contend that the presumption of unfairness does not exist in transactions between husband and wife. They rely on Tillaux v. Tillaux, 115 Cal. 671, 47 Pac. 691; Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189; Stiles v. Cain, 66 Pac. 232, 134 Cal. 170. These decisions are cited and approved in the recent case of McDougall v. McDougall (decided January 8, 1902) 67 Pac. 778, 135 Cal. 316, wherein the court says: 'There was, in fact, no evidence tending to show undue influence, unless it be the relation of husband and wife existing between the parties to the deed, and this relation, under the authority of Tillaux v. Tillaux, 115 Cal. 670, 47 Pac. 691, White v. Warren, 120 Cal. 324, 49 Pac. 129, 52 Pac. 723, Sheehan v. Sullivan, 126 Cal. 192, 58 Pac. 543, and Stiles v. Cain (Cal.) 66 Pac. 231, must be regarded as of itself, having no such effect.' These decisions establish the law of this state, and from the mere relation of husband and wife a business transaction between them will not be tainted with any suspicion of undue influence; that, notwithstanding the influence which may exist by the one over the other, a transaction will not, from this relation alone, be presumed to be made under undue influence These decisions may also be said to fix the law of this state that this confidential relation, coupled with an entire want of consideration, will not raise an inference of any unfairness in a transaction between them, but this is the scope of the California cases. Therefore, if plaintiff's case extends no further than this, but is confined within the limits fixed by them, her case is lost. If she has simply shown the marital relation and want of consideration, she falls short of making out a case of undue influence. She cannot there stop and shift the burden to defendants to prove that this confidence has not been abused. The burden is upon her to go further, and show that the husband made use of the confidence reposed in him by his wife for the purpose of obtaining an unfair advantage over her. Section 1575, Civ. Code. In determining this question, the fact that they were husband and wife when the deed was executed is to be considered as one of the facts in connection with the other facts of the case, and it has more or less weight in determining the question. The relation is one that is easily used and easily abused. As Justice Temple has said in Stiles v. Cain, supra: 'The right to control her own affairs would not free her from what usually in fact is, and is always presumed to be, the predominating influence of her husband.'

"The want of consideration is also a fact present in this case, and, while a deed solemnly executed will not be declared void for this reason, if in fact nothing was received by the grantor, or if the consideration was so small as to 'shock the conscience,' yet the fact is one to be considered with the other facts indicative of an abuse of confidence. People make gifts, the consideration may be love and affection entertained and for their better maintenance, support, protection, and livelihood, but the deed herein was not a deed of gift. The consideration recited therein was the cold sum of $10 and was never paid. How could such a sacrifice by Mrs. Yordi benefit a dying husband? Is it possible to suggest a rational or reasonable motive on her part in dispossessing herself of her home that her husband had given her before their marriage? The unnaturalness of the transaction suggests the predominating influence. To these two facts—that is, to the fact of a confidential relation and a want of consideration—let there be supplemented the fact that she first formed her intention to make this deed during the conversation with her husband at their home, about an hour before she signed the deed, and at that time her mind was in a state of fear. Plaintiff was asked: 'Q. At the time when you first formed your intention to convey this property back to Mr. Yordi, what was the state of your mind with respect to fear or absence of fear? A. I feared. I had fear.' This fear must, I think, be connected with the intention to make the deed and with reference to it, and to no other subject, and is not consistent with that state of mind which should exist with reference to such a transaction. It is not in consonance with a state of mind produced by honest persuasion or by any arguments addressed to the understanding or appeals to the affection, and this state of mind formed a part of the whole transaction. Within an hour after this intention was formed she went to her husband's store, met the notary, signed the deed, and went home. No conversation at all took place, no one was present save Mr. and Mrs. Yordi and the notary. And this brings us to the consideration of another strong circumstance usually considered in determining undue influence, namely, Mr. Yordi employed the notary and conducted the whole transaction. Our Code provides that a husband is bound to act in the highest good faith towards his wife, and may not obtain any advantage over her by the slightest misrepresentation, concealment, threat or adverse pressure of any kind. Sections 158, 2228, Civ. Code. There must be no constraint upon her or against her free will of what she is unable to refuse. Greenleaf on Ev. § 688.

"As the writers upon the subject would put it, he must deal with her at arm's length. And closely connected with this fact is the fact that Mrs. Yordi had no independent or other advice. I take it to be a well-established principle of this court that persons standing in a confidential relation towards others can not entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had competent and independent advice in conferring them. Rhodes v. Bate, L. R. 1st Ch. 257. The rule is further stated, and I think correctly, in the English note to Hugein v. Basely, 2 Lead. Cas. Eq. 595, as follows: 'The conduct of the party benefited must be such as to sever the connection and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage save only whatever kindness or favor may have arisen out of the connection.' As was said in a recent case: 'The wife should have had the benefit of a full, free, and private preliminary conference with a competent lawyer or business man who was employed and paid by her and in whom she had confidence and who would be devoted to her interest and hers only.' Pironi v. Corrigan, 20 Atl. 227, 47 N. J. Eq. 135.

"The relation of confidence therefore existing, the consideration mentioned in the deed being untrue, the wife receiving no pecuniary advantage by the transfer, but, on the contrary, losing her home, the husband obtaining property for nothing and soon transferring it as a gift to defendants, the fact that she formed her intention to deed in an interview with her husband, and was at the time and when she signed the deed in a mental state of fear, that Mr. Yordi employed the notary who took her acknowledgment, and the entire absence of independent advice and that freedom of marital influence which should characterize every such act—all taken together, would, under the law as I interpret it, constitute undue influence. The facts of the case are as strong as, if not stronger, than either Dolliver v. Dolliver, 94 Cal. 643, 30 Pac. 4, and Ross v. Conway, 92 Cal. 637, 28 Pac. 785, and the Supreme Court of this state in both cases held that the facts established undue influence.

"There is evidence in the case of declarations by Mrs. Yordi to the defendants and their brothers that may tend to show fairness of the transfer, but such testimony, under our Code and the law of evidence, is not entitled to much weight, especially when contradicted. It is entitled to but little weight as against the uncontradicted facts above stated, constituting in themselves undue influence.

"Plaintiff has proved the issues by a clear preponderance of the evidence, and may prepare and present findings in accordance with this opinion. S. K. Dougherty, Judge.

"Dated March 28th, 1902."

We may here remark that, after plaintiff had conveyed the property to her husband, he held the title until shortly before his death, although he had previously deeded all his property to a corporation, the shares of which he gave his children, and plaintiff's deed to him was not recorded until the day of his death. During this interval the children of Yordi showed considerable ill feeling towards plaintiff, which would have been greatly increased had Yordi reconveyed the property to his wife. When, however, he found his life fast ebbing away, and that he was about to depart where his wife's reproaches would not reach him, he deeded to his children and they withheld the deed from record and from her knowledge until his act was beyond recall. Under the circumstances shown it is no unfair inference that Yordi obtained the deed with the secret purpose to convey title to his children and that the fact was withheld from plaintiff, leaving her to indulge her "confidence in her husband that he would give it [the property] back to her again," as she testified.

2. The deed from Yordi to plaintiff was executed and delivered on the day of their marriage. The parties to the deed are thus described: "Fred Yordi, of the county of Sonoma, state of California, the party of the first part, and Sarah Jane Yordi (wife), the party of the second part." Plaintiff was permitted to prove, over defendants' objection, and the court found, that the deed was delivered before the marriage was actually celebrated, but on the same day. It is claimed that the finding is not supported by the evidence, because the deed conclusively proved that when delivered the grantee was the grantor's wife, citing subdivision 2, § 1962, Code Civ. Proc. It seems to us that defendants were in no wise prejudiced by this testimony if it be conceded that it was error to admit it. But we do not think it was error. The question of the time of the delivery, whether before or after the marriage ceremony, was not material. No presumption of undue influence would have arisen in favor of the husband if the deed be regarded as having been delivered after the marriage.

3. On the direct examination Notary Lewis, who prepared the deed from plaintiff to her husband under the latter's direction, testified that Yordi instructed him to prepare a new deed similar to an old deed then handed him. Upon cross-examination defendants sought to bring out all that Yordi said to the notary at that time. Plaintiff objected unless it was limited to such parts of the conversation as related to the preparation of the deed by the notary, Lewis. The court allowed the question, with leave to plaintiff to move to strike out the answer. The witness answered that Yordi told him "that the former deed made by him to Mrs Yordi should not have been recorded, that it was recorded by mistake, and now they were going to change it, she was going to deed it back to him." The court, on plaintiff's motion, struck out that part of the answer which referred to the recording of the former deed. The ruling was correct. The answer was not cross-examination as to matters testified to by the witness in chief, was not made in plaintiff's presence. and, besides, was self-serving. Appellants claim that it helped to establish one of the issues presented by defendants' answer. It was not competent to thus prove it.

4. Upon her cross-examination by defendants plaintiff, as a witness, was asked whether at any time after she had executed the deed of November 20, 1900, to her husband, and prior to his death she had told the defendants or either of them that the property in question was hers, or that she claimed it, or owned, or had any interest in it, to all of which she answered "No." Upon the redirect, plaintiff's counsel asked her, "What was the reason for not doing so?" Defendants' objection was overruled, and the witness answered that it would cause trouble for her husband and herself; that "there would have been war" if she had made known her claim to defendants; that she "had confidence in her husband that he would give it back to me (her) again." It is urged that the court erred and should have disallowed the testimony and should have stricken it out on defendants' motion because the answers were but conclusions and opinions of the witness. But they had a direct relation to the matter brought out on the cross-examination, and were intended to remove from the mind of the court any prejudicial inference it might have drawn from the witness' answers that she had not made known her claim to defendants during her husband's last sickness. If it was material for defendants to show that plaintiff was silent as to her claim upon the property after she had deeded it to her husband, she had

a right in reply to explain why she was silent.

5. Upon her direct examination plaintiff was asked the following question: "State what the consideration was for this deed which you executed to your husband." She answered: "No consideration." She had previously testified that she had received nothing for executing the deed. It was objected that the question called for the conclusion of the witness as to a question of law, and that, in permitting her to answer, it was equivalent to allowing her to testify that "she did not hold the said deed on November 20, 1900, upon implied or constructive trust for the benefit of her husband." It was said in Hardison v. Davis, 131 Cal. 635, 63 Pac. 1005, where the right to make a similar inquiry arose: "* * * Being in a position to know the ultimate fact, and appellant having the opportunity to cross-examine him (the witness), it was not improper for him to testify directly that there was no consideration." The inference which appellants say might have been drawn from the answer is highly conjectural, and we think not warranted. The court manifestly accepted the answer as referring wholly to the money consideration.

6. It is also claimed that the demurrer to the second amended complaint should have been sustained. It is contended, first, that the general demurrer should have been sustained because the complaint "alleged that said deed of November 20, 1900, was obtained partly by means of intimidation and partly by means of undue influence, but does not set out the facts constituting the alleged intimidation or duress," citing Goodwin v. Goodwin, 59 Cal. 560; second, it is contended that if not obnoxious to a general demurrer the complaint was demurrable for uncertainty. The complaint alleges the marriage relation, plaintiff's ownership of the premises as her separate property; that said Yordi, "for the purpose of causing her [plaintiff] to convey to him [her husband] the said lot of land, without consideration, intimidated plaintiff, and exerted upon her the predominating influence which he then had over her by reason of his position as her husband, and used the complete confidence which she then and at all times, until his death, reposed in him, and thereby did then and there cause her, against her will and contrary to her wishes, to make, acknowledge, execute, and deliver to him a deed of conveyance of said lot of land, without consideration"; that "plaintiff made * * * and delivered the said deed to said Fred Yordi solely by reason of his said acts and conduct, and not freely or voluntarily"; that "said deed was prepared by a scrivener selected by said Fred Yordi," and under his "personal direction"; that the property was of the value of $4,000; that plaintiff received "no pecuniary advantage in return for said deed, and said Yordi suffered no pecuniary damage therefor," and that "plaintiff had no independent advice in said transaction."

The point in objection to the complaint chiefly urged is that the particular acts constituting the alleged intimidation or undue influence or abuse of confidence are not set forth. This is not the case usually found in the reports where the instrument was executed by one enfeebled mentally or bodily, and easily susceptible for that reason to the operation of undue influences. It is a case where the effect of the alleged acts must be judged from circumstances difficult of precise affirmation. While, as our Supreme Court has held, marriage of itself alone will not give rise to a presumption of undue influence in a transaction such as this, the conjugal relation still is an important fact to be considered. Intimidation on the part of plaintiff's husband is alleged and the exertion of his predominating influence over her and taking advantage of the confidence reposed in him by her, and at a time when she was called upon to act without any independent advice, all of which resulted in his obtaining title to valuable property without consideration. The complaint contains sufficient facts to constitute a cause of action. Furthermore, uncertainty is not good ground in support of a general demurrer. Ward v. Clay, 82 Cal. 502, 505, 23 Pac. 50, 227. This court will not in all cases where error has been committed by the trial court in overruling demurrers for alleged ambiguity or uncertainty order a reversal of a judgment based upon a trial of the issues made by the complaint and the answer. Prejudicial error must appear. The party must have been misled to his prejudice, or the error otherwise appear injurious and not merely abstract, before cause for complaint can be predicated of its uncertainty or ambiguity. Gassen v. Bower, 72 Cal. 555, 14 Pac. 206; Alexander v. Central L. & M. Co., 104 Cal. 532, 38 Pac. 410. The answer specifically denies the averments of the complaint, and sets forth distinctly the facts upon which defendants relied at the trial. The evidence was directed to the issues thus framed and it is manifest from the record that defendants were not misled or injured by the failure of plaintiff to allege with greater particularity the facts upon which she relied. Conceding the rule of pleading to be as claimed by appellants, we are satisfied that the substantial rights of the parties were not affected by the alleged uncertainty in the complaint.

7. The opinion of the court was filed March 29, 1902, and findings of fact and judgment entered September 16, 1902. The second amended complaint was filed July 18th, to which answer was filed September 10, 1902. On June 9, 1902, plaintiff, after due notice, moved the court for leave to file amended complaint "to conform to the proof given at

the trial thereof." This was objected to on the grounds (1) that it would raise issues of fact other than those presented by the original complaint and answer thereto; (2) that no evidence had been received outside of the issues presented by the pleadings on which the cause was tried; (3) that it would be an abuse of discretion to allow the proposed amendment. The objections were overruled and amended complaint filed. The court made an order allowing defendants 10 days to plead to the amended complaint, and findings were deferred until the coming in of defendants' answer. Subsequently plaintiff confessed the demurrer with leave to file a second amended complaint to conform to the proofs at the trial which the court ordered plaintiff to file within 10 days. On July 16th plaintiff served and filed her second amended complaint to conform to the proof, and on July 25th defendants filed their demurrer thereto. This demurrer was called for hearing on September 2, 1902, on which date defendants applied for a postponement of two weeks. The court refused this request, and heard and overruled the demurrer, allowing defendants five days to answer, and on September 8th defendants answered the second amended complaint. On September 10th plaintiff gave notice that she would on September 15th move the court to sign and file the findings of fact and conclusions of law. On September 12th defendants served and filed a notice that they would on September 22d move the court to set aside the submission of the cause, and also for an order granting leave to defendants to introduce testimony in addition to that adduced at the trial and for a further order setting said cause for trial. The grounds of the motion were (1) that plaintiff's second amended complaint does not conform to the evidence; (2) that the issues presented by plaintiff's second amended complaint and defendants' answer thereto differ from the issues presented in the original complaint and defendant's answer thereto; (3) that defendants desire to and can adduce testimony, in addition to that presented at the trial, tending to support the denials and allegations in their answer to plaintiff's second amended complaint. The motion was made upon the affidavit of one of defendants' counsel and upon the papers and records in the case. On September 15th plaintiff moved the court in accordance with her notice of September 10th, and thereupon defendants moved for a continuance of the hearing of said motion until September 22d, the day noticed for the hearing of the motion mentioned in their notice of September 12th, and until after the hearing of their said motion to set aside the submission of the cause. The court denied defendants' motion for continuance and made and signed findings on said September 15th, and final judgment was entered September 16th. On September 22d the court heard and denied defendants' motion to set aside the submission. It was said in Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955, that, while it is unusual to find it necessary to amend the complaint after a case has been submitted, there is, under the power given by section 473 of the Code of Civil Procedure, no limitation as to the time before judgment entered when the power of the court ceases. It was also there said that this power to allow amendments in the interest of justice is uniformly held to be within the discretion of the trial court.

The only question, then, is: Did the court abuse its discretion in allowing the amendment? And this question must be answered in the negative unless the amended complaint introduced new issues substantially different from those presented by the complaint under which the evidence was submitted, and unless it appears that the rights of the defendants were prejudiced by the amendment. The evidence adduced on both sides seems to have been addressed to the issue of undue influence, and there is no showing beyond the opinion of one of the counsel for defendants, expressed in his affidavit, that, if the case were reopened, important additional evidence would be produced to rebut plaintiff's case. So far as we can see, defendants had an opportunity at the trial to rebut the evidence on which the amended complaint rests, and they seem to have availed themselves of the opportunity. If they refrained, as they say they did, from cross-examining plaintiff, when called as a witness, upon any point bearing upon the issue of undue influence, they cannot now be heard to complain. The tendency of plaintiff's testimony was obvious, and that she was not permitted to go into particulars as to what took place between her and her husband on November 20, 1900, was due to no reluctance on her part, but from a ruling of the court forbidding it. Defendants had then the opportunity they now say they desire to cross-examine her. In their motion for a new trial neither surprise nor newly discovered evidence is made a ground. If the defendants' motion to set aside the submission of the case had no merit, it was not prejudicial error to file findings and enter judgment without waiting to hear such motion, and it appears that when, subsequently, the motion was denied no exception was taken.

We cannot discover that defendants have been deprived of any substantial right by the procedure complained of.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

151 Cal. 577

## BROOKSHIRE OIL CO. v. CASMALIA RANCH OIL & DEVELOPMENT CO. et al. (L. A. 1,787.)

(Supreme Court of California. July 30, 1907.)

INJUNCTION — TRESPASS — IRREPARABLE INJURY.

Plaintiff was entitled to a preliminary injunction, where the complaint alleged he owned and had been in peaceable possession of an easement to maintain a pipe line to convey oil; that defendants wrongfully and maliciously tore up 4,000 feet of the pipe, and mutilated and rendered it useless, with intent to wantonly prevent the exercise of the easement; that defendants threatened to, and would, if not restrained, prevent plaintiff by force from relaying the pipe line which was essential in the continued marketing of plaintiff's oil, and that the damage from such wrongful acts would be irreparable; that plaintiff's actual damages already sustained were $7,500, the answer admitting the tearing up of pipe, and merely raising the issue of the ultimate title and property rights of the parties, showing that plaintiff, if he should finally prevail, would not be irreparably damaged by the acts temporarily enjoined, and it not appearing plaintiff's use of the pipe line pendente lite would be of any serious detriment to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305, 306.]

In Bank. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by the Brookshire Oil Company against the Casmalia Ranch Oil & Development Company and others. Defendant company appeals from an order denying its motion to dissolve a temporary injunction. Affirmed.

W. H. Chapman and Henley C. Booth, for appellant. Richards & Carrier and McD. R. Venable, for respondent.

McFARLAND, J. This is an appeal by the defendant the Casmalia Ranch Oil & Development Company from an order of the superior court denying said defendant's motion to dissolve a temporary injunction. The injunction was issued upon the complaint in the action, and the motion to dissolve was based entirely upon the complaint and the answer of the defendant filed to the complaint. No showing was made on the motion other than what appeared on the face of the said pleadings.

It is averred in the complaint, which was filed March 2, 1905, that on February 24, 1905, and for more than 30 days prior thereto, plaintiff was the owner and in the peaceable possession of an easement and privilege granted to it by the owner of certain lands subject to said easement "to construct and maintain a pipe line for the conduct of oil" from certain oil lands in the vicinity owned by plaintiff across the said lands subject to said easement to a certain station on the Southern Pacific Railroad, and, being in the peaceable possession of said easement and privilege, the plaintiff prior to February 24, 1905, had constructed a line of oil pipes four inches in diameter across the said lands; that on said February 24, 1905, in the absence of plaintiff and its officers and agents, the defendants wrongfully, maliciously, and without any right whatever tore up about 4,000 feet of said pipe, and mutilated and rendered the same useless; and that, by reason of said acts, plaintiff suffered actual damage on account of pipe destroyed in the sum of $2,500, and damage by loss incident to the prevention of the conduct of oil from the oil lands of plaintiff to said railroad station in the sum of $5,000. It is also expressly averred that in doing these acts defendants were guilty of oppression and malice, and that they did said acts with intent to wantonly, oppressively, etc., prevent plaintiff in the exercise of his said easement, and that plaintiff was entitled to receive as vindictive damages the further sum of $10,000. It is also averred that defendants threaten to, and will, if not restrained by the court, prevent plaintiff by force from relaying and re-establishing its said pipe line and easement during the pendency of this action, that said line is essential to the continuance of the marketing of the oil products from plaintiff's land which are constantly being produced from wells thereon, and that the damage to plaintiff from said wrongful acts will be irreparable. The prayer is for damages in the sum of $17,500, and for a final injunction restraining defendants from continuing said unlawful acts, and for a temporary injunction during the pendency of the action. Upon this complaint, duly verified, the court granted the preliminary injunction enjoining defendants from preventing or in any way interfering with, the construction and maintenance of said pipe line, and from removing any part of the same until further order in the premises.

In the answer the ownership and possession of the alleged easement is denied; and it is also denied that defendants "wantonly, maliciously, and oppressively" tore up the oil pipe as alleged in the complaint, but it is not denied, and is admitted, that defendants did actually tear up said pipe, etc., and it is not denied that defendants will prevent plaintiff from relaying said line. There are also denials of the amount and the irreparable nature of the damages suffered, and of some other of the averments of the complaint. It is also averred—and appellant relies greatly on this averment—that on November 25, 1897, George B. Arellanes was the owner in fee of a certain tract of land, which may be called for brevity the "Juan Arellanes Rancho"; that this is the land which plaintiff claims to be subject to its alleged pipe line easement; that on said November 25, 1899, Arellanes, as party of the first part, executed to C. C. Morehouse and others, as parties of the second part, a certain written instrument, of which a copy is attached to the answer marked "Exhibit A"; that this instrument was duly acknowledged and was on December 2, 1899, duly recorded in Book 2 of Leases in the office of the recorder of Santa Barbara county, in which county said land is situated, and has ever since remained a record in said office; and that afterwards, on December 2, 1899, the said Morehouse and others, parties of the second part to said instrument, by a written instrument executed, acknowledged and duly recorded, assigned to defendants herein, the said Casmalia Company, all the right, title, and interest which said Morehouse and others had by virtue of said instrument of February 25, 1899, which is called a "lease."

It is contended by appellant that said instrument of February 25, 1899, vested the lessees therein named with full possession of all the surface of the Arellanes rancho. so that neither the lessor nor any other person could enter upon any part thereof without the consent of the said lessees except as trespassers, and that, therefore, the plaintiff herein could not subsequently to the execution of said lease acquire the easement asserted in the complaint, or any right or privilege whatever in said land adverse to appellant. Respondent contends that this lease, on its face, gives to the lessees only the right, for a term of years, to produce petroleum and other hydrocarbon substances from said land, and to drill and operate oil and gas wells thereon, and to use such part of the land, and to lay and operate such pipe lines, etc., and to have such rights of way, as should be necessary to carry on said business of producing oil, etc., from said land; but did not give said lessees any possession of any part of said land not used by them in said business. We need not, however, examine into this matter, because it goes only to the question of title which is to be determined on the final decision of the case on its merits, and not to the propriety of the refusal of the court to dissolve the temporary injunction. The verified averments of the complaint show a clear case for the equitable interposition of the court by a preliminary injunction. The answer does not in any way change the basis upon which rested the equitable considerations which led the court to grant the injunction. The answer merely raises the issue of the ultimate title and property rights of the parties in the premises involved in the action. It does not deny the facts upon which the equitable right to an injunction pending the determination of the issue of title rested. It does not show that plaintiff, if it should finally prevail in the action, would not be irreparably damaged by the acts of appellant which are temporarily enjoined. A court will sometimes hesitate to grant a preliminary injunction, even upon a strong showing of the plaintiff, when it appears that the injunction may seriously injure or disturb the use of the property or possession of the defendant; but there is no consideration of that kind in the case at bar. It nowhere appears that, even if appellant should finally prevail, the continuance by plaintiff of the use of the pipe line during the pendency of the action would be any serious detriment to appellant, or would in any material way interfere with the exercise of whatever rights in the premises appellant has by virtue of said lease, or that it obstructs appellant in anything it has done, or has to do, in carrying out its right of prospecting for and taking oil, etc., from said land. On the other hand, if respondent should finally prevail, it is apparent that, in the absence of the preliminary injunction, it would have unjustly suffered great and irreparable damages. We think that the case presents an exceedingly proper one for the employment of the aid of a preliminary injunction, and that no reason appears for disturbing the ruling of the court in refusing to dissolve it.

The order appealed from is affirmed.

We concur: SHAW, J.; LORIGAN, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.

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151 Cal. 553

## TRINITY COUNTY BANK et al. v. HAAS et al. (Sac. 1,463.)

(Supreme Court of California. July 26, 1907.)

1. MORTGAGE — CONSTRUCTION —NONPAYMENT OF INTEREST—PROVISION FOR FORECLOSURE.

A note and mortgage, being parts of one transaction, are to be read together, and the mortgagee may rely on the provision in the mortgage making the principal due for nonpayment of interest at his option, though the note contains no such provision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 214, 215.]

2. SAME—DEFAULT—NOTICE OF ELECTION TO FORECLOSE—NECESSITY.

Where a mortgage provides that, on default in payment of interest, at the mortgagee's option the whole debt shall become due, the mortgagee need not, before commencing a foreclosure action, notify the defaulting mortgagor of his election to declare the principal due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1209.]

3. SAME.

Where a mortgage provides that, on default in payment of interest, at the mortgagee's option the whole debt shall become due, the principal sum does not become due ipso facto upon default in interest payment, but the clause gives the mortgagee a mere option which he may take or waive, and the option is lost if before it has been exercised the mortgagor pays or offers to pay the overdue interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1209.]

4. PAYMENT — DEPOSIT IN BANK FOR CREDITOR.

Under the express terms of Civ. Code, § 1500, where a mortgagor's tender of interest was refused, a deposit in a bank of good repute of the amount to the mortgagee's credit, with notice thereof to the mortgagee, amounted to payment of the interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 24.]

5. SAME—ELECTION TO DECLARE DEBT DUE—SUFFICIENCY.

A mortgagee cannot be held to have exercised an option under the mortgage entitling him to declare the whole debt due on default in payment of interest until by some outward act beyond a mere mental determination or a direction to his own agents he has manifested an election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1209.]

6. SAME—PLEADING.

Where the complaint in a foreclosure action alleges that the plaintiffs "elect" to declare the whole debt due for default in payment of interest, proof may not be made of an election made before the commencement of the action.

Department 1. Appeal from Superior Court, Trinity County; James W. Bartlett, Judge.

Action by the Trinity County Bank and another against F. G. Haas and others. Defendants appeal from a decree foreclosing a mortgage and from an order denying a new trial. Reversed and remanded.

William C. Bissell, for appellants. D. J. Hall and H. R. Given, for respondents.

SLOSS, J. The defendants appeal from a decree foreclosing a mortgage, and from an order denying their motion for a new trial.

On January 11, 1904, the defendants F. G. Haas and Emily E. Haas made and delivered to plaintiffs their promissory note for $5,969.73, payable one year after date, with interest thereon at the rate of 1 per cent. per month from date until paid, said interest payable quarterly, and, if not so paid when due, to be added to the principal and to bear interest at the same rate as the principal sum. On the following day said defendants executed and delivered to plaintiffs a mortgage of real property to secure their note. The mortgage provided that, "in case default be made in the payment of the said principal or any installment of interest as provided, then the whole sum of principal and interest shall be due at the option of the said parties of the second part (the payees), or assigns." On September 6, 1904, the defendants F. G. and Emily E. Haas conveyed to the defendant Joseph Elliott the greater part of the mortgaged premises, Elliott assuming the payment of the mortgage debt.

The first installment of interest, payable on April 11, 1904, was paid when due. This action was commenced October 17, 1904, the plaintiffs alleging in their complaint that no further interest had been paid, and "default having been made in the payment of the sum of interest due July 11th, 1904, plaintiffs, in accordance with the terms of said mortgage, elect to declare the whole of said principal sum and interest thereon from April 11th, 1904, now due and payable." The answers allege that all interest due upon said note or by said mortgage "has been heretofore paid, and that the principal sum of said note and mortgage is not yet due." The court found against the plea of payment, found that plaintiffs had, on or about the 3d day of October, 1904, elected to declare the principal and interest due, and, as has been stated, granted to plaintiffs a decree of foreclosure. The finding that the interest had not been paid is attacked as unsupported by the evidence. It appears, without contradiction, that on October 11, 1904, six days before the commencement of the action, the defendant Elliott, who had assumed the payment of the note and mortgage, tendered to the plaintiffs the interest then due, comprising the two installments payable, respectively, on July 11, 1904, and October 11, 1904, and amounting to about $368.20. The tender was refused on the ground that plaintiffs had exercised their option "of considering both principal and interest due on that note and that the [their] money was not sufficient." The defendant Elliott immediately deposited the sum of $375 in gold coin in the name of plaintiffs in a bank of deposit of good repute and gave notice thereof to plaintiff. Civ. Code, § 1500. There is no evidence that at any time prior to October 11th the plaintiffs notified any of the defendants they had elected to declare the principal of the note due, or that they ever demanded payment of such principal. Evidence offered by defendants to show that plaintiffs had not given such notice or made such demand was excluded. The agent of plaintiffs was allowed to testify, over defendants' objection, that two weeks before the commencement of the suit he had elected to declare the whole note due and payable, and had directed the attorneys of the plaintiffs to proceed to foreclose the mortgage. The note and mortgage, being parts of one transaction, are to be read together, and the plaintiffs may therefore rely on the provision contained in the mortgage, making the principal due for nonpayment of interest at the payees' option, although the note contains no such provision. Phelps v. Mayers, 126 Cal. 549, 58 Pac. 1048; Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110. The contention of the appellants is that they had the right to pay the accrued interest and defeat the right to exercise this option, at any time before it had actually been exercised, and that it could not be validly exercised by any determination reached in the creditors' own minds, and not communicated in any way to the debtors.

It is settled by several decisions of this court that the holder of an instrument of this kind need not, before commencing his action, give any notice to the defaulting maker of his election to declare the principal due for nonpayment of interest. Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423; Sichler v. Look, 93 Cal. 600, 29 Pac. 220; Clemens v. Luce, 101 Cal. 432, 35 Pac. 1032; Bank of Commerce v. Scofield, 126 Cal. 156, 58 Pac. 451. As was said in Hewitt v. Dean, supra: "The commencement of the action was notice of the exercise of the option * * * and no previous notice or demand was necessary." But, while a formal notice before suit is not necessary, the principal sum does not become due ipso facto upon default in the payment of interest. The clause in question gives to the holder of the note a mere option which he may take or waive. Belloc v. Davis, 38 Cal. 242. He is entitled to a reasonable time in which to determine whether or not he will claim his right. Hewitt v. Dean, supra; Fletcher v. Dennison, 101 Cal. 294, 35 Pac. 868. If after a default in the payment of interest the holder accepts the overdue interest (Belloc v. Davis, supra), or delays unreasonably before electing to declare the principal sum due (Crossmore v. Page, 73 Cal. 213, 14 Pac. 787, 2 Am. St. Rep. 789), the right to exercise the option is lost. And we think it is equally lost if, before the option has been in fact exercised, the defaulting debtor pays or offers to pay the overdue interest. Until such option has been exercised, the principal of the note is not due. Until then the holder has a mere option to declare it due. During this interval he has, by his failure to act, in effect declared that he will not regard the delay already past as sufficient ground for asserting the right given him. The delay to that extent is waived by him. If then, before the exercise of the option, the debtor pays the accrued interest, the condition upon which the holder may declare the whole note not due does not exist. The interest is no longer unpaid, and the creditor cannot take advantage of a prior delay, which he has already waived. Here the debtor, by his tender, followed by the deposit in bank, extinguished the obligation to pay the interest then due. Such tender and deposit constituted a payment (Civ. Code, § 1500), if made before the plaintiffs had exercised their option to declare the principal due. And the offer of payment, without the deposit in bank, was equally effectual to destroy the right of the plaintiffs to declare the principal of the note due. Civil Code, § 1504. The plaintiffs cannot therefore rely upon the commencement of the suit as an exercise of their option. When the complaint was filed, the interest had already been paid. Nor can any effect, as against the defendants, be given to the statement made by the agents of plaintiffs in response to the tender, that the plaintiffs had exercised their option of considering both principal and interest due. Such statement was made after the rights of the defendants had become fixed by their tender. It is true that the court finds that the plaintiffs had on or about the 3d day of October, 1904, elected to declare the principal and interest due.

This finding is based upon the testimony that the plaintiffs had on or about the date last stated directed their attorneys to proceed to foreclose. We think the rights of the defendants could not be cut off by such ex parte determination, not communicated to them. The plaintiffs had a right of election, and, having elected, had the right to proceed without notice to the defendants, but they cannot be said to have exercised their option until by some outward act beyond a mere mental determination or a direction to their own agents they had manifested their election. Furthermore, the complaint does not allege any election prior to the commencement of the action. The allegation is that plaintiffs "elect to declare the whole of said principal sum and interest thereon from April 11, 1904, now due and payable." This statement, which is in the present tense, must be taken to refer to the time of filing the complaint. It was not denied. The allegation was probably unnecessary, as the filing of the complaint seeking the relief claimed sufficiently evidenced an exercise of the option at the time of such filing. But, under the averment as made, evidence of a prior election was outside of the issues, and was objected to on this ground. For the same reason the finding of an election on October 3, 1904, is entitled to no consideration.

It follows that, in the present condition of the pleadings and the evidence, the action seems to have been prematurely begun, the principal sum sued for not being due when the complaint was filed.

The judgment and order appealed from are reversed, and the cause remanded for a new trial. The plaintiffs, if so advised, should have leave to amend their complaint.

We concur: SHAW, J.; ANGELLOTTI, J.

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(151 Cal. 572)

## CITY OF OAKLAND v. THOMPSON, City Clerk. (S. F. 4,849.)

(Supreme Court of California. July 30, 1907.)

1. MUNICIPAL CORPORATIONS — PARKS — AUTHORITY TO ACQUIRE — INDEPENDENT SCHEMES.

Though no repugnancy exists between St. 1889, p. 361, c. 248, authorizing cities to acquire public parks and boulevards, and St. 1901, p. 27, c. 32, authorizing them to incur indebtedness for and regulating the acquisition of municipal improvements, the 1889 act does not provide the sole method by which land may be acquired for public parks, since the Legislature may provide two independent schemes, to either of which a municipality may resort.

2. SAME.

Under St. 1901, p. 27, c. 32, authorizing cities to acquire or construct any municipal improvement, including street work, etc., and property necessary or convenient to carry out the objects, purposes, and powers of the municipality, and Oakland City Charter, art. 3, § 31, St. 1889, p. 524, authorizing the city to acquire lands for public parks, etc., it may purchase lands for park and boulevard purposes.

3. SAME.

St. 1901, p. 27, c. 32, authorizing cities to acquire land for parks, and providing a proposition to incur debt therefor shall be submitted to the voters, does not contemplate that each price of land desired for a park should be voted upon separately, where there is a single scheme of park improvement, including several parcels of land widely separated, to be converted into separate parks.

In Bank. Petition by the city of Oakland for mandamus to Frank R. Thompson, city clerk, to compel him to countersign bonds. Peremptory writ ordered to issue.

J. E. McElroy, City Atty., for petitioner. Allen & Walsh and Ben. F. Woolner, for respondent.

HENSHAW, J. This is a petition for mandate against the respondent, who is city clerk of the city of Oakland, to compel him as such official to countersign certain municipal bonds of petitioner. The proceedings, culminating in the voting of the bonds, are set forth in full.

The respondent pleads by demurrer, and admits the due performance of all the acts taken by the officers of the city, and admits likewise the regularity and sufficiency of the election proceedings and of the election. He bases his refusal to countersign the bonds upon two grounds: First, that the proceedings culminating in the special election whereat the bonds were voted were had under a statute not applicable to the purpose; and, second, that the election, calling, as it did, for the acquisition of certain detached pieces and parcels of land for public parks, was irregular and void, in this: that each piece and parcel of land proposed to be purchased should have been submitted to the voters to be voted upon as a separate and distinct proposition; whereas, by the method adopted, it was made necessary for the voters to vote for or against the acquisition of all of these detached parcels as a single unit.

1. Under the first objection, it is contended that the proceedings should have been had, the election called, and the bonds issued, under an act of the Legislature entitled "An act to enable incorporated cities and counties, and towns to acquire, maintain, and improve public parks and boulevards." St. 1889, p. 361, c. 248. In fact, the proceedings were had under the authority of the act of 1901, entitled "An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations for municipal improvements, and regulating the acquisition, construction, and completion thereof." St. 1901, p. 27, c. 32. It is argued that the act of 1889 deals expressly with the subject-matter of the petitioner's bond election; that there is no repugnancy between it and the later act of 1901, which is general in its nature; and that it must be held, therefore, that the Legislature in the act of 1889 has set forth the single and controlling method whereby municipalities may acquire lands for park and boulevard purposes. It may freely be conceded that no repugnancy exists between the act of 1889 and the act of 1901, but it does not necessarily follow therefrom that the act of 1889 provides the sole and exclusive method by which a municipal corporation may acquire land for park purposes. Thus, if it shall be determined that the act of 1901 is in its scope broad enough to include the acquisition of lands for park and boulevard

purposes, there is no constitutional inhibition forbidding the Legislature from providing two independent schemes, to either of which a municipality may have resort as it shall deem expedient. Indeed, the essential difference between the act of 1889 and that of 1901 is in the life of the bonds; the act of 1889 providing for 20-year bonds, and that of 1901 for 40-year bonds. One city might consider it to be more to its advantage to use the longer term bonds, while another might be of contrary opinion, and, as we have said, there is no constitutional or other objection which prevents the Legislature from giving cities their option and choice in this matter. The language of the act of 1901 is certainly general enough to empower a city to purchase lands for park and boulevard purposes. It declares: "Whenever the legislative branch of any city, town or municipal corporation shall, by resolution passed by vote of two-thirds of all its members and approved by the executive of said municipality, determine that the public interests or necessity demands the acquisition, construction or completion of any municipal improvement, including bridges, waterworks, water rights, sewers, light or power works or plants, buildings for municipal uses, school houses, fire apparatus, and street work, or other works, property, or structures necessary or convenient to carry out the objects, purposes and powers of the municipality."

Herein is a declaration empowering a city to bond itself for the acquisition "of any municipal improvement" including the acquisition of any "property * * * necessary or convenient to carry out the objects, purposes, and powers of the municipality." It will not be questioned but that the acquisition of parks is, without any express words of authorization, included, whenever a grant of power is conferred to acquire property for "municipal purposes." Law v. San Francisco, 144 Cal. 384, 77 Pac. 1014; City of Lexington v. Kentucky, etc., Assembly, 71 S. W. 943, 114 Ky. 781; In re Mayor, etc., 2 N. E. 642, 99 N. Y. 569; In re North Terrace Park, 48 S. W. 860, 147 Mo. 259. But in addition to this, the charter of the city of Oakland expressly contemplates the exercise of this power, when in section 31 thereof it declares that "the council shall have power to pass ordinances * * * 40, to acquire lands for public parks and to improve and maintain such lands for the benefit of all the inhabitants of the city." Charter of City of Oakland, art. 3, § 31; St. 1889, p. 524. The effort of respondent to limit the scope of the act of 1901 to enumerated matters under the rules of noscitur a sociis and expressio unius is untenable. The language, "including bridges, waterworks, water rights, sewers, light or power works, or plants, buildings for municipal purposes, school houses, fire apparatus," is more obviously designed to include in the phrase "municipal improvement," subject-matters concerning which doubt might be entertained as to their proper place in such a category, than to limit the kind of public improvements to those specifically designated. Thus, to illustrate: While it would be unhesitatingly said that a sewer, or a bridge, or buildings for municipal use, were public improvements, it might be debatable in a town adequately supplied with light by a quasi public corporation whether the acquisition of a lighting plant by a city could, in strictness, be denominated a public improvement, and it was to relieve from any necessity of construction that light works, power works, waterworks, and water rights were expressly enumerated. It was thus not designed to limit the meaning of the phrase "municipal improvements," but rather to broaden its scope to include any of these matters which might otherwise be considered doubtful.

2. The second objection urged by the respondent is equally untenable. The scheme had in contemplation the acquisition of several distinct parcels of land, widely separated, to be converted into separate parks for the enjoyment of all the inhabitants of the city. The scheme is a single scheme, the purpose a single purpose, and came clearly within the authority of the act of 1901, which provides that the proper authorities may "call a special election and submit to the qualified voters of said city, town, or municipal corporation, the proposition of incurring a debt for the purposes set forth in said resolution." The law does not contemplate—much less compel—that each piece and parcel of land which may be desired for a park should be voted upon separately. The plan is a single plan for the acquisition of all of these lands for park purposes, and in recognition of the jealousies which so often arise in wards and sections of a municipality it may easily be believed that it would be disastrous to the municipal scheme if the other course were adopted—the jealousies of the inhabitants of one section prompting them to vote for lands for a park, if it were to be situated in their own district, and to vote against it if it were not—thus rendering it difficult, if not impossible, for the city ever to acquire park lands at all. Certainly the plan adopted was within the discretionary power of the council under the law, and it enabled every voter to express himself as being for or against the whole proposition. More than this was not required.

It appearing, therefore, that the objections of the respondent are untenable, it is ordered that a peremptory writ of mandate issue, directing him forthwith to contersign petitioner's bonds as prayed for.

We concur: BEATTY, C. J.; LORIGAN, J.; McFARLAND, J.; SHAW, J.; SLOSS, J.

151 Cal. 561

## DURKEE v. CHINO LAND & WATER CO.

(L. A. 1,892.)

(Supreme Court of California. July 30, 1907.)

1. ANIMALS—TRESPASSING—OWNER'S DUTY.

The owner of cattle of known roving and destructive tendencies must take commensurate precautions to prevent their escape to the lands of others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, § 338.]

2. SAME—ACTION FOR DAMAGE — EVIDENCE—SUFFICIENCY.

Evidence in an action for damage caused by trespassing cattle *held* to sustain a finding that defendant had neither taken sufficient precaution to prevent trespass by its cattle nor exercised due diligence in removing them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, § 360.]

3. DAMAGES—EVIDENCE—SUFFICIENCY.

Evidence in an action for damage caused by trespassing cattle *held* to sustain findings of damage in plaintiff's favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 511.]

4. APPEAL — PRESENTATION OF OBJECTIONS BELOW—NECESSITY—THEORY OF CAUSE.

Where, in an action for damages, the rule adopted by plaintiff for the measurement thereof was acquiesced in by defendant, who raised no objection to the evidence given, which sustained the findings, defendant is concluded from questioning the sufficiency of the evidence when tested by some other rule.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1054, 1055.]

Department 2. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Daniel Durkee against the Chino Land & Water Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

J. S. Chapman and Ward Chapman, for appellant. E. W. Freeman and A. D. Laughlin, for respondent.

LORIGAN, J. This action was brought by plaintiff to recover damages from the defendant, claimed to have been sustained by him on account of the defendant wrongfully and negligently allowing its cattle to trespass upon certain grain and pasture lands owned and leased by him in the vicinity of Chino, in San Bernardino county. The complaint stated four causes of action and judgment was rendered in favor of plaintiff upon the first three, but denied upon the fourth.

The first count alleged the trespass of said cattle on 320 acres of land belonging to plaintiff between December 1, 1902, and September 1, 1903, during which time they ate up and injured growing hay and verdure thereon, to the damage of plaintiff in the sum of $175. The court allowed damages on this count on the sum of $150. The second count alleged the trespass by the cattle of defendant, between the same dates, on another tract in possession of plaintiff containing 120 acres; that they ate up and destroyed the grain, hay, grass, and verdure thereon, causing the loss of pasture to the amount of $1,080; that said cattle broke down the fences on said tract and damaged plaintiff in the further sum of $150; that as a result of such trespass by the cattle of defendant, and destruction of said fences, 10 head of cows belonging to plaintiff mingled with the trespassing cattle of defendant and with them escaped from said tract of land and were lost, to the further damage of plaintiff in the sum of $500, making in all a total of $1,630 damages. On this count the court allowed $720 for the loss of grass and pasture; for destruction of fences $50; and for the loss of cows $500, making $1,270. It deducted from this, however, the sum of $105, an installment of rent on a lease of these premises due from plaintiff to defendant. The third count alleged a further trespass of defendant's cattle, between the same dates, upon two other tracts of land in possession of plaintiff, aggregating 1,500 acres, and constituting practically one pasture, whereby the fences of said tract were broken down, and the grass, hay, and verdure destroyed; that, on account of the destruction of said grass, hay, and verdure, plaintiff was compelled to purchase alfalfa hay at the expense of $1,500, which expenditure would have been unnecessary save for the destruction by said cattle of the hay, grass, and verdure growing on said lands. It was further alleged in this count that, by reason of the destruction of said grass and verdure, 60 head of young cattle belonging to plaintiff, of the value of $500, were deprived of proper food, and perished. Plaintiff laid his damages resulting from the destruction of said grass, hay, and verdure on said land, and the breaking down of said fences, in the sum of $2,599.80. The court allowed on this count for the destruction of grass, $900 damages, and fences $600, but found against plaintiff for the alleged loss of 60 head of young cattle. In relation to the fourth count, the court found against plaintiff as to its allegations, and it is unnecessary to particularly refer to them. Judgment was given plaintiff for the amounts found in his favor on the three counts, aggregating the sum of $2,815. The defendant moved for a new trial upon various grounds; the principal claim in support of it being that the evidence was insufficient to support the finding of negligence on the part of defendant in caring for its cattle, and, further, that there was no evidence sufficient to support the findings of the court of the amount of damages suffered by plaintiff, or any of its various items. In disposing of the motion for a new trial, the court ordered a reduction of $20 to be made from the judgment on the first count and $180 from the judgment on the second count, and that, if this reduction was accepted by plaintiff, the motion for a new trial be denied. The reduction was accepted by the plaintiff, and the defendant thereupon appealed from the judgment and order denying its motion for a new trial.

The evidence shows that the vicinity in which the trespasses complained of by plaintiff occurred was devoted largely to the cattle business, the people living there being principally engaged in dairying, conducting it with gentle, native, dairy cows. The plaintiff was thus extensively engaged, using the fields upon which the trespass of the cattle occurred for such dairy purposes. The defendant was not engaged in dairying, but in raising cattle for the market. The ranch upon which its cattle were supposed to range consisted of some 46,000 acres, and upon this were carried at the dates involved in this action something over 3,000 head of cattle, of which, by far, the larger number were what is called Sonora or Mexican cattle. It was these Mexican cattle which entered upon the fields of plaintiff, depastured and destroyed the growing crops and natural feed thereon, broke down his fences, and caused all the damage to him which the court found he sustained, and upon which it awarded him judgment. As to the disposition of these Mexican cattle, their roving and destructive propensities, there is a unanimity in the testimony of the witnesses on the subject. They were wild "long horned cattle," which wandered on or off the range at will, and whose roving disposition was not restrained by the presence of any ordinary fence. Excerpts from the testimony of a few of the witnesses called (and the same views are expressed by all who spoke upon the subject) so sufficiently describe the character of these cattle as to make further reference to it unnecessary. One witness, speaking upon the subject, said: "I don't believe there is a ranch in that country that they have not looted, and to do it they would have to break half a dozen fences. It is no more trick to go through half a dozen fences for that band of steers than to go along the road peaceably on a Sunday afternoon." Another: "They would jump and run and go right through the fences." And a third: "The Chino cattle were wild and fences did not stop them. They were monarchs of all they surveyed." And the foreman of the defendant is also credited in the testimony with having summarized the evil tendencies of these animals in the declaration that "a whirlwind isn't in it with these cattle." We refer to the characteristics of these cattle in connection with a claim of appellant that the evidence was insufficient to sustain the finding of the court that defendant was negligent in their care.

It was the duty of the defendant, in view of the roving and destructive tendencies of these cattle, to take commensurate precautions to prevent their escape from the range upon which they were placed. Reasonable care on account of their known disposition required that a greater diligence should have been exercised concerning them than would be required relative to ordinary range cattle. The evidence on behalf of defendant tended to show that it had, at most, four vaqueros to ride along and repair the fences, which extended eight or nine miles around the ranch, and to look after all the cattle on the range, and that they rode these fences, as one testified, once or twice, another two or three times, a week. No particular attention was given to the fences on the ranch in the vicinity of the premises of plaintiff where these cattle of marauding tendencies were ranging, or to keep them back on the range, and, under the circumstances, the court would be justified in finding that no sufficient care over them was exercised by defendant. Aside from this, the evidence on behalf of plaintiff warranted the court in finding that even the attention claimed to have been given was not sufficient, as that testimony showed that the cattle were constantly in the fields of plaintiff while the feed there lasted, and, when driven out one day, returned the next, and that defendant had information and knowledge of their constant and continued depredations. The plaintiff made frequent complaints from the beginning to the end of the trespassing of these cattle. He testified that he complained at the head office of the company in San Francisco, at the main office at Chino, and to the superintendent of the corporation at the ranch. He told them that these cattle were destroying all the feed in his fields and breaking his fences; that he had kept men riding after them; that his horses were worn out; and that he had to have relief. To these appeals he received only evasive answers, and gives what he terms "a fair illustration" of the result of one of them and the general result of all. He stated: "I went to the office and saw the clerk there in charge—in the Chino office—and I stated the case very thoroughly, that there were 200 or 300 head of their steers there; that they were there for a long time, and that I wouldn't have a thing if there wasn't something done; and the agent asked me what time I could get up in the morning. I told him I could get up in the dead hour of the night if I could get relief. He said: 'You get up tomorrow morning bright and early, and be here about the home ranch, and you will meet the vaqueros, and you state your case to them.' I got up before daylight, and it was very cold, and I drove up about sunrise, and I met Mr. Williams and four others all mounted, coming leisurely from the home ranch, and I stopped the gentlemen and stated my case to them. Mr. Williams was very kind, so far as he had anything to say, and he said: 'Mr. Durkee, we can't do anything for you. We have to go to work at the silo on the east side.' I asked if I could not have one man, and that my horses were worn out. And he said: 'We can't spare even one man.' I said: 'How long will you be busy?' He said: 'About six days or a week.' I said: 'Isn't there any one who can give me any relief?' And he said: 'You go up to the home ranch and see Mr. Gird.' That is about the way they kept me going from one fellow to another. Mr. Gird was connected with the company. I went to the home ranch, and told the same thing to Mr. Gird, and when I got through I received information that Mr. Steele was the man to see. I inquired where I could find Mr. Steele. The information was that Mr. Steele was in Mexico, and I didn't go any further. After all these complaints occasionally the men would come up and take out a few and put them over the fence, and they would be back before the night, as a rule, and bring some more with them." While this is not all the evidence bearing on the question, it was enough to warrant the court in its finding that the defendant had neither taken sufficient precautions to prevent the trespassing of defendant's cattle upon the premises of plaintiff, or exercised due diligence in removing them when they were doing so.

We approach now the next point urged by the appellant, and to which its argument on this appeal is mainly addressed, namely, that the finding of material injury suffered by plaintiff through the trespassing of these cattle and the amount of damages found to have been sustained are not justified by the evidence. As to the material injury suffered by plaintiff, there cannot be the slightest question under the evidence. It showed, as far as the grain and feed upon the fields of plaintiff were concerned, that such fields were depastured, or the feed thereon destroyed, by the constant incursions of these cattle of defendant upon the premises, and it equally showed that the destruction of his fences was likewise occasioned by them. It would be a waste of time to discuss the evidence in the record upon these subjects, as it completely sustains the findings of the court upon them.

The appellant, however, insists that the evidence showed that other cattle besides those of defendant trespassed upon the fields of plaintiff, and that the owners thereof were responsible for some of the damage occasioned by plaintiff, and that the court was not warranted in finding that the injuries sustained were the result of the trespass of defendant's cattle alone. While some 23 witnesses were called in the case on behalf of both sides—persons in charge of the cattle of plaintiff and those of defendant, men riding the ranges caring for the stock, repairing fences, and driving out the cattle of defendant—only three testified that any other stock save those belonging to either plaintiff or defendant were ever seen in the fields of plaintiff. These witnesses testified that they each on one occasion saw a few head there. When they were there, how many there were, or how long they remained, the evidence does not show, and, assuming that the court was required to accept this testimony, it was too indefinite and uncertain to be given any serious consideration. If it be conceded that the mere presence of these cattle—which is practically all that was proven relative to them—damaged to some extent the fields of plaintiff, still the court was warranted under the evidence in finding that it was too trivial and inconsequential to affect the substantive damage proven to have been occasioned through the continuous trespassing of large numbers of the cattle of defendant.

Now, as to the next point—the sufficiency of the evidence to sustain the finding of the court as to the various amounts in which the plaintiff sustained damage under the separate counts of his complaint. And first as to the damages allowed for the destruction of the grain and pasturage. Plaintiff, who was a practical farmer, as well as a dairyman, testified as to the first count that the damage he sustained by the trespass of the cattle was the destruction of a nine-acre field of growing barley, and fixed the amount of his damages at $175, based upon the appearance of the grain and surrounding conditions, and the probable yield of hay per acre, and its value per ton if it had been permitted to mature and had been harvested. He testified that the probable yield of the field in hay would be 15 tons of the value of $10 per ton. The court originally found on this basis the damage to be $150, but upon the motion for a new trial, it being called to the attention of the court that hay worth $20 had been taken from this tract by plaintiff, the damages on this count were reduced to $130. As to the field described in the second count, plaintiff testified that the grass and verdure there destroyed by the cattle of the defendant was of the value of $720. Another witness testified that the value of the feed on this 120-acre tract for dairying was worth $1 per head of stock per month, and that it would sustain at least 60 head of cattle the year round. This would figure $720 per annum as the value of the pasturage, but, as the plaintiff pastured the tract for three months, the court made a deduction of $180 from that sum. The 1,500-acre tract, described in the third count, plaintiff had contemplated using for the conduct of his dairy business and for dairy purposes, and, with that object in view, had erected necessary structures thereon. He testified that on this tract was the best pasture feed known in that section. It produced the best milk and the best returns. He was feeding on this tract and milking 100 head of cows, selling the milk from them under contract in Los Angeles at a net profit of $450 per month. The feed on this range would support these cows for three months, and, after they were pastured there a month, the depredations of defendant's cattle commenced, resulting in the total destruction of the feed to plaintiff, and he estimated his damages at $900, on the basis of the net profits which he would have obtained from the sale of milk during these two months—$450 per month—had the pasturage not been destroyed by the trespass. Another witness testified that the net returns from milk would be $4.50 per head for the same time, or $450 per month. The court allowed damages on this basis for $900.

It is claimed that this evidence afforded no proper basis for the allowance of damages. Upon the record, however, we do not see how the appellant can be heard to raise the question whether it presented the proper basis or not. This case was tried in the lower court by counsel for defendant other than those representing it on this appeal. The complaint set forth in the several counts the nature, character, and amount of damages sustained by plaintiff, and the court found that plaintiff had been damaged by the trespass on his property as alleged and the extent of that damage. The plaintiff presented the evidence as to damages to which we have referred upon the theory that he was adopting and following the proper and legal rule for establishing them. No objection was made by defendant to the introduction of any of the evidence, nor was it suggested by defendant until after judgment and on the motion for a new trial that the rule which was adopted by plaintiff was not the proper or correct one for the measurement of damages. Not only was no objection then made or a different rule suggested, but counsel for defendant, though not introducing any evidence on the subject of damages, cross-examined the witnesses of plaintiff on the matter of damages testified to by them with a view of reducing the amount claimed. The failure of defendant to object to the evidence, and defendant's cross-examination of the witnesses, was equivalent to a concession that the evidence was competent on the question of damages and an acquiescence in the theory of plaintiff that it was presented under a correct rule for proving them. This was in effect an acceptance of the evidence as competent upon the subject of damages and that the correct rule for their measurement was being followed. If, in the opinion of defendant, the rule adopted was not the correct one, it was defendant's duty to have objected to the evidence offered under it and to have insisted upon the proper rule being applied. This would have given counsel for plaintiff, if he was pursuing the wrong course, an opportunity for rectifying his mistake, or, in the event of dispute between counsel as to the true rule, would have afforded an opportunity to the court to declare it. This counsel for defendant did not do, but, on the contrary, tacitly conceded that the correct rule was being followed and competent evidence was being offered under it. While parties have a right to insist that damages shall be measured by a recognized legal standard, error cannot always be predicated upon failure to do so. There is no rule of practice which precludes them from trying the question of damages on any theory they see fit. They may adopt any rule which they deem proper, and courts will not interfere of their own motion to compel the adoption of a rule contrary to that which the litigants are satisfied to accept. If they are satisfied, the court will be. When they do adopt such a rule, they are bound by it, and neither one will be subsequently permitted to question his own conduct relative to it. This is the situation here. The defendant acquiesced in the correctness of the standard adopted by plaintiff. It is to be assumed that defendant deemed the rule which was followed as favorable to itself as any other which it might suggest. In any event, it made no objection to the evidence presented under it, suggested no other or better rule, and examined the witnesses on the theory that it was the correct one. Under these circumstances defendant is concluded from raising any question as to the sufficiency of the evidence to sustain the damages on the ground that the rule adopted for the measurement of them and under which the evidence was received was not the correct one. The evidence which was presented on behalf of plaintiff was sufficient to sustain the findings of damages under the rule adopted and acquiesced in by defendant for ascertaining them. This being true, the contention of appellant, then, practically amounts to a claim that the evidence did not justify these findings because, if the correct rule for measuring damages had been adopted, the evidence received would not have been competent to prove them. But, if the correct rule was not being followed, defendant should have objected to the evidence and insisted on the true rule being adopted, and, if the objection was overruled, have excepted and assigned the ruling as error, and based his motion for a new trial upon that ground. To claim now, under a specification of insufficiency of evidence, that the evidence did not justify the finding of damages because it was admitted upon an incorrect theory as to the proper rule for measuring them, is, in effect, to assign the admission of the evidence as error of law, a matter which, even had an objection, and exception been taken, could not under any circumstances be presented or considered under a specification of insufficiency of evidence. As the rule adopted by plaintiff for the measurement of damages was acquiesced in by defendant, no objection raised by it to the competency of the evidence given under it, and, as that evidence fully sustains the findings, the defendant is concluded by its conduct from raising any question of the sufficiency of the evidence when tested by some other and different rule than the one adopted and acquiesced in upon the trial. In this view, whether the rule adopted for the ascertainment of damages was the correct one or not, we are not called upon to consider. It was the one adopted and acquiesced in by both parties and followed by the court, and neither of the litigants can be heard after judgment to question its correctness, or the competency of the evidence introduced under it. Gooddale v. West, 5 Cal. 339, 341; McCloud v. O'Neall, 16 Cal. 393, 398; Janson v. Brooks, 29 Cal. 214, 223; Bullard v. Stone, 67 Cal. 477, 482, 8 Pac. 17; Storey v. Nidiffer, 146 Cal. 549, 552, 80 Pac. 692.

Appellant attacks the further findings as to the loss of 10 head of cows by plaintiff and the destruction of his fences through the negligent trespass of the cattle of defendant. As to the cows: These were part of a herd of 62 being pastured by plaintiff on the 120-acre tract. There can be no question as to their value as found by the court, and the only question is whether the evidence warranted the court in finding that through the negligence of the defendant in permitting its cattle to trespass on this field the plaintiff lost them. It is not claimed that the defendant would not be liable if the evidence so showed, and we think it did. We have already referred to the evidence which justified the court in finding that the cattle of defendant were negligently permitted to break down the fences and trespass upon the several fields of plaintiff described in the complaint, and no further discussion of that matter is necessary. As to the escape of the cows in question, it appears that they were being pastured with the rest on this tract when the several incursions of defendant's cattle upon it commenced; that defendant's cattle would break in and herd and feed with plaintiff's cows; and when run out would take the cattle of plaintiff with them; that while the cows would run out with the wild cattle they would not herd with them, and usually could readily be got together for plaintiff to put them back in the field. While no one saw the cows leaving the field of plaintiff, still the court was warranted from this evidence, and the other circumstances disclosed, in reaching the conclusion that these cows had mingled and gone with defendant's trespassing cattle, and been lost in the hills of the Chino range. After he missed them plaintiff asked permission of defendant's superintendent to search for them on the Chino ranch, and was refused.

As to the destruction of the fences of plaintiff and the damages therefor as found by the court, the findings in both respects are sustained by the evidence.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

151 Cal. 581

## MANHA v. UNION FERTILIZER CO.

(L. A. 2,014.)

(Supreme Court of California. Aug. 1, 1907. Rehearing Denied Aug. 28, 1907.)

1. PLEADING—AMENDMENT OF ANSWER—LEAVE OF COURT.

Code Civ. Proc. § 472, provides that any pleading may be amended once by the party of course and for cause at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereof, by filing the same as amended and serving a copy on the adverse party, who may have 10 days thereafter in which to answer or demur to the amended pleading; that a demurrer is not waived by filing an answer at the same time, and, when demurrer to a complaint is overruled and no answer is filed, the court may allow an answer on terms, etc. *Held*, that such section only permits an amended answer to be filed before a demurrer to the original answer is filed, or while the issue of law raised by the demurrer thereto is undisposed of, and that an amended answer as of course cannot be filed after a demurrer to the original answer has been disposed of, or after the time within which plaintiff might have demurred, but did not, has expired, when the amendment can be allowed only by stipulation or leave of court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 765, 768.]

2. SAME—LEAVE TO FILE—DISCRETION.

A cause was set for trial in June, 1905, on the original pleadings, and continued on defendant's application until August 14th, when defendant promised to be ready for trial. On that day defendant first moved for leave to amend its answer, the result of which would have been to have required a continuance of the cause, because the proposed amendment presented additional issues. There was no showing as to why the application was not made earlier, and it appeared that matters sought to be presented in the amendment were known to defendant in June. *Held*, that the refusal of the amendment was not an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 601.]

3. SHIPPING—CHARTER PARTY—BREACH BY OWNER.

Defendant chartered a vessel for a voyage to Magdalena Bay and return to San Diego with a cargo of guano, plaintiff, the owner, to accompany the vessel. This requirement was changed, and, when the vessel was off Ensenada, plaintiff boarded her, and directed the captain not to put into that port, as he had been directed by defendant's agent. It was not shown why defendant's agent desired the vessel to enter Ensenada, nor that he had any business there, nor that the captain informed plaintiff that he had orders from such agent to enter that port. *Held*, that plaintiff's orders to the captain not to enter Ensenada did not constitute a breach of the charter.

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Frank Manha against the Union Fertilizer Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Grant Jackson and George Fuller, for appellant. Powers & Holland for respondent.

LORIGAN, J. This suit was brought to recover the sum of $590 for work and labor performed by the plaintiff at the request of the defendant, and for the use and hire by the defendant from plaintiff of that certain boat known as the schooner "May" for a period of 59 days from the 11th day of September, 1904, to the 9th day of November of the same year. From the answer and the evidence it appears that plaintiff's action is based upon the written agreement attached to the answer made between the plaintiff and one Beermaker, agent of the defendant, for the hiring of plaintiff's power schooner May for a voyage to Magdalena Bay, stopping at any place or island designated by said Beermaker, and to return to San Diego with a load of guano. The rental agreed upon was $10 per day, and by the terms of the contract the plaintiff was to go with the boat as engineer and to furnish one man as sailor; said Beermaker furnishing all provisions, oil for engine, captain, and two sailors. The schooner on the 11th day of September, 1904, cleared from the port of San Diego for that of Ensenada, but on arrival there the plaintiff was arrested by the Mexican authorities for an alleged criminal offense, and the schooner also taken into custody. She was, however, released at the end of five days, and it was found that under an arrangement between the plaintiff and Beermaker, by which the latter waived the defendant's rights to require the plaintiff to accompany the schooner, she proceeded on her voyage, under the terms of the contract as thus modified. The voyage was completed on the 9th day of November, 1904, and it is found by the court that defendant, during the period between the date of her sailing, September 11, 1904, and the date of her arrival, had and used the schooner under said contract for a period of 39 days. Judgment was accordingly rendered for the sum of $390 less the sum of $50 already paid, and $25.75 expenses for repairs incurred by the defendant. The defendant appeals from the judgment, and from the order denying its motion for a new trial.

The first error claimed to have been committed by the trial court was in striking out, on motion of plaintiff, an amended answer and counterclaim filed by defendant. It appears that the defendant filed its original answer and counterclaim on December 24, 1904, and the cause was set down for trial on June 16, 1905, but upon the application of defendant, made on that day, and over the objection of plaintiff, the trial was continued until August 14, 1905, counsel for defendant announcing that he would be ready for trial on that date. On August 4, 1905, without leave of the court, defendant filed an amended answer to which plaintiff demurred. After this demurrer was filed, defendant, still without leave of the court, served and filed a second amended answer, both of which, on motion of plaintiff made on August 14, 1905, the date fixed for the trial, were stricken out. The grounds of the motion were, first, that the amended answer and counterclaim had been filed without leave of court, and without authority of law; second, that the second amended answer and counterclaim changed the issues made in the action; and, third, that the plaintiff was taken by surprise. As the order striking out the answer and counterclaim was general, it must be sustained if any of the grounds urged in support of it were tenable. We shall not discuss the merits of the last two grounds, because the order was properly based on the first. The position of the appellant is that under section 472, Code Civ. Proc., he had an absolute right to file an amended answer at any time before trial of the cause. This, however, is not a proper construction of the section which only permits an amended answer to be filed before a demurrer to the original answer is filed, or while the issue of law raised by demurrer thereto, is undisposed of. An amended answer "as of course" cannot be filed after a demurrer to the original answer has been disposed of, or after the time within which the plaintiff might have demurred, but did not, has expired. It can thereafter only be allowed upon stipulation, or by leave of the court. This identical question was before this court in the case of Tingley v. Times Mirror Co. (Cal.) 89 Pac. 1097, decided since the appeal in the present case was taken. We there construed the section adversely to the position assumed by appellant, and as supporting the view taken by the trial court, and we refer to the decision in that case for a more extended presentation of our views upon the subject.

The amended answer having been stricken out, appellant then moved the court for leave to file it, which was denied, and this ruling is also assigned as error. The original answer, after denying the allegations in the complaint, set up a counterclaim for damages alleged to have been sustained by the failure of plaintiff to make the voyage provided for in the contract. The second amended answer asked to be filed set up the additional defenses that the vessel was unseaworthy, and that plaintiff took forcible possession of it on the high seas, and refused to return it to defendant. Also various counterclaims were set up for amounts paid and expenses incurred by defendant relative to the voyage and resulting from its alleged abandonment by plaintiff. Whether the court should allow this amended pleading to be filed rested in its sound discretion and the order of the court refusing it could only be reversed because of an apparent abuse of it, and the record here discloses no such abuse. The cause was set for trial in June, 1905, under the original pleadings, and continued on the application of defendant until August 14, 1905. No intimation was given then by defendant that any change in its pleadings were contemplated. On the contrary, its counsel stated that he would be ready for trial on the date to which a continuance was had. On the day for which the trial was last set he moved to be allowed to amend, the result of which allowance would have been as asserted by plaintiff—and which was no doubt true—to work a further continuance in the cause. No showing whatever was made why the application had not been made earlier. The absence of such a showing would of itself have sustained the order of refusal. A party is entitled to have a cause tried at the date for which it is set, unless some satisfactory reason is presented for its postponement. An application for leave to amend a pleading, which, if granted, will warrant a continuance of a trial without any showing why the application was not made earlier, is sufficient ground for refusing to allow it. Not only was there no showing made in behalf of the application, but from an affidavit made by the manager for appellant in support of its application for a continuance of the trial on June 16, 1905, it appears that defendant had knowledge then of practically all the matters set forth in its amended answer and counterclaim, which on August 14, 1905, it asked leave to file. Under all these circumstances, there was no error on the part of the court in refusing to allow the amended pleading to be filed on the day last set down for trial of the cause. Aside from this claim relative to the ruling of the court upon the pleadings tendered by appellant, it is insisted by it that the evidence did not justify the findings in favor of plaintiff. The court found the facts as we have heretofore recited them. Some of them were not denied, and, as to those which were, it is only necessary to say that the evidence was conflicting, and the court accepted that offered on behalf of plaintiff.

It is particularly insisted, however, by appellant that the finding of the court that the voyage under the contract was completed on the 9th day of November, 1904, is not supported by the evidence. The position of defendant in this regard is that, when the vessel was about to proceed on its way back from Magdalena Bay to San Diego, the captain thereof was given instructions by Beermaker to put in to Ensenada; that when the vessel was off that port on the 7th or 8th of November the plaintiff, who had remained in the vicinity of Ensenada while the vessel proceeded to Magdalena Bay, came out in a boat, boarded her, and directed the captain not to put in to Ensenada, but to sail directly for San Diego, which he did, arriving there on November 9th, but, when plaintiff boarded the vessel, it was on its way home, and its voyage had already been long extended beyond the time contemplated in the contract of the parties. Beermaker was not on the vessel. He had remained at some point in the vicinity of Magdalena Bay. No reason was suggested why Beermaker wanted the boat to put in to Ensenada. It does not appear that he had any business there, or was at all discommoded or inconvenienced by the failure of the vessel to land at Ensenada. She was not returning with any cargo which necessitated her entering or clearing at that port. Neither had Beermaker told plaintiff that he wanted the vessel to put in there on her return; nor does it appear that, when the plaintiff boarded the vessel outside of Ensenada, the captain in charge gave him any information that he had been instructed by Beermaker, or any one else, to enter the port of Ensenada. It appears only that the captain contemplated doing so, but that plaintiff persuaded him to proceed directly to San Diego, her home port, instead. Why the captain wanted to put in to Ensenada does not appear, but, whatever the reason was, the evidence does not disclose that either he, or any one else, informed plaintiff that he had orders from Beermaker to do so. Under the circumstances, it cannot be said that plaintiff broke up the voyage or retook the boat without the consent of defendant before the voyage was completed, or that the evidence did not show that it was completed under the contract as found by the court.

We have considered the points made by the appellants relative to the admission and rejection of testimony, and are of the opinion that no material error was committed in that respect. Other points are made in the case, but we do not think they are of any merit or that they require particular discussion.

The judgment and order appealed from are affirmed.

We concur: SLOSS, J.; SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; McFARLAND, J.

BEATTY, C. J. I concur. As to the right of defendant to file an amended answer at any time before demurrer filed, it is sufficient for the purposes of this case to say that after an answer has been filed, and the issues so formed have been set for trial on a day certain, with the knowledge and acquiescence of the defendant, he cannot, on the eve of the trial, file an amended answer, raising new issues, without leave of the court. To so much qualification the general language of section 472, Code Civ. Proc., must be subject, and perhaps it is the only qualification we are authorized to impose.

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151 Cal. 587

## GUTIERREZ et al. v. WEGE. (L. A. 1,843.)

(Supreme Court of California. Aug. 5, 1907.)

1. WATER COURSES — RIPARIAN OWNERS — RIGHT OF DIVERSION — EVIDENCE — FINDINGS.

Where in a contest between riparian owners as to their respective rights in a creek there was evidence that, notwithstanding defendant's diversion of a miners' inch of the waters through a pipe, there was always water flowing down onto plaintiffs' land, the court properly found that defendant had not acquired an adverse right to all the waters of the creek, and had not diverted or acquired any right to such waters other than to a quantity sufficient to supply the pipe.

2. SAME—DIVISION OF WATER.

Plaintiffs and defendant owned adjoining land. A creek rose from a spring on defendant's land and flowed through the same and through about three-fourths of the length of plaintiffs' land, when it was absorbed. Defendant had never diverted more than one miners' inch of the water, and his land contained only three acres and a fraction that was irrigable and adapted to cultivation by means of such water, while plaintiffs' land contained about 2,000 acres, 50 of which was adapted to cultivation and susceptible of irrigation from the creek. *Held*, that a decree vesting in defendant sufficient water to supply his pipe and dividing the balance of the flow so that defendant should have the entire flow for one day out of every 21 days, and that plaintiffs should have the balance, was a proper division.

In Bank. Appeal from Superior Court, Ventura County; J. W. Taggart, Judge.

Action by Soledad Gutierrez and another, as executors of the will of Benigno Gutierrez, deceased, and another, against Henry Wege. From a part of the judgment in favor of plaintiffs, defendant appeals. Affirmed.

See 79 Pac. 449.

H. L. Poplin, for appellant. G. H. Gould and W. R. Edwards, for respondents.

McFARLAND, J. This action was brought to quiet title to the waters of a small stream called "Casitas creek," and to have the proportionate rights of the parties to said waters definitely determined. The court made findings and rendered a judgment, and from a part of this judgment defendant appeals.

No errors of law are assigned, and the only grounds for a reversal are that certain findings of fact are not supported by the evidence. Each of the parties is the owner of a tract of land riparian to said creek; defendant's land lying immediately above and adjoining the land of plaintiffs. The creek rises in a spring on defendant's land, and flows through his land onto the land of plaintiffs and runs through plaintiffs' land about three-fourths of its length, when it is all finally absorbed by the soil. Defendant having claimed all the waters of the spring and creek and threatened to divert the same unless plaintiffs pay him certain money, plaintiffs commenced this action for an injunction against the infringement of their riparian rights and for a decree settling the proportionate ownership of the parties of the waters of the creek, and also prohibiting defendant from maintaining a certain nuisance, namely, a manure pile, in the creek. Defendant set up his right by prescription to all the waters of the creek, claiming that for more than five years before the commencement of the action he had continuously, notoriously, and adversely to plaintiffs and all the world diverted all of the said water onto his own land and used it there, and prevented any of it from flowing down through the lands of plaintiffs. The court found that defendant had so diverted one miners' inch of said water through an iron pipe, and had acquired a right by prescription to said one inch of water, and also found that defendant had not diverted or acquired any right to the waters of said creek other than the said one inch. Defendant contends that this finding, except as to said one inch, is unsupported by the evidence, and that the evidence shows that he had adversely diverted all of the water of said creek as claimed by him. This contention of defendant as to the finding of his claim to all the water by prescription substantially includes all of his case on appeal; for it will be found on examination that his other points as to findings not being sustained by the evidence all point to and are based on the contention that the finding as to prescription is unwarranted. But, in our opinion, there was ample evidence to support the finding that there was no adverse diversion of the water of the creek other than the one inch diverted through the iron pipe. There was, no doubt, some conflicting evidence on this point; but there was material testimony that notwithstanding the diversion through the pipe there was always water flowing down the stream onto plaintiffs' land.

Plaintiffs' land contains about 2,000 acres, and the court found that 50 acres of it was adapted to cultivation and was susceptible of irrigation from said creek, and that only 3 acres and a fraction of defendant's land was adapted to cultivation and irrigable from said creek; and it found that a fair proportionate division of the water of the creek, other than the said 1 inch, for irrigation, would give to plaintiffs the entire flow of the creek, other than the 1 inch, for 20 days out of every 21 days; and to defendant, in addition to said 1 inch, the entire flow of the creek for 1 day out of every 21 days; and judgment was rendered in accordance with this finding. Defendant excepts to this finding as not supported by the evidence; but it is not specifically contended that this would not be a fair division, provided all the water other than the 1 inch is to be divided between the parties; and defendant, in arguing this point, reverts to his contention that defendant is entitled to all the water by prescription. We think that the evidence fairly warrants the division of the water decreed by the judgment. The other points made by defendant as to the title to the water of the creek are covered by what has already been said.

As to the nuisance, we think that the evidence amply warrants the findings of the court as to that matter and justifies the judgment.

The part of the judgment appealed from is affirmed.

We concur: SLOSS, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

151 Cal. 340

## Ex parte COLLINS. (Cr. 1,374.)

(Supreme Court of California. June 12, 1907.)

HABEAS CORPUS—APPEAL AND ERROR—BAIL.

When, after a habeas corpus hearing, a prisoner has been remanded to the custody whence he came, there is ordinarily no proceeding to be stayed pending a review of that order, since he is not thereafter held by the order of remand, but by the warrant or other process upon which he was held when the writ of habeas corpus was issued, and the power to admit him to bail belongs exclusively to such officer, if any, as had the power to admit him to bail independent of habeas corpus proceeding, and he must make his application for bail in the usual manner as provided by law.

In Bank. Application by George D. Collins for a writ of habeas corpus. Petitioner having been allowed a writ of error to the United States Supreme Court to review an order (90 Pac. 827) remanding him to custody, he requests that the writ operate as a supersedeas. Refused.

George D. Collins, in pro. per. Wm. Hoff Cook and Hiram T. Johnson, for respondent.

**BEATTY, C. J.** Having allowed the prisoner a writ of error to enable him to secure a review of the record in this proceeding by the Supreme Court of the United States, and having been requested to order that the writ operate as a supersedeas, I desire to state my reason for specially limiting the operation of the order. In certain cases of recent origin in this state in which prisoners in custody under process of the superior court have been remanded after a hearing upon habeas corpus in another court, or before a different judge, upon the ground that the imprisonment was lawful, the judge making the order of remand has allowed a writ of error and ordered a supersedeas which he has construed as empowering him to admit the prisoner to bail. The order which I make in this case is not to be understood by any judge to whom an application for bail may be made as having such effect. When, after a hearing upon his petition for a writ of habeas corpus, a prisoner has been remanded to the custody from whence he came, there is ordinarily no proceeding to be stayed pending a review of that order. The prisoner is not thereafter held by virtue of the order of remand, but by virtue of the warrant or other process upon which he was held at the time the writ of habeas corpus was issued, and the power to admit him to bail belongs exclusively to such officer, if any, as had the power to admit him to bail independent of the habeas corpus proceeding, and he must make his application for bail in the usual manner as provided by the laws of this state.

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6 Cal. App. 85

## EDDY v. HOUGHTON et al. (Civ. 363.)

(Court of Appeal, Second District, California. July 8, 1907.)

1. VENUE—CHANGE—AFFIDAVITS—ANSWER.

On an application for a change of venue, the affidavit and answer are only available as affecting the question of residence, and cannot be considered in determining the nature of the cause of action pleaded, which must be found from the complaint alone.

2. SAME—TRANSITORY ACTION.

An action to compel a depositary of stock in a mining corporation and the pledgee to deliver the same to plaintiff was a transitory action, and not local as involving a controversy over real property.

3. CORPORATIONS—VENUE—RIGHT TO CHANGE.

Under Const. art. 12, § 16, providing that a corporation may be sued in the county where the contract is made or to be performed, where the obligation or liability arises or breach occurs, or in the county where the principal place of business of the corporation is situated, subject to the power of the court to change the place of trial as in other cases, corporation defendants have no absolute right to a change of venue on account of residence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1943.]

4. VENUE—CHANGE—RIGHT OF DEFENDANT.

A defendant against whom no cause of action is stated is not entitled to a change of venue.

5. SAME—AFFIDAVIT OF MERITS.

An affidavit of merits in support of an application for a change of venue, alleging that the affiant had fully and fairly stated "the case," as distinguished from the "facts of the case," to his counsel, and had been advised that there was a good defense to the action on the merits, was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 113.]

Appeal from Superior Court, Los Angeles County, N. P. Conrey, Judge.

Action by E. C. Eddy against F. T. Houghton and others. From an order denying defendants' motion for a change of venue, they appeal. Reversed.

J. S. Larew and R. B. Stolder, for appellants. Chas. S. McKelvey, for respondent Eddy. Hugh T. Gordon, for respondent Tennessee-California Gold Mining Company.

**TAGGART, J.** Appeal from an order denying motion for change of venue.

The action was begun in Los Angeles county and the application for change of place of trial was made by the defendants F. T. Houghton and Merced Security Savings Bank. It was based upon the grounds that the cause of action related to a controversy over real property situated in the county of Mariposa, and the real defendant and party in interest (Houghton) was a resident of Mariposa county. Two demands for a change appear in the record, one by the defendant Merced Security Savings Bank, and the other by the defendant Houghton, and the latter files an affidavit setting out that he is the only real party in interest as defendant in said action, and that all the other persons named as defendants are mere nominal parties. The defendant Tennessee-California Gold Mining Company, which joins the plaintiff in resisting the motion, files a verified answer, presenting its interest in the subject-matter of the action brought by plaintiff.

In determining the cause of action to be tried neither the affidavit nor the answer can be looked to. The effect of the complaint in this respect cannot be varied by either. Only as affecting the question of residence will they be considered. Quint v. Dimond, 135 Cal. 572, 67 Pac. 1034. The only cause of action attempted to be stated in favor of plaintiff is one against the defendants Merced Security Savings Bank and Houghton, and is to compel the bank to deliver to plaintiff certain shares of stock of the defendant corporation, Tennessee-California Gold Mining Company, in which Houghton is interested. The relations of the parties to the transactions involved in the action, as disclosed by the complaint, are: The plaintiff and defendant Guenther were pledgors of the shares of stock—the bank the pledge holder and the defendant Houghton the pledgee. There is no real property involved in the said cause of action attempted to be stated in favor of plaintiff. The extensive allegations of probative facts anticipating the bank's reason for refusing to deliver the stock constitute no part of the statement of a cause of action which the court can consider on this motion.

Neither of the corporation defendants has an absolute right under the constitutional provision (section 16, art. 12) to have the action removed on account of its place of residence. Trezevant v. Strong Co., 102 Cal. 49, 36 Pac. 395. The principal place of business of the Tennessee-California Gold Mining Company is stated in the complaint to be at Los Angeles, Cal., but the complaint states no cause of action in favor of plaintiff to which that corporation is a proper or necessary defendant. The defendant Guenther passed out of consideration by the stipulation of the parties in open court. This leaves but the two moving defendants to be considered. The bank is a resident of Merced county, but its demand for change is to Mariposa county, and may be considered as a consent to the granting of the motion of the defendant Houghton, whose demand on the ground of his place of residence is for a change to Mariposa county. The mining company being neither a necessary nor proper party to the determination of the cause of action therein stated in favor of plaintiff, the defendant Houghton's motion should have been granted, if there was a sufficient showing on the merits. McKenzie v. Barling, 101 Cal. 459, 36 Pac. 8. We think there was.

The contention of respondent that the affidavit of merits made by the moving party is insufficient cannot be sustained. The affidavit is substantially the same as the one held good in McSherry v. Penn. Co., 97 Cal. 642, 32 Pac. 711, except that in the case cited the affiant avers that he "has fully and fairly stated the facts of the case" to his counsel, while in the case at bar the statement is that he "has fully and fairly stated the case" to his counsel. There is no essential difference between these statements. Rathgeb v. Tiscornia, 66 Cal. 96, 4 Pac. 987.

The order appealed from is reversed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 29

## PEOPLE v. HARBEN. (Cr. 44.)

(Court of Appeal, Second District, California. Feb. 18, 1907.)

1. False Pretenses—Fictitious Bank Bill—Information.

An information charging that defendant passed a fictitious bill in writing on a bank not in existence, with intent to cheat and defraud the complaining witness, and alleging that defendant had knowledge of the character of the bill and of the nonexistence of the bank named therein at the time he passed such bill, sufficiently charged the offense defined by Pen. Code, § 476, prohibiting the passage of a bank bill of a bank having no existence, with intent to defraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 34-36.]

2. Same—Fictitious Bill—Statutes.

Defendant passed an alleged $20 bank bill to complainant in payment of room rent. The bill consisted of two bills pasted together; the exposed sides being similar to each other. Both bills were of the denomination of $20 and purported to be issued by a New Jersey bank which had had no existence since 1865. One of the exposed faces bore the "No. 31,777" and the date 1864, and the other showed the number blank, the date incomplete, the signature by the president, but a blank for the signature of the cashier. *Held* that, though such bills were genuine in so far as they were complete, they were nevertheless false and fictitious, within Pen. Code, § 476, prohibiting the passing of a fictitious bank bill of a bank not in existence, with intent to cheat and defraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 4.]

3. Criminal Law—Other Offenses—System.

In a prosecution of defendant for passing a fictitious bank bill at Long Beach on October 28, 1905, in payment for room rent, evidence was also offered of a similar offense alleged to have been committed by him in San Pedro on the 3d day of November following. Defendant admitted being in San Pedro on the day of the alleged later offense, but tried to establish an alibi as to the principal offense. *Held*, that evidence of the subsequent offense was admissible to identify defendant as the person who passed the fictitious bill at Long Beach, and to show that defendant was operating a system of imposition and fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 833, 834.]

4. False Pretenses—Statutes—Amendment.

Pen. Code, § 470, as amended by Acts 1905, relating to the offense of signing the name of a fictitious person with intent to defraud, had no application to section 476, prohibiting the passing of a fictitious bank note of a bank not in existence.

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Steven Harben was convicted of passing a fictitious bank bill with knowledge of its character, and he appeals. Affirmed.

E. L. Hutchinson, Henry H. Roser, and H. H. Appel, for appellant. U. S. Webb, Atty. Gen., and E. E. Selph, Deputy Atty. Gen., for the People.

TAGGART, J. This is an appeal from a judgment of conviction, and from an order denying defendant's motion for a new trial, upon a charge of passing a fictitious bank bill in violation of the provisions of section 476 of the Penal Code. The information charges that the defendant on the 28th day of October, 1905, passed a certain fictitious bank note of a bank or corporation having no existence at the time, and charges the defendant with knowledge of the false and fictitious character of the bill and of the nonexistence of the bank named in the bill at the time of the passing of the bill.

The note or bill is double; that is, it consists of two bills pasted together, the exposed sides being similar to each other, and the reverse side of each bill being entirely concealed from view. Both bills are of the denomination of $20, and purport to have been issued by the State Bank at New Brunswick, state of New Jersey. One of the exposed faces bears the "No. 31,777" and the date 1864. The other shows the number blank (No. ———) and the date (18 —) incomplete. Both are signed "John B. Hin, Prest.," but the space preceding the word "Cash'r" is blank (———, Cash'r). The bank named in the bill closed its doors, or, as one witness puts it, "busted, about 1864 or 1865." It has had no existence, either as a bank of issue or otherwise, since 1865. The bills constituting the "bill" are worthless, and have had no value since the date last mentioned, except a nominal one given them by curio dealers. The absence of the name of the cashier indicates that they were never regularly issued, and never became current bank notes, or possessed any value as such. These two bills, so made into one, were on the 28th day of October, 1905, tendered by defendant to the complaining witness as $20 in lawful money, in payment of the sum of $3, being in part payment for rent of a room in the lodging house kept by such witness at Long Beach. She accepted the bill as such payment, and returned to defendant $17 in good money in change. Defendant immediately left, and said witness did not see him again until 10 days later, when he was under arrest in San Pedro.

In addition to defendant's said conduct, tending to show his knowledge of the character of the bill in question, the prosecution introduced in evidence two other bank notes or bills, of the denomination of $10 each (made into one in similar manner), purporting to have been issued by the Merchants' & Planters' Bank of the State of Georgia, at Savannah; also testimony to show the passing of these bills by defendant as a $10 bank note, in payment for a loaf of bread worth 10 cents, at San Pedro, on the 3d day of November, 1905, and that the bank named in these bills passed out of existence about the time of the close of the Civil War. The testimony shows that in connection with the latter bills defendant received in return as change the sum of $9.90 lawful money. The ruling of the trial court in admitting the latter bills to show guilty knowledge and intent is assigned as error.

The record discloses no attack upon the information, either by demurrer or motion in arrest of judgment. The appeal presents three matters for consideration: Does the information state a public offense? Is the evidence introduced sufficient to sustain a verdict of guilty? And did the court err in admitting in evidence the bills passed by defendant in San Pedro, and the testimony in connection therewith introduced to show that he did pass them and to show the character of the bills?

Every essential element of the offense for which punishment is provided by section 476 of the Penal Code is set forth in the information. It charges the defendant with passing a fictitious bill in writing of a bank not in existence, with the intent to cheat and defraud the complaining witness, and alleges that defendant had knowledge of the character of the bill and of the nonexistence of the bank named in the bill at the time he passed the latter. This is sufficient.

Defendant contends that there is no evidence to show that the bills are "fictitious," but that, on the contrary, all the evidence in this respect tends to show that they were "genuine" in so far as they were complete, and that the bank was in existence at the time they bear date. Again, it is urged that, the bill or bills not having been properly executed and this appearing upon the face or faces thereof, it or they could not be the means of committing a fraud. Webster defines "fictitious" as "feigned; imaginary; not real; counterfeit; false; not genuine." If it were the duty of the court to divorce these bills from the circumstances under which they were passed by defendant, separate them from each other, and restore them to the condition in which they probably were when they left the bank whose name they bear, it might find them to have been genuine at that time; but as prepared by defendant, or some one else, with the evident purpose of concealing their real character, and, as passed, they were "not genuine," but were "false," and instruments of fraud and deceit, and the jury were justified by the evidence in so finding.

It is not material to the question that the bills were not complete and legally issued. As appears from language quoted by the Supreme Court with approval in People v. Munroe, 100 Cal. 667, 35 Pac. 327, 24 L. R. A. 33, 38 Am. St. Rep. 323: "It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money or the delivery of property. The question is whether upon its face it will have the effect to defraud those who may act upon it as genuine or the person in whose name it is forged. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it, if genuine, or have a remedy over." The language here used was in relation to forged paper, which might injure either the person imposed upon by its passage, or the person whose name was forged. By the passing or utterance of a bank note of a nonexistent bank, no one would be injured except the person receiving it as a thing of value and those to whom he might deliver it in the same manner. No question of the liability of the person whose signature is attached can arise. It becomes unimportant to know who signed it, or whether or not it was signed at all. As pasted together, the two bills were in effect a simulation of a current bank note, and intended to deceive. They accomplished this purpose with the complaining witness. Being false, fictitious, and "not genuine," the only test of whether or not the passage of this "bill" was a crime was the intent to defraud on the part of the defendant.

The practice of permitting the introduction of evidence to prove other or similar offenses to show knowledge, intent, design, or system in cases of conspiracy, counterfeiting and forgery, false pretenses or representations, receiving stolen goods, embezzlement, etc., has long been recognized by the criminal courts. Roscoe's Crim. Ev. (6th Ed.) p. 88; Wharton's Crim. Ev. (8th Ed.) § 39 et seq.; People v. Gray, 66 Cal. 275, 5 Pac. 240, and cases cited. Some confusion exists in the cases as to the principle upon which such evidence has been admitted. A recent treatise on Evidence (Wigmore on Evidence), by a classification of the cases on the basis of the purposes which the evidence is intended to serve, has dispelled some of the fog which envelops the declarations of the courts on the subject. A distinction holding that facts admitted to show knowledge should contain an element of notice or warning, while those to establish intent need only to negative inadvertence or other innocent explanation of the act, appears at first sight purely academic; but in the consideration of apparently conflicting opinions, by ascertaining the viewpoint of the court expressing the opinion, it greatly aids in reducing the apparent inharmony among the cases.

The knowledge to be considered here is that which refers to the character of the bill charged by the information to have been fraudulently uttered. In order that the utterance of another fraudulent bill should be evidence of such knowledge on the part of the defendant, it must have been uttered prior to the time of the passing of the bill in question. The intent with which the bill was passed, as distinguished from the knowledge of the passer, however, opens a broader field. It includes the knowledge of the character of the bill and also the purpose with which the act was done. While the subsequent utterance could not establish notice at the prior date, it might, nevertheless, throw some light upon the intent and purpose which actuated the utterer at the time of the passing of the first bill. The same distinction may also be drawn between the facts constituting design and those establishing system. A design implies a preconceived plan or preparation, while system may be established by any facts showing a general intent coupled with similarity of method or arrangement. While a preconceived plan could not well be inferred from subsequent events, a general system might be deduced from a line of conduct preceding or following the principal event. A system being established, it would matter little whether the act complained of was the first or last individual manifestation of the general plan that could be shown. It cannot be denied that a repetition of utterances of false and fictitious notes tends to negative innocence in particular cases. Mr. Wigmore says the principle applicable to such evidence proceeds upon the doctrine of chances. As to remoteness of time of the utterances sought to be introduced and the similarity of the notes or bills uttered on the several occasions, the rulings exhibit views of all degrees of liberality and narrowness. Wigmore on Ev. § 310.

Conceding that the principle upon which this evidence is introduced is the doctrine of chances or probabilities, the number of the utterances, their remoteness in time, and the similarity of the instruments become matters affecting the weight, rather than the admissibility, of the evidence. In such cases, if the evidence has any application under the rule, whether or not it has sufficient weight to entitle it to be submitted to the jury is a question for the determination of the trial court. People v. Frank, 28 Cal. 507, 518. The sameness of the peculiar, if not unique, method of preparation of the two sets of bills, and the similarity of the manner of realizing upon them, warranted the court in permitting the jury to determine from the two transactions whether or not the defendant was operating by a system of imposition and fraud, and to draw therefrom such inference of intent and knowledge as the facts justified.

In the consideration of the case the fact that the record discloses that defendant sought to establish an alibi as to the principal offense, and to prove that he was not in Long Beach on the 28th of October, 1905, while he admitted being in San Pedro on the 3d day of November, has not been overlooked. Under such circumstances there is no doubt that the admission of the evidence as to the San Pedro transaction tended to establish the identity of the defendant as the man who passed the fictitious bill in Long Beach. Conceding, but not deciding, that it was not admissible for that purpose, it was relevant to the issue of fraudulent intent, and this was sufficient to entitle the evidence to be admitted.

The rules relating to the admission of such evidence were carefully complied with. Ground was first laid implicating the defendant in the case under trial, the defendant was shown to have committed the extraneous crime, the similarity of the offenses was apparent from the evidence, and the jury were properly instructed by the court as to the purpose of the introduction of the evidence. There was no error in the introduction in evidence of "Exhibit B," nor in permitting the prosecution to introduce the testimony given in connection therewith.

Defendant's motion for a new trial, as displayed in the transcript, also relies upon the ground that the court erred in instructing the jury. No particulars are specified in the transcript, and none presented in the brief. An examination of the instructions in the record fails to disclose any error in this respect.

The amendment of section 470 of the Penal Code in 1905 did not affect section 476, and section 470 has no application here. That amendment applies only to the "signing of the name of a fictitious person," with the intent to defraud, while the crime here charged is the passing of a fictitious bank note of a bank having no existence.

The judgment and order of the trial court are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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5 Cal. App. 726

## HERCULES WATER CO. v. FERNANDEZ et al. (Civ. 116.)

(Court of Appeal, Third District, California. June 17, 1907.)

1. EMINENT DOMAIN—CONDEMNATION — PUBLIC USE—COMPLAINT.

The complaint of a water company to condemn water rights, alleging a necessity therefor, for the purpose of supplying the inhabitants of the town of H. and of the town of P. and of "other places in said county" of C. with water, does not, as it must, show a necessity for condemnation exclusively for a public use, under Code Civ. Proc. § 1238, authorizing the exercise of the right of eminent domain in behalf of canals, ditches, etc., for conducting or storing water "for the use of the inhabitants of any county," city, village, or town.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 512.]

2. SAME—REVIEW—FINDINGS—PUBLIC USE.

Where in condemnation proceedings there is a question of fact, on conflicting evidence, as to whether the use for which the property is sought to be condemned is one of those authorized by the statute, the finding of the trial court thereon is conclusive, to the same extent as the findings of fact in other cases; but its finding that a certain use, not one of those for which the statute authorizes condemnation, is a public use, is not binding; only the uses enumerated by the statute being public uses for the purpose of condemnation.

3. SAME—MEASURE OF DAMAGES.

The measure of damages for condemnation of a riparian owner's water rights is the depreciation in the value of the whole of his tract of land adjacent to the stream, depending as well on the depth of the land as its frontage on the stream.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 250.]

Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Condemnation proceedings by the Hercules Water Company against B. Fernandez and others. From a judgment for plaintiff, said defendant Fernandez appeals. Reversed, with directions.

Morrison, Cope & Brobeck, for appellant. Pillsbury, Madison & Sutro, for respondent.

CHIPMAN, P. J. Eminent domain. The complaint alleges corporate organization of plaintiff under the laws of this state, for the purposes, among others, of acquiring water rights, "on one or more rivers, creeks or streams within the state of California; of acquiring, purchasing, erecting, constructing, holding, owning, improving, and leasing dams, reservoirs, tanks, canals, flumes, aqueducts, ditches, pipe lines, and other waterways or conduits, and securing and impounding springs, streams, and all other waterways; of buying, selling, owning, or otherwise dealing in, water for domestic, irrigation, manufacturing, and all other purposes; of furnishing, supplying, and selling the same to any county, city and county, city, town, and the inhabitants thereof; of acquiring, constructing, and maintaining reservoirs, tanks, canals, pipe lines"; avers the ownership of water rights in the waters of Pinole creek, Contra Costa county, "being the right to divert and use the waters of said creek and to store the same for the purpose of supplying the inhabitants of the town of Pinole and of the town of Hercules and of other places in the said county of Contra Costa, with water for domestic and other necessary and useful purposes"; avers the ownership of a reservoir and pumping plant and pipe line whereby said water is diverted from said creek and pumped into said reservoir; that it owns pipe lines leading from said reservoir to various places in the towns named, "and elsewhere in said county," by means of which "it now supplies water for said purposes to the inhabitants of said town of Hercules and to the inhabitants of said town of Pinole, and by means of which it expects and intends to supply water for like purposes to the inhabitants of other places in said county"; that the uses and purposes for which the property, rights, and easements already acquired have been and are being appropriated are public uses within the meaning of the law of this state; that it is necessary, in order to make effective use of the waters of said creek as aforesaid by means of dams erected across said creek at various places thereon above the lands of defendant, to impound all the waters of said creek in order to facilitate the taking all of the water of said creek at a point or points above the land of defendant, to wit, at the said pumping station and at other points on said creek, and to store the same in said reservoir of plaintiff; that plaintiff is the owner of all the riparian lands and rights upon said creek which are affected by the diverting of said water, as aforesaid, except the premises hereinafter described. The complaint then describes the lands of defendant Fernandez and other defendants alleged to be affected by the condemnation sought and alleges that said creek flows through each parcel of land thus described to the waters of which defendants are the owners of riparian rights; "that for the purpose of supplying the inhabitants of the town of Hercules and of the town of Pinole and of other places in said county of Contra Costa with water as aforesaid it is necessary that the plaintiff should acquire, have and hold an easement in and to all the waters of said Pinole creek * * * for the aforesaid use and purpose of supplying the inhabitants of the said towns named, and of other places in said county of Contra Costa with water." The defendants other than defendant Fernandez made default, which was duly entered. Defendant Fernandez demurred to the complaint generally for insufficiency of facts, and specially on the grounds of uncertainty, ambiguity, and unintelligibility. The demurrer was overruled, and defendant Fernandez answered, denying specifically the material allegations of the complaint.

The findings follow closely the allegations of the complaint; the court finding, among other facts, that plaintiff at the commencement of the action, was supplying water, and since has been supplying water, as alleged, to the two towns named, and "expects and intends to supply water for like purposes to the inhabitants of said towns and of other places in said county." The court also finds that, in order to make effective use of said water sufficient to supply the inhabitants of said two towns "and of other places in said county with water," it is necessary to impound the waters of said creek as alleged in the complaint; that for the purpose of supplying the inhabitants of said towns "and other places in said county of Contra Costa with water, it is necessary that plaintiff acquire * * * an easement to all the waters of said Pinole creek, to wit," the right by means of dams at various places above defendant's land and store the same, "for the aforesaid use and purpose of supplying the inhabitants of the town of Hercules and of the town of Pinole and of other places in said county of Contra Costa with water." In assessing the damages, the court found the total damages to be $2,675, as follows: (1) That the rights and easements belonging to defendant Fernandez are fixed at $1,000; (2) the damage to accrue to the first, second, and third parcels of his land, as described in the complaint, is fixed at $25 each, and to the fourth parcel it is fixed at $1,600, the last three items of damage by reason of the severance of his said riparian rights from said parcels of land. The findings generally follow the allegations of the complaint, and the judgment follows the findings. Defendant Fernandez appeals from the judgment on bill of exceptions.

It is urged by appellant that the general demurrer should have been sustained, for that it is sought by the proceedings to condemn water for the use of places in the county which are not described as cities, towns, or villages or otherwise as required by statute law. The special demurrer also points out that the complaint is ambiguous, uncertain, and unintelligible among other grounds, because it cannot be ascertained therefrom whether it is necessary to condemn the said water rights for the purpose of supplying the inhabitants of the towns named, or for the purpose of supplying the inhabitants of "other places" in said county.

Section 1238 of the Code of Civil Procedure provides as follows: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following uses: * * * (3) * * * Canals, aqueducts, reservoirs, tunnels, flumes, ditches or pipes for conducting or storing water for the use of the inhabitants of any county, incorporated city, or city and county, village or town. * * *" Section 14, art. 1, of the Constitution, prohibits the taking or damaging of private property for public use without just compensation having first been made. We are, however, to look to the Legislature to ascertain what constitutes a public use and for the authority to exercise the right of taking or damaging private property for a public use. The only limitation upon this power is contained in the Constitution. Lindsey Irrigation Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802. Section 1241 of the Code of Civil Procedure provides that before private property can be taken it must appear "that the use to which it is to be applied is a use authorized by law," and the uses so authorized are those specified in the statute (section 1238, Code Civ. Proc.), and none others.

The words "the inhabitants of," as used in the complaint, we think should be read in connection with the words "other places in the county of Contra Costa," and it was not necessary to repeat them before the latter words. But these latter words, as used in the complaint, are clearly in addition to and were intended to embrace territory different from that of a town, village, city, or incorporated city and county. Unless, therefore, a construction can be given to these words which would make them equivalent to an averment that the purpose was to supply with water the inhabitants of the county of Contra Costa, we do not see how the complaint can be upheld as seeking to condemn for a public use. Such construction, however, we think unwarranted. "Other places" cannot mean all places in the county other than the towns of Hercules and Pinole, nor can the complaint be held to mean all the inhabitants of the county other than said towns. The terms are too indefinite to embrace either the whole county or any particular body of the inhabitants who are to be supplied with water. Apparently, the plaintiff is to be the exclusive judge of whom and what places it will supply with water, and no reciprocal right attaches to any particular group of the inhabitants of such places to demand service of plaintiff. "The other places might be," as suggested by appellant, "factories, such as that of the California Powder Works, or they might be farms belonging to one individual, or hotels, stores, shops, residences, or innumerable other private places and establishments." Nor do we think by this illustration "that counsel are sticking in the bark," as replied by respondent. It is true that in supplying these places plaintiff would be engaged in supplying water to some of the inhabitants of the county of Contra Costa, but would plaintiff be under obligation to supply the inhabitants of the whole or any definite part of the county? It was said in Lindsay Irr. Co. v. Mehrtens, 97 Cal. 681, 32 Pac. 803: "It is not necessary that the entire public shall enjoy the use, or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use."

The statute authorizes the exercise of the right of eminent domain (except as to towns, villages, and incorporated cities), in behalf of canals, ditches, etc., for "conducting or storing water for the use of the inhabitants of any county," not for the inhabitants of places in any county, indefinitely described, or for the inhabitants less than those of the entire county. All may not enjoy the use, but the use must be capable of enjoyment by all. In the Lindsay Case, supra, the court said: "Whether the particular region is a farming neighborhood, and whether the supplying of water to that neighborhood constitutes a public use, are questions of fact which must be determined by the court before whom the proceeding is had, and its decision thereon must be held conclusive upon this court to the same extent as in other cases where it is called upon to determine matters of fact." It is hence urged by respondent that, as there is a finding to the effect, as is claimed, that the supplying of water to the inhabitants of the town of Hercules and of the town of Pinole and other places in said county of Contra Costa, constitutes a public use, is conclusive upon this court. The finding of the court was not that to supply water to "other places in said county" was a public use, but that "the rights and easements already acquired and owned have been, and at the time of the commencement of this action were, and now are being appropriated, are public uses." But had the finding gone to the extent claimed, we do not think it would have been conclusive upon this court. The statute under examination in the case just cited made the supplying of farming neighborhoods with water a public use. The question involved was as to the sufficiency of the evidence to sustain the judgment that the particular land constituted a farming neighborhood. The court did not mean that the trial court could conclusively determine what the Legislature alone can determine. It is not sufficient for the pleader to allege that the use for which property is to be taken is a public use. The complaint must show that the use is one of those enumerated in the statute, and the trial court cannot obviate this requirement by finding the use to be a public use. It was said in the case last cited: "Whoever, under the claim of agency of the state, would deprive the owner of any of the property by virtue of the exercise of eminent domain, must show not only that the use for which he seeks to appropriate it is a public use, but also that the Legislature has authorized the taking of property for that particular use, and in the mode in which he is seeking to appropriate it. The Legislature must designate, in the first place, the uses in behalf of which the right of eminent domain may be exercised, and this designation is a legislative declaration that such uses are public and will be recognized by the courts; but whether, in any individual case, the use is a public use, must be determined by the judiciary from the facts and circumstances of the case." As we understand the decision: If, for example, a question of fact had arisen as to whether or not Hercules is a town or village, it would be for the court to determine that fact, and its finding upon conflicting testimony would be conclusive. But if the Legislature had not provided for the condemnation of riparian rights for the benefit of towns or villages, no right of condemnation could rest upon such finding by the trial court, even with the added finding that the supplying of water to such towns was a public use. A corporation can no more condemn property for purposes not declared to be public uses than for purposes without the power conferred by the corporation charter; and that this latter cannot be done was held in Chicago & N. W. Ry. Co. v. Galt, 23 N. E. 425, 24 N. E. 674, 133 Ill. 657, conceded by respondent to be good law. Mr. Lewis says: "The petition should show the use or purpose for which the property is desired, and that it is within the statutory powers conferred. It should show a clear right to condemn the property described." 2 Lewis on Eminent Domain, § 353. See, also, 7 Ency. of Pl. and Pr. p. 526. "Where the proceeding shows upon its face two distinct uses or purposes, one lawful and the other not, which are so inseparably blended in the petition and orders as not to be severable, it cannot be sustained." Id., p. 527. Here, both by averments of the complaint and by the findings and judgment of the court, a necessity is alleged and found for the condemnation to supply not only the inhabitants of the towns named, but also of other places in the county of Contra Costa.

Nor can the terms "other places" be disregarded as surplusage or stricken out by amendment of the judgment. The court found that the water was necessary not only for the inhabitants of the towns named, but that, in order to make effective use of said waters sufficient to supply the inhabitants of said two towns and other places in said county, it is necessary that plaintiff acquire an easement to all the waters of said creek. We cannot say that the trial court would have found it necessary to condemn all the waters of the creek if plaintiff had not expressed an intention in its complaint to use the waters of the creek elsewhere than in said towns and had asked for a decree to that effect. Mr. Lewis cites cases holding that, where an act combined a private use with a public use in a way that the two cannot be separated, the whole act is void. He adds: "So an application under an act to condemn property for purposes, part of which are within, and part not within, the act, will be bad in toto." 1 Lewis on Eminent Domain, § 206. If plaintiff had no right to condemn the riparian rights of defendant Fernandez to supply water to the inhabitants of other places than the towns named, the complaint was indefinite and uncertain in the particular claimed, as well as seeking the aid of the statute for an unauthorized purpose. A private corporation formed for private gain, under guise of serving the public, should not be permitted to take private property through the extraordinary remedy of eminent domain, and under an assumed agency of the state, upon any strained or doubtful construction of the statute declaring what are public uses.

Error is claimed arising out of the method adopted by the trial court in assessing the damages. As the cause must be remanded for a new trial, we deem it best to notice this point. Over defendant's objection, the court allowed the witness McMahon to testify that the value of water rights all along the banks of Pinole creek was about $2 per running foot, apparently without regard to the extent of the land at different places lying back of the creek. There were several tracts of land of appellant, marked on the map used at the trial, of various acreage—in all about 182 acres through which the creek flowed for a distance of about 1,190 feet. The damage awarded was $2,675, made up as shown above. Whether appellant was injured by this particular testimony is not clear, for the court seems to have assessed the damage to all the land, by reason of the severance of the riparian rights, and in addition allowed a separate sum for the rights and easements belonging to appellant. In the present case the riparian rights alone were sought to be condemned, and the water was to be taken at a point above appellant's land. No part of his land was sought to be taken. It seems to us that the true rule is stated by respondent—that the measure of damage to a riparian owner by the appropriation or diversion of the waters is the depreciation in the value of the property affected by the taking. The question was thus disposed of in Lee et al. v. Springfield Water Co., 35 Atl. 184, 176 Pa. 223, where the court said: "The defendant had seized a part of the waters of Crum creek for the supply of its waterworks. The plaintiffs are mill owners on the same stream, and below the point at which the water is taken. The object of this action is to ascertain the damages sustained by the plaintiffs by reason of the appropriation of a portion of the water of the stream that had previously flowed through their property, and been used by them to aid in propelling their machinery. The true measure of damages to be applied in all cases of a taking by virtue of eminent domain is involved in no doubt. It is easy of application. It is the depreciation in value of the property affected by the taking. Where land is taken, this has been said so frequently that it would be a work of supererogation to cite the cases in which the doctrine has been stated and applied. It was applied in Miller v. Water Co., 23 Atl. 1132, where, as in this case, a water company had appropriated water, and a lower riparian owner complained that he was injured by the appropriation. It is the proper measure of the plaintiff's damage in this case. The jury should inquire what the property affected was fairly worth immediately before the water was appropriated and what it was worth affected by the appropriation. The difference, if any, is the loss actually sustained, and therefore the measure of the plaintiff's right to recover damages." It was also so held in City of Syracuse v. Stacey et al., 62 N. E. 354, 169 N. Y. 231.

Appellant claims that the extent of the riparian right is to be measured by the area of land adjacent to the stream and within the watershed, citing Alta Land, etc., v. Hancock, 85 Cal. 219, 229, 230, 24 Pac. 645, 20 Am. St. Rep. 217; and Wiggins v. Muscupiabe L. & W. Co., 113 Cal. 182, 195, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337. There seems to be but little if any disagreement between counsel upon the rule. The point made by appellant is that the measurement of damage by the running foot was, in view of the facts of the case, an improper method of ascertaining the compensation, and upon the point we agree with appellant. Such method wholly disregards the extent of the land adjacent to the stream and within its watershed and owned by the defendant. The riparian right to a narrow strip of land a hundred feet wide would thus have the same value as it would have if the body of land had a width of a thousand feet. Then, again, the water frontage in question embraced land lying along a creek of fresh flowing water, and land also whose frontage was on tide water unfit for domestic use. It is not probable that the riparian right was of equal value foot by foot of all this frontage.

The single fact to be determined was the depreciation in the value of the property affected by the taking away from it the water sought to be condemned, to be ascertained, of course, by competent and proper evidence.

The judgment is reversed, with directions to sustain the demurrer; plaintiff to have leave to amend its complaint, if so minded.

We concur: HART, J.; BURNETT, J.

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5 Cal. App. 762

## LANE v. SUPERIOR COURT OF KINGS COUNTY. (Civ. 404.)

(Court of Appeals, Second District, California. June 19, 1907.)

1. JUSTICES OF THE PEACE—APPEAL—UNDERTAKING.

Code Civ. Proc. § 974, authorizes an appeal from a justice's judgment at any time within 30 days after its rendition. Section 978 provides that an appeal from a justice's court is not effectual unless an undertaking be filed, etc. A party appealing from a justice's judgment filed within 30 days of its rendition an undertaking. The sureties failed to justify, and after the expiration of the 30 days he filed a new undertaking. *Held*, that the superior court acquired no jurisdiction to entertain any proceeding in the case except a motion to dismiss the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 555.]

2. SAME.

Where the successful party in justice's court moves for the dismissal of an appeal, on the ground that the superior court acquired no jurisdiction for failure of the defeated party to file an undertaking as prescribed by statute, the superior court cannot take jurisdiction on the theory that the issues involve title to or possession of real property.

3. PROHIBITION—GROUNDS FOR RELIEF—WANT OF JURISDICTION.

Where the superior court takes jurisdiction of a cause on appeal from a justice's court, notwithstanding the failure of the party appealing to perfect his appeal as required by statute, the Court of Appeal, on petition of the successful party, may issue a writ prohibiting the superior court from proceeding with the trial of the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 37-56.]

Application for writ of prohibition by O. P. Lane against the superior court of the county of Kings. Writ granted.

Robert W. Miller, M. L. Short, and Wheaton A. Gray, for petitioner. T. M. McNamara and R. J. Hudson, for respondent.

TAGGART, J. Application for writ of prohibition. One David Bonham commenced an action in the justice's court of Lucerne township, Kings county, against petitioner to recover $200 as money had and received. Judgment was for defendant (petitioner here) for costs, and plaintiff appealed.

The judgment was rendered April 25, 1907, and on May 23, 1907, plaintiff served defendant with a notice of appeal to the superior court from said judgment. The same day he filed an undertaking on appeal reciting that his appeal was "from a judgment entered against him, in said action, in the said superior court," etc., and obligating the sureties in the sum of $300, instead of $100. On May 24th, the justice of the peace certified the records and papers in the case and filed them in the superior court. Defendant gave notice of exception to the sufficiency of the undertaking and of the sureties thereon on May 27, 1907, and May 29th notice of intention of sureties to justify was served on defendant without time being fixed in the notice; after oral notice of the time and an adjournment of the hearing to May 31st, counsel for plaintiff in open court, on that date, stated that one of the sureties on the undertaking could not justify and the court adjourned without any justification of any surety on that or any other undertaking. Thereafter, on said 31st day of May, 1907, the plaintiff filed in the office of the clerk of the superior court an undertaking entitled: "In the Justice's Court of Lucerne Township, County of Kings, State of California"—and in the cause mentioned, reciting that he has appealed "from a judgment made and entered against him in said action in the said superior court, in favor of the plaintiff" [himself], etc. Notice of the filing of this bond as a new undertaking, and of the intention of the sureties thereon to justify before the superior court on June 1, 1907, was given to defendant the same day, and the latter appeared by counsel in the superior court at the time named in the notice and objected to the filing of a new undertaking on appeal in the said cause, on the grounds that no notice had been given defendant of the proceedings under which said undertaking was filed, and that the filing of a new undertaking and justification of sureties thereon was not authorized by law. The court overruled the objection, and defendant excepted. At the same time and place, all parties being in court by counsel, and notice being waived, defendant moved the dismissal of the appeal on the ground that the court had acquired no jurisdiction of the case. He specified as reasons: That the original undertaking was fatally defective, in that it described no judgment appealed from; that the sureties had failed to justify, and no other sureties had justified in their stead; that the new undertaking filed in the superior court more than 30 days after the rendition of the judgment in the justice court was ineffective. The superior court overruled this motion and set the case for trial June 20, 1907. Petitioner (as defendant and respondent in that case) makes application to this court for a writ of prohibition to prevent the superior court of Kings county from proceeding with the trial of said cause.

We have stated the matter at length, since we think the mere statement of the facts give ample reasons for the issuance of the writ as prayed for. Conceding the last undertaking filed to be sufficient in form and to have been filed in the proper court, it was ineffectual to perfect the appeal, as it was not filed within 30 days after the rendition of the judgment. Sections 974, 978, Code Civ. Proc.; Coker v. Superior Court, 58 Cal. 178. The justification of the sureties on the first undertaking having been abandoned, the appeal taken was "not effectual for any purpose" after May 25th (30 days from the rendition of the judgment). The proceedings to justify on the only undertaking given within the statutory time extended that time only for the purpose of justification, and did not operate to give additional time within which a new and independent undertaking might be filed. The sureties having failed to justify, the appeal must be regarded as if no such undertaking had been given. Bennett v. Superior Court, 113 Cal. 442, 45 Pac. 684, 54 Am. St. Rep. 354. There was nothing before the superior court until the undertaking was filed, and, until the sureties justified, the cause remained in the justice's court. McCracken v. Superior Court, 86 Cal. 76, 24 Pac. 845. By the appeal attempted to be taken the superior court acquired no jurisdiction to entertain any proceeding in the case except a motion to dismiss the appeal.

It is unnecessary in ruling upon this application to determine whether or not the verified answer filed in the justice's court raised an issue involving the title or possession of real property. Conceding that it does, it would not give the superior court jurisdiction of the appeal here in question. None of the authorities cited hold that a party can be brought within the jurisdiction of the court against his consent by any other than the statutory method. In the case of Santa Barbara v. Eldred, 95 Cal. 378, 30 Pac. 562, an application for a transfer to the superior court was made to the police court on the statutory grounds provided by section 838 of the Code of Civil Procedure, and the application denied, the cause was tried by the police court, and an appeal from the judgment taken to the superior court. The case was tried in the superior court without objection, and the question of whether the jurisdiction exercised by the superior court was original or appellate was under consideration by the Supreme Court on an appeal to that court from the judgment rendered by the superior court. The court says: "The police court had no jurisdiction to try the cause upon the merits, and it necessarily follows that the superior court had no appellate jurisdiction to try the cause at all. But the superior court had original jurisdiction of the subject-matter, and, * * * having jurisdiction over the subject-matter, the court obtained jurisdiction over the parties when, without objection, they proceeded to trial upon the main issue. * * * The proper procedure would have been for the superior court to have set aside the judgment, and ordered the police court to remand the cause in accordance with section 838." There is nothing in the opinion in Hart v. Carnall-Hopkins Co., 101 Cal. 160, 33 Pac. 633, to modify this statement of the law. See, also, Arroyo Co. v. Superior Court, 92 Cal. 47, 28 Pac. 54, 27 Am. St. Rep. 91.

In the case at bar, if a question of title or possession of real property be involved, the parties are not proceeding to trial without objection, and in such a case the superior court has no jurisdiction at all. Neither original by consent, or process, nor appellate because appellant failed to comply with the statutory requirements in attempting to appeal from the judgment in the justice's court.

It is proper, therefore, that a writ issue from this court prohibiting the superior court of Kings county from proceeding with the trial of said cause, and it is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 773

## NELSON v. McCARTY. (Civ. 370.)

(Court of Appeal, Second District, California. June 20, 1907.)

1. WEAPONS—NEGLIGENT USE—PERSONAL INJURY—EVIDENCE—SUFFICIENCY.

Evidence in an action for negligently injuring plaintiff by firing a revolver *held* to sustain a finding that the shot fired by defendant did not cause plaintiff's injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Weapons, § 34.]

2. APPEAL—REVIEW—CONCLUSIVENESS OF FINDING.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Personal injury action by S. A. Nelson against F. W. McCarty. Plaintiff appeals from a judgment for defendant and an order denying a new trial. Affirmed.

L. E. Dadmun, for appellant. T. L. Lewis and Daney & Lewis, for respondent.

ALLEN, P. J. Appeal by plaintiff from a judgment in favor of defendant, and from an order denying a new trial.

This action is one for personal injuries alleged to have occurred through the wanton, reckless, and negligent act of defendant in firing a revolver toward and in the direction of plaintiff, by reason whereof he was wounded and injured. The answer, among other things, denies the firing of any revolver or firearm by defendant toward or in the direction of plaintiff, or the wanton, reckless, or negligent firing of a revolver at any time, or in any direction whatever by defendant, and denies that any bullet fired or discharged from the revolver of defendant hit or injured the plaintiff. The cause was tried by the court without a jury, and the court found that the defendant did not at the time alleged in the complaint, or at any other time, or at all, carelessly or negligently fire or discharge any revolver toward or in the direction of plaintiff, or on the date mentioned or at any time carelessly, wantonly, recklessly, or negligently fire or discharge any revolver or other firearm, and that no bullet fired or discharged by the defendant from his revolver, or any other revolver or other firearm, fired by defendant, struck said plaintiff or entered said plaintiff's leg.

From the bill of exceptions, it appears that a horse attached to a buggy, in which was seated a woman, was running at a great rate of speed through the public streets of San Diego; that the bridle of such horse had become disarranged, and the woman had lost all control over the animal; that the defendant was a policeman in the city of San Diego, and fired a shot from a revolver at the horse for the purpose of so disabling it as that it might be gotten under control. It further appears from the record that another shot was fired by another policeman at the same horse about the same time; and there is evidence in the record tending to show that a third shot was fired at the horse within the same block. That plaintiff was injured by a bullet from one of the three shots is not to be questioned. But there is ample testimony in the record to justify the court in finding that the shot fired by defendant was not the cause of any injury to plaintiff. There is some testimony which indicates that, from the very situation of the parties at the time of the firing of the shot by defendant, it was not possible for the shot fired from his revolver to have in any wise affected the plaintiff. The most that can be said in favor of appellant's position is that there is some conflict in the testimony; but the rule is well established that, where the testimony is conflicting, an appellate court in support of the decision of the court below will construe the testimony as favorably as possible for the respondent, and will not disturb a judgment or verdict when there is a substantial conflict in the testimony, even though the appellate court may consider it greatly against the weight of the evidence. Under this rule, it is unnecessary for us to discuss any other questions presented upon the appeal.

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

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6 Cal. App. 54

## DURPHY v. PEARSALL. (Civ. 296.)

(Court of Appeal, Third District, California. June 25, 1907.)

1. PARTNERSHIP—ACCOUNTING—ISSUES—FINDINGS.

Where, in a suit for a partnership accounting, the complaint alleged that the profits accrued and to accrue to the firm, as would appear on an accounting and settlement of the firm business, would amount to a specified sum, and prayed that an accounting be taken of all of the partnership transactions, the matter of a complete accounting was a material issue, and the failure of the court to find on it in making findings in favor of plaintiff, based on a part of the transactions, was erroneous.

2. APPEAL—REVIEW—DECISION AGAINST LAW.

Where, in a suit for a partnership accounting, the matter of a complete accounting was a material issue, and the court failed to find on it, but made findings in favor of plaintiff based on a part of the transactions of the partnership, the findings were against the law and reviewable on appeal.

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by B. F. Durphy against C. E. Pearsall. From a judgment for plaintiff, defendant appeals. Reversed.

J. N. Gillett, A. W. Hill, W. T. S. Hadley, and Edwin S. Easley, for appellant. J. H. G. Weaver, H. L. Ford, L. M. Burnell, and William Kehoe, for respondent.

BURNETT, J. The action is based upon an alleged partnership between plaintiff and defendant. Among other things, the plaintiff prays "that an account be taken of all of said copartnership dealings and transactions from the commencement thereof and of the moneys received and paid out by plaintiff and defendant for and on account of said copartnership." The judgment was against defendant for $6,048.91. Defendant has appealed from the judgment, and also from an order denying his motion for a new trial. These appeals are presented in separate transcripts, but we shall consider them together. All the points made by appellant except two seem to be satisfactorily answered by respondent. As to those two propositions, however, respondent has not attempted in his brief to afford the court any assistance, and it cannot be said that the points are unimportant.

The first is that "the court's finding of fact No. 15, to the effect that appellant's net profits from the Henry deal were $16,196.41, is not justified by the evidence." According to appellant's figures, the gross profits from the sale of the 13,000 acres in the Henry deal were $38,000 and the expenses were $33,500, and since admittedly plaintiff was only interested in the sale of 10,040 acres, the proportional net profit in which he is entitled to share is about $3,500, instead of $16,196.41, as found by the court. There is undoubtedly some evidence to uphold appellant's contention in this regard, and respondent might well have called our attention specifically to the evidence upon which he relies to support the finding.

Again, appellant claims "that there is another error in the same finding where the court subtracts $6,215.10, advanced by defendant to plaintiff from the gross profits, instead of from the net one-half belonging to the plaintiff." Appellant's position would be sound if it appeared that the $6,215.10 were advanced from the separate funds of defendant, but, on the contrary, the finding shows that it was a part of the partnership funds, as it was realized from the Henry sale. There appears to us, however, to be a mistake in the figures, which seems to have escaped the attention of counsel and the learned trial judge. The said finding 15 discloses that defendant received of the partnership funds the sum of $16,196.41; that plaintiff received $6,215.10 advanced by defendant and $11,000 from the Hammond deal, making a total of $17,215.10. The total amount received by plaintiff and defendant was thus $33,411.51. If they were to share equally, each would be entitled, therefore, to $16,705.75. But, under the agreement of April 3, 1900, defendant, out of his share, was to pay plaintiff $3,500. Add this amount to $16,705.75, and we have $20,205.75, the sum plaintiff should receive. But he had already received $17,215.10. The difference, or $2,990.65, is the amount for which he should have judgment, assuming that the record discloses no other defect.

Finding 16, which we must assume is based upon the figures found in finding 15, is "that defendant has received in excess of his share of said partnership funds the sum of $6,098.41, which said excess belongs to plaintiff herein." It may be that other transactions were taken into account, but the findings do not disclose them. It must be manifest, however, we think, that there ought to have been a complete accounting as prayed for by plaintiff. The judgment might then appear to be correct.

Respondent suggested in the oral argument that a complete accounting was not necessary, as the "Hammond and Henry" deals were the only ones involved in the action. We must look, however, to the pleadings to determine what questions are submitted to the court for decision. To indicate the scope of such inquiry, we refer to paragraph 15 of the complaint: "And the plaintiff alleges, on information and belief, that the profits accrued and to accrue to said copartnership between plaintiff and defendant as will appear upon a true accounting and settlement of said copartnership business, will amount to the sum of $134,000, one-half of which belongs to and of right ought to be paid to plaintiff herein." Besides, it appears from the findings that there were other transactions of the partnership, but no account is taken of them as far as we are advised; and as emphasizing the importance of considering them, it is expressly found that the settlement of April 3d was only a partial settlement of the copartnership matter.

It seems clear, therefore, that the doctrine announced in Albery v. Geis, 1 Cal. App. 381, 82 Pac. 262, and Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303, demands a reversal of the case. The reason for the rule demanding an accounting is stated in Story on Partnership, § 221, as follows: "Until all the partnership concerns are ascertained and adjusted it is impossible to know whether a particular partner be a debtor or a creditor of the firm; for, although he may have advanced large sums of money on account thereof, he may be indebted to the firm in a much larger amount." The matter of a complete accounting, therefore, was a material issue, and, the court having failed to find upon it, the decision is against law, and may be reviewed on appeal. Adams v. Helbing, 107 Cal. 301, 40 Pac. 422; Clark v. Hewitt, supra; Senior v. Anderson, 138 Cal. 721, 72 Pac. 349.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

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5 Cal. App. 771

## DEMING v. GAMBLE. (Civ. 358.)

(Court of Appeal, Second District, California. June 20, 1907.)

EVIDENCE—ADMISSIONS AGAINST INTEREST.

Where, in a suit by a husband against the administrator of his wife for a decree adjudging that land standing in the name of the wife is community property, there was no evidence that the husband knew the contents of the petition for administration of the estate of the wife, averring that the land was her homestead and her property at the time of her death, which petition was signed and sworn to by defendant, the petition and a waiver attached by the husband of his right to administration and a request for defendant's appointment were inadmissible as admissions against interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 714.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by H. C. Deming against F. G. Gamble, administrator of Mannie Deming, deceased. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Reversed and remanded for new trial.

Valentine & Newby, for appellant. Geo. Adams and Hugh J. Crawford, for respondent.

ALLEN, P. J. Appeal by plaintiff from a judgment and an order denying a new trial.

This action was brought by the plaintiff against defendant as administrator of the estate of plaintiff's deceased wife, the object of which was to have it adjudged that certain premises, to wit, lot 44, Park Villa tract, and lot 45, Angelus Vista tract, in Los Angeles city, all of which stood in the name of the wife at her decease, were community property. The court found that all of the premises described were purchased by the husband and the purchase money paid by him out of the funds of the community, and that the principal part of the improvements upon lot 45 had been paid for by him after the decease of the wife; that, as to lot 44, the title was in the wife in trust for the community, but that lot 45 was conveyed to the wife by way of gift from the husband, and was her separate estate. From this judgment in favor of defendant as to the said last-mentioned lot, and from an order denying a new trial, plaintiff appeals upon a bill of exceptions.

All of the evidence introduced by defendant tending to rebut that of plaintiff, in his effort to overcome the presumption created by the deeds, was in the nature of admissions of plaintiff against interest made before and after the decease of the wife. The trial judge, under objections and exceptions, permitted the defendant to introduce in evidence a petition for letters of administration signed and sworn to by defendant, in which petition it is stated that lot 45 was the homestead of deceased and was her property at the time of her decease, and of the value of $11,000. To this petition was attached a written waiver on the part of the husband, plaintiff herein, of his right to administer, and a request for defendant's appointment. There was no preliminary proof tending to show that plaintiff had ever read the petition signed by defendant, or had knowledge of its contents, when he signed the waiver so attached. The appointment and qualification of defendant as administrator was not in issue. The court in overruling the objections made to the introduction of this paper upon the grounds of its immateriality and incompetency must be taken as having considered that the statement of ownership therein made by the defendant was material and competent, and that plaintiff by signing the waiver thereto attached became bound by such declarations. We think the court erred in admitting this paper writing in evidence. The waiver signed by the husband is not a part of the petition, and that it was thereunto attached was of no significance. The waiver might well have been upon a separate instrument, in which event there would be no room for controversy in relation to the admissibility of the petition. The mere appending of the waiver to an instrument, the contents of which were unknown, could not have the effect to conclude the party signing the waiver as to the facts alleged in the petition.

The oral evidence appearing in the record is most conflicting, and we cannot say from such record that the findings of the court as to the separate character of this lot 45 would have been the same had this petition not been considered and due weight given it as an admission against interest. The error, therefore, in our opinion, was prejudicial.

The judgment and order are reversed, and cause remanded for a new trial.

We concur: SHAW, J.; TAGGART, J.

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6 Cal. App. 35

## GUPTILL v. KELSEY. (Civ. 329.)

(Court of Appeal, Third District, California. June 20, 1907.)

1. TAXATION—DELINQUENT TAXES—ENFORCEMENT.

St. 1891, p. 223, c. 161, authorizing the establishment of sanitary districts with power to levy taxes on property within the districts, providing for the collection of the taxes by the county tax collector in the manner he collects the county taxes, declaring that the laws relating to the collection of taxes and enforcement of delinquent taxes shall apply, and empowering the board to provide a system for the collection of delinquent taxes, etc., points out the manner in which the tax collector of a county shall collect such taxes, but authorizes the board to collect the taxes through its own agent, pursuant to such regulations, consistent with the laws of the state, as it may adopt.

2. SAME—TAX SALE—VALIDITY.

The failure of the tax collector of a county to comply with Pol. Code, §§ 3764–3766, 3769, as amended in 1895 and 1897, and section 3785, as it existed prior to the statutes of 1895 and 1897, relating to the sale of property for delinquent taxes, in collecting delinquent taxes assessed by a sanitary district established under a statute of 1891 is fatal to the validity of a sale made in 1899, and his deed to the purchaser is void.

3. SAME—REMEDY OF OWNER.

An owner whose land is sold for delinquent sanitary district taxes without complying with the law may sue for the cancellation of the unrecorded tax deed purporting to convey the land by proceeding under Civ. Code, § 3412, providing that a written instrument which, if left outstanding, may cause injury to a person against whom it is void may on his application be adjudged void and canceled, and he need not pursue the remedy provided by Code Civ. Proc. § 738, providing for action to quiet title by persons against others claiming interest in real estate adverse to them.

Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Action by Mary E. Guptill against B. Kelsey. From a judgment for plaintiff, defendant appeals. Affirmed.

Mortimer Smith, for appellant. Gavin McNab, for respondent.

HART, J. The complaint in this action alleges that, at the time of the institution of the suit, the plaintiff was the owner and seized in fee of certain real property situated within the boundaries of "sanitary district No. 2, Fruitvale, county of Alameda, a corporation organized under the laws of the state of California," and that said real property was sold in the year 1899 by the tax collector of Alameda county to the defendant, for unpaid and delinquent taxes assessed thereon by and for said sanitary district No. 2, and that a tax deed to said lands was executed by said tax collector to said defendant on the 13th day of July, 1901. It is alleged that "said deed has never been recorded, and that the plaintiff has never seen the same," and that "plaintiff is informed and believes, and upon her information and belief alleges, that said tax deed is regular in form, and purports to convey title of all of said described lands to the defendant, B. Kelsey," etc. It is charged in the complaint that several of the statutory provisions prescribing the steps necessary to be taken in order to effectuate a valid sale of property for delinquent taxes were not, in the sale by the tax collector of the property in question, complied with, and that, therefore, such sale was void. It is averred that the price paid for the property to the tax collector by the defendant was the sum of $3.39, and that prior to the commencement of the action plaintiff "tendered in gold coin the sum of $3.39, with interest thereon, from the 3d day of July, 1899, and the sum of $3 additional, the said latter sum being the sum defendant paid to said tax collector for the issuance of said pretended deed, with interest thereon from the 13th day of July, 1901, and plaintiff offered to pay to said defendant the foregoing sums of money, and, in addition thereto, any additional sums that defendant might make known to the plaintiff that he had expended on account of or by reason of said pretended tax deed, with interest thereon, provided defendant would deliver to plaintiff said pretended tax deed, or cancel said pretended tax deed," and that "defendant refused to accept said sums of money and refused to deliver to plaintiff said pretended tax deed, or to cancel the same, and still so refuses." It is further declared that plaintiff is ready and willing to pay into court for the benefit of the defendant the sums of money tendered by plaintiff to defendant before the commencement of the suit, or "any sums of money that this court may find as having been expended by defendant by reason of said pretended tax, or said pretended tax deed, with interest on said sums, and any other sums, or costs or expenses that said defendant may be found by this court to have expended or incurred in the matter of said pretended tax, or said pretended tax deed, with interest thereon." The defendant interposed a general and a special demurrer to the complaint. The special demurrer charges that the complaint is uncertain in several specified particulars. The demurrer was overruled by the court, and, the defendant failing to answer the complaint within the time granted him by the court, a judgment by default was entered against him. The appeal is from said judgment.

The Legislature of 1891 passed a law embracing a scheme for the establishment of sanitary districts throughout the state, the manifest purpose of which is to enable communities consisting of small numbers of inhabitants to exercise, under corporate authority, to a limited extent, certain portions of the police power of the state. The main object of the law appears to be the authorization of the establishment of sanitary districts in such communities for the purpose of investing them with such corporate rights as will the more effectually enable the residents thereof to promote and maintain healthful sanitary conditions within the boundaries of such districts. Such corporations have no power of course, except such as the Legislature has legitimately clothed them with. While they are public corporations, they are not municipal corporations. In re Werner, 129 Cal. 567, 62 Pac. 97. The law from which they derive their right to exist provides, among other things, for the levying of taxes for the accomplishment of their corporate purposes upon all property within their boundary lines, and also provides for the incurring of a bonded indebtedness in a limited amount. The provision with reference to the collection of the taxes levied authorizes two methods, either of which may, in the discretion of the sanitary board, be resorted to for the purposes of such collection. It is this provision which furnishes the principal one of the several reasons upon which the defendant bases his charge in the special demurrer and his contention in argument that the complaint is faulty because of uncertainty. The provision referred to is found in section 12 of the act, and reads as follows: "On or before the first Monday in July of each year, the board shall transmit, or cause the assessor to transmit, a duplicate of the list so made to the tax collector of the county, who shall collect the taxes shown by said list to be due, in the same manner as he collects the county taxes, and all the provisions of the laws of the state as to the collection of taxes and delinquent taxes, and the enforcement of the payment thereof, so far as applicable, shall apply to the collection of taxes for sanitary purposes; and said tax collector, and the sureties on his official bond, shall be responsible for the due performance of the duties imposed on him by this act; provided, that the sanitary board may, in its discretion, direct the district attorney of the county to commence and prosecute suits for the collection of the whole, or any portion, of the delinquent taxes; and it shall be the duty of the district attorney to carry out such directions of the sanitary board, and he, and the sureties upon his official bond, shall be responsible for the due performance of the duty imposed upon him by this act; and provided further, that the sanitary board may, at any time, by order enforced in its minutes, provide a system for the collection of delinquent taxes, or make any change in the manner of their collection, which as to such taxes shall have the force of law. All money collected for sanitary purposes by the district attorney under this act shall be at once paid to the county treasurer." Laws 1891, p. 227, c. 161. The specific contention is that where a law prescribes two different methods of performing an act, upon the due and proper execution of which depends the legality or validity of the result or product of such act, a party must first clearly disclose by his complaint which of the methods prescribed had been adopted for the performance of such act, and that a failure to so point out the particular method followed is fatal to a proper statement of a cause of complaint. It is claimed that plaintiff's complaint is subject to this objection, for which reason the special demurrer should have been sustained upon the ground of uncertainty.

The complaint, in paragraph 2 thereof, alleges that "defendant, B. Kelsey, is the owner and holder of a certain deed made by the tax collector of the county of Alameda, and issued to and in the name of said B. Kelsey by said tax collector, on the 13th day of July, 1901"; and in paragraph 3 it is alleged that "said tax collector did on behalf of said sanitary district No. 2, a corporation, and at its request, hold a pretended sale of said property for the nonpayment of said pretended taxes," etc. The statute, it will be observed, provides that the tax collector of the county upon the transmission to him by the sanitary board or by the assessor of such district of a duplicate list of the assessments made in the district and for the purposes thereof shall proceed to the collection of the taxes shown by said list to be due, "in the same manner as he collects the county taxes," and that "all the provisions of the laws of the state as to the collection of taxes and delinquent taxes, and the enforcement of the payment thereof, so far as applicable, shall apply to the collection of taxes for sanitary purposes." We think the complaint is sufficiently clear, in its allegations as to the method for the collection of the taxes adopted by the board of trustees under the discretion in that particular conferred upon it by the statute, to successfully resist the force of the special demurrer upon the point. Counsel for appellant does not question the sufficiency of the allegations of the complaint to show that the tax collector of Alameda county was the official to whom the sanitary board, under its power under the law, committed the duty of collecting the taxes, but declares that the tax collector, for aught that is shown by the complaint, might have acted in the matter of the collection of the taxes under the provisions of a system established by the sanitary board itself, and which might be altogether different from those of the system by which the tax collector must be governed in the discharge of his duties as a tax gatherer under the general laws of the state. It is therefore claimed that it was the duty of respondent to have shown by the pleaded facts that the sanitary board did not adopt a system of its own, as it is provided it may do by the law, or that the tax collector was not, if such were the fact, charged with the duty of collecting the taxes in a mode or manner different from that prescribed for the collection of state and county taxes. This position finds no support in the language of the statute. In the first place, there is, it seems to us, no conceivable ground or reason upon which to rest a successful contradiction of the proposition that the Legislature has absolutely no power to delegate to the sanitary board provided for in the act under consideration the right or authority to confer upon a county officer new or additional official duties. The power of the Legislature to charge the tax collector with the duty of collecting the taxes levied in and for the benefit of a sanitary district in any proper manner it may deem wise to prescribe, or to collect such taxes in the same manner as state and county taxes are collected, cannot be questioned; but to undertake to maintain that the manner or mode of discharging any official duties which the general laws of the state require that officer to perform may be changed by a mere regulation of a sanitary board, or upon the mere whim or caprice of the members of such board, is a proposition which can find no encouragement in any rule of law with which we are familiar under our system of government. In the second place, we think it is manifestly clear that the Legislature, in the enactment of the law governing the organization of sanitary districts, has not attempted nor indicated any intention of attempting to invest such boards with any such power. There is, it is true, a provision in the law that the board may, at any time, by order entered in its minutes, provide a system for the collection of delinquent taxes, or make any change in the manner of their collection, "which as to such taxes shall have the force of law." By this provision the Legislature evidently intended to grant to the board the right and authority to collect the taxes levied for the purposes of the corporation through its own agent, directly appointed by itself, and to enforce the collection of such taxes by such regulations, consistent with the general laws of the state, as it might deem prudent to adopt. The act, as we have seen by express language, provides that if the tax collector is called upon by the constituted authorities of the corporation to collect the taxes, he must conduct and perform that duty "in the same manner as he collects the county taxes," and that "all the provisions of the laws of the state as to the collection of taxes and delinquent taxes, and the enforcement of the payment thereof, so far as applicable, shall apply to the collection of taxes for sanitary purposes," and that he and his sureties on his official bond "shall be responsible for the due performance of the duties imposed upon him by this act." The Legislature itself, it thus clearly appears, has expressly pointed out how and in what manner the tax collector of the county shall gather such taxes when called upon to perform that duty by the sanitary board. The statute contains no language which can be interpreted or construed into giving the board any power whatever to authorize, when the duty of collecting the sanitary taxes is imposed upon the county tax collector, a departure from the mode prescribed by the statute itself for the collection of such taxes by substituting therefor, through an order or regulation of its own, another and different plan or mode by which that duty shall be performed by that officer. In other words, the Legislature itself having prescribed the method and manner of collecting such taxes by the tax collector of the county, there is no power in the sanitary board to modify, amend, or in any particular change the provisions of the law respecting that subject.

The complaint charges that the proceedings in the matter of the sale of property for the delinquent taxes, which were required to be taken by the tax collector by sections 3764, 3765, 3766, and 3769 of the Political Code, as those sections read in the year 1891, when the Legislature passed the law for the creation of sanitary districts, were not followed or observed by that officer. The sections mentioned provided for the sale of property upon which taxes were delinquent to individuals See St. 1885, p. 326, c. 218. The Legislature of 1895, however, made a radical change in the system of selling property for delinquent taxes and by said amendment authorized and required that all such property should be sold to the state. It is obvious, from the facts stated in the complaint, that there is no pretense that the property involved here was sold in pursuance of the provisions of the law upon the subject of tax sales as amended by the Legislatures of 1895 and 1897. It is also alleged that the requirements of section 3785 of the Political Code (Deering's Annotated Codes and Statutes), as it existed and read prior to said amendments of 1895 and 1897, making it the duty of the purchaser of property at tax sale, or of his assignee, to serve upon the owner or occupant of the property 30 days prior to the time of the redemption of the property a notice, giving the date of sale, the amount of property sold and the amount for which it was sold, etc., were not complied with. The demurrer of course, admits all the material allegations of the complaint to be true. The failure or omission of the tax collector, as charged in the complaint, to comply with all the provisions of the statute prescribing the proceedings essential to effecting a sale of property for delinquent taxes, is fatally defective to a valid sale thereof. "All proceedings in the nature of assessing property for the purpose of taxation and in laying and collecting taxes thereof, are in invitum, and must be stricti juris." Weyse v. Crawford, 85 Cal. 196, 24 Pac. 735; Hearst v. Eggleston, 55 Cal. 365; Shipman v. Forbes, 97 Cal. 574, 32 Pac. 599; Gwynn v. Dierssen, 101 Cal. 566, 36 Pac. 103; Merced County v. Helm, 102 Cal. 159, 36 Pac. 399; Dranga v. Rowe, 127 Cal. 509, 59 Pac. 944. It will thus readily be perceived that the sale here was no sale at all under the law and it necessarily follows that the purported tax deed executed by the tax collector to the defendant was and is void.

Counsel for appellant contends that respondent, by proceeding in this action under section 3412 of the Civil Code, is "seeking to enforce the wrong remedy," and that, inasmuch as the facts pleaded show the deed held by defendant to be void and therefore no title under it acquired by appellant, the remedy of respondent was under section 738 of the Code of Civil Procedure. Some authorities are cited by counsel which he contends support this suggestion. But the point is technical in the extreme, even if it be admitted that, strictly viewing the proposition, it might be held that there is some merit in it. There is, however, in our opinion nothing in the contention. Section 3412 of the Civil Code provides that "a written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." Section 738 of the Code of Civil Procedure provides for actions to quiet title by persons against others who claim an estate or interest in real property adverse to them. The remedy here invoked appears to be peculiarly appropriate to the facts as pleaded in the complaint. Besides, an action under section 738, Code Civ. Proc., could accomplish in effect nothing more or nothing less than the object of the present action.

Other points are discussed, which, under the views expressed in this opinion, it is unnecessary to consider.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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5 Cal. App. 562

## VISHER v. WILBUR. (Civ. 317.)

(Court of Appeal, Third District, California. June 20, 1907.)

1. APPEAL — REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where it is established that an action is barred by the statute of limitations, evidence that may have been offered in response to the issues on the merits becomes of no consequence, and errors in admitting or rejecting such evidence are without prejudice to the party against whom made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4035.]

2. LIMITATION OF ACTIONS—SUFFICIENCY OF ACKNOWLEDGMENT.

A claim filed against a decedent's estate showing that at one time claimant was indebted to decedent, but that through expenditures made by claimant for decedent there was a balance due claimant, was not an acknowledgment of indebtedness to decedent, reviving a barred cause of action for the same, notwithstanding the expenditures may have themselves been barred or constituted a demand otherwise not enforceable against the estate.

3. SAME.

A declaration in writing cannot revive a barred cause of action, unless it contains an express promise to pay the debt or an acknowledgment from which a promise may be implied, and such acknowledgment must be a direct and unqualified admission of an existing debt the debtor is willing to pay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 599, 600.]

On petition for rehearing. Petition denied.

For former opinion, see 90 Pac. 1065.

HART, J. It is conceived proper in denying the petition for a rehearing herein to add to what has been said in the main opinion that, from our original examination of the record in this cause, we felt justified in concluding that the trust theory of the complaint was adopted for no other reason than to obstruct the successful interposition of the statute of limitations against plaintiff's right of action. We concluded, from what we conceived to be a painstaking examination and careful analysis of the complaint, that the facts pleaded, with the exception of a few general averments amounting to mere conclusions of the pleader, failed to show the transaction between the deceased and the defendant to have been of a fiduciary nature. The evidence, as disclosed by the record, fully sustains this conclusion. We were convinced that the relations, if, indeed, any at all existed at the time of Visher's death, between the defendant and the deceased, were merely those of ordinary debtor and creditor, bearing none of the essential characteristics of a trust, except the bare fact, as alleged, of the possession of money belonging to the deceased by the defendant. Under this view of the record, the evidence, we think, irrefragably established a bar to the action under the terms of section 337 of the Code of Civil Procedure. Upon the theory that the action was for money had and received upon a stated account, any evidence relevantly bearing upon the question of the alleged bar was admissible. Of equal soundness is the proposition that the moment the court finds, upon sufficient evidence, that the claim that an action is barred by the statute is sustained, and that such special plea is therefore well taken, any evidence that might have been offered and received in response to the issues upon the merits of the case, such evidence having no bearing whatever upon the special plea in bar, is, whether improperly admitted or not, of no consequence, and errors in the rulings of the trial court in admitting or rejecting evidence so confined to the merits are without significance or prejudice to any rights of the plaintiff or party against whom such rulings are made. But counsel argues in his petition that the errors of the trial court in the admission and rejection of evidence "become the more apparent" if, as we have held, the action is on an account stated, and adds: "We have already pointed out in the petition that where an account is stated between the parties thereto, it cannot be disputed, questioned, modified, or changed, except for mistake or fraud, which must be set up in the pleadings." This contention goes to the merits of the case, and, as we have suggested, has no force in its application to the evidence bearing upon the special plea in bar. It is only the statement of a cardinal rule of evidence to say that any competent proof was admissible which would show or tend to show that the debt declared upon was created at such point of time with reference to the time of the commencement of the suit as would bar a right of action thereon. And the defendant, if he so elected, could entirely ignore the issues involving the merits of the case, and rely solely upon his special plea in bar. The record in this case discloses no errors in the rulings of the court admitting evidence directed to the issue tendered by the special plea.

The point made by appellant in his original argument, and vigorously renewed in his petition, that the filing by the defendant against the estate of a claim, showing that at one time defendant was indebted to the deceased, but that through disbursements of certain moneys for and on behalf of deceased by the defendant, the latter became a creditor rather than a debtor of the deceased, is an acknowledgment of the debt, and restores to plaintiff a right of action for the same, is, we think, without merit, and so plainly did it so appear to us in our original investigation of the record that we did not feel called upon to give it extended notice in the main opinion. Counsel, however, seems to give the question such serious consideration in his petition for a rehearing that we feel justified in giving it briefly further attention. The argument is that the items set forth in the claim and which show money to have been paid out for the benefit of the deceased by the defendant and which were so set out in said claim as a set-off to any amount which might at one time have been due deceased cannot be considered, because they had not been presented, as required by law, to the administrator of the estate of said deceased for allowance and payment; that "such claims cannot be pleaded in bar of any action, or paid until they have been thus presented, and either allowed or disallowed"; that, therefore, the admission in said claim of the original indebtedness to the deceased constitutes an acknowledgment from which the law will imply a promise to pay the debt, hence the right of recovery thereon in the plaintiff is revived. The view, briefly expressed, as to this point in the original opinion, was that there could be no such acknowledgment of an "outlawed" debt as would restore a lost right of action thereon, where a party files or submits in writing against another a claim, as to which an action could not be maintained for any legal reason, said claim showing a mutual account, according to which it appears that at one time the claimant was indebted to the party against whom it is presented, but that the latter, at the time of the filing or submission of such claim, is indebted to the claimant.

How can such a claim be construed to be an acknowledgment of an old debt when the defendant by the very nature of said claim in effect says: "Instead of being indebted to the plaintiff, the latter is indebted to me?" It must, of course, be clear to the most obtuse understanding that by filing the claim it was the intention of the defendant to convey the notion that the plaintiff's intestate was indebted to him and not he to the estate. There is but one sensible interpretation of the language of the claim filed against the estate by the defendant, and that is that the defendant not only claims but in substance declares that he is in no way indebted to said estate in any sum or amount whatsoever. The contention that the items in said claim purporting to have been expended for the benefit of deceased by defendant are barred, or constitute an otherwise illegal demand upon the estate, cannot affect the determination of the question we are considering. Let it be granted that those items are barred, and that the defendant could not maintain an action upon them. The decision of the question here can in no manner or degree be influenced by that fact. The sole question is as to the effect of the language of the claim so filed. Does it admit an old or any indebtedness, or does it deny it? It seems to us that there can be no two sides to the question. A declaration in writing, in whatever form of language it may be made, cannot revive a right of action once barred, unless it involves an express promise to pay the debt, or an acknowledgment from which the law will imply a promise. And, as we have seen from an examination of the authorities cited in the main opinion, such acknowledgment must be clear, distinct, and direct—not vague, indeterminate, and uncertain. It will not be contended that the claim contains language expressly promising to pay the debt, to recover which the suit is brought, and, as previously suggested, the very nature of the document itself—the very intrinsic character of it, in purpose and effect—completely negatives the idea of an admission of any acknowledgment of an indebtedness to the deceased or his estate by the defendant.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

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6 Cal. App. 113

## RICKEY LAND & CATTLE CO. v. GLADER. (Civ. 307.)

(Court of Appeal, Third District, California. July 10, 1907.)

1. Courts—District Court of Appeals—Jurisdiction—Equity Cases.

Under Const. art. 6, § 4, conferring exclusive jurisdiction in all cases of appeals in equity on the Supreme Court, a District Court of Appeals had no jurisdiction of an appeal from a judgment in a suit to restrain defendant from diverting the waters of a creek, without reference to whether the judgment involved the merits of the controversy.

2. Same—Transfer.

Where an appeal in an equity suit was erroneously taken to the District Court of Appeals, the appeal was not lost, but would be transferred to the Supreme Court, as authorized by Const. art. 6, § 4.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1303.]

Appeal from Superior Court, Mono County; J. D. Murphey, Judge.

Action by the Rickey Land & Cattle Company against C. P. Glader. From a judgment for defendant, plaintiff appeals. Transferred to Supreme Court.

Jas. F. Peck, Wm. O. Parker, Alfred Chorty, and Chas. C. Boynton, for appellant. Richard S. Miner, for respondent.

CHIPMAN, P. J. This cause was argued and submitted upon the unquestioned assumption that this court had jurisdiction to entertain the appeal. Upon an examination of the record, it clearly appears that the action is in equity, being an action to restrain defendant from diverting the waters of a certain creek. Appellate jurisdiction in all cases in equity is given to the Supreme Court. Article 6, § 4, Const. Cal.

We have no doubt that this court is without jurisdiction to entertain an appeal involving the merits of the action; and it seems to us to be equally clear that we cannot entertain an appeal from any judgment entered in the case whether or not involving the merits of the controversy. Logically it would appear to be reasonable that if an appeal would not lie to this court from the judgment on the merits it cannot lie from any judgment growing out of the case. Otherwise there might be an appeal pending here by plaintiff from the present judgment and an appeal pending in the Supreme Court by defendant from the judgment on the merits.

In this view it becomes our duty to transfer the case to the Supreme Court, under article 6, § 4, of the Constitution. The appeal, though improperly taken to this court, is not lost. Id.

The cause and all the papers relating thereto are, under rule 32 (78 Pac. xiii), transferred to the Supreme Court.

We concur: BURNETT, J.; HART, J.

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6 Cal. App. 1

## AMERICAN COPYING CO. v. LEHMANN et al. (Civ. 371.)

(Court of Appeal, Second District, California. June 20, 1907.)

1. Contracts — Construction — Severable Contract.

A contract whereby plaintiff agrees to print in its stamp directory the name and business of defendant, and to secure orders from at least 100 persons for portraits to be given free by defendants on presentation of stamps worth $25, and whereby defendants agree to pay plaintiff $175 for 100 frames on the completion of the canvass, and to receive from plaintiff stamps to carry out the scheme, paying therefor 50 cents per 100, and which stipulates that it is a part of the agreement that 100 persons shall order 100 frames, is not a severable contract, and plaintiff performing it in part is not entitled to recover, especially where it fraudulently altered orders for portraits procured by it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 754.]

2. SAME—RESCISSION.

Where a party to a contract, bound to procure orders for portraits, only attempted to perform its agreement by procuring orders which it fraudulently altered, the other party was not obliged to rescind to defeat a recovery.

Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

Action by the American Copying Company against Leon Lehmann and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Shepherd & Barnes, for appellant. I. W. Stewart and Blackstock & Orr, for respondents.

TAGGART, J. Plaintiff appeals from judgment in favor of defendants.

Plaintiff is an Illinois corporation, engaged in supplying trading stamps, and free enlarged portraits, and paid-for frames therefor, to merchants desirous of increasing trade by such methods. Defendants are merchants in the town of Oxnard, Ventura County, Cal.

From the complaint it appears that plaintiff and defendants entered into a contract in writing, whereby the former agreed to print the name and business of defendants in its citizens' stamp directory, to canvass and deliver to the homes of Oxnard and vicinity copies of the stamp directory, explain the use of it, and to secure orders from at least 100 persons for portraits, to be given free by defendants upon presentation of $25 worth of stamps. In consideration for this the defendants were to pay to plaintiff $175 for 100 oval frames, upon the completion of the canvass, and to receive from plaintiff a sufficient amount of stamps to carry out the scheme shown in the contract, paying therefor 50 cents per 100 for all stamps used, to make weekly settlements, and to promptly return all redeemed stamps. The contract to continue for two years. Upon the face of the order for frames set out in the complaint appears the words: "This is part of the agreement that 100 persons are to order 100 frames." It is alleged in the answer, and found by the court, that these words were written in at the request of defendants, and were intended to and did obligate the plaintiff to secure orders for 100 picture frames to be purchased from defendants at $3 per frame, being the same frames which defendants purchased from plaintiff at $1.75 per frame. The complaint further alleges a full compliance with the contract by plaintiff, the delivery to defendants of 23 stamp books of 5,000 stamps each, to be paid for at the rate of 50 cents per 100, and demands judgment for $575. The court finds that the plaintiff made a canvass of the town of Oxnard, procured 124 orders for portraits, each including an agreement to trade the amount of $25 at defendants' store, each person so ordering to receive an enlarged portrait, called a "Demar portrait" in the order. These orders were signed by the respective persons giving them, and near the signature on each was stamped with a rubber stamp the words, "Reserve for me one frame," and delivered to the defendants by the solicitor for plaintiff as and for the orders provided for in the contract. The defendants thereupon paid said sum of $175 for the frames, and received the 100 picture frames. The words, "Reserve for me one frame" were not on said orders when signed by the respective parties signing the same, but were stamped thereon between the time they were signed and the time of delivery to the defendants, and the agent of plaintiff represented to defendants that said words were placed thereon prior to signature. The signers of said orders repudiated said orders as altered and refused to take or pay for said frames, and defendants notified plaintiff of such repudiation, but plaintiff did not procure other or further orders or canvass therefor, whereupon defendants ceased to use said trading stamps. The defendants received 23 books of said stamps and used 18 thereof. Judgment was for defendants for costs, and against their counterclaim for damages for loss of trade because of failure of plaintiff to carry out the contract.

Appellant contends that the contract is severable, and that plaintiff is entitled to a judgment for the 18 books at 50 cents per 100 on the findings made. We cannot agree with this contention. An examination of the entire scheme discloses that the purpose and intent of the contract as made was to secure a return to the defendants of all the moneys which they obligated themselves to pay to plaintiff, and thereby receive at no cost to themselves the advertising and patronage resulting from the scheme, while all the money profits went to the plaintiff. By the contract the signers of the orders were to bind themselves to trade $25 worth at defendants' store, pay $3 for the privilege, and receive nothing in return but the article which defendants now say was worthless. The merchant was to receive the benefit of the patronage secured by the scheme, and in return was to advance $175 to plaintiff, which he was in time to collect from the customer, be responsible for the balance of the $3 per frame, collect the same, and remit it to plaintiff. The reasons upon which the Supreme Court held the anti-trade stamp act unconstitutional would hardly apply to this scheme. Ex parte Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588. Conceding, however, that public policy would not prevent a court of justice from enforcing such a contract if carried out in good faith, an examination of the findings requires the consideration of the further fact of the false and fraudulent alteration of the orders by plaintiff after procuring the signatures thereto. One of the moving considerations to defendants to enter into the contract was the sale of the frames at $3 each, that they might thereby get their money back. No such sales were made by plaintiff. Nothing was done by it to comply with this provision of the contract. The only attempt to do so was the fraudulent alteration of the orders. In other words, the character of the transaction being left out of consideration, there was not such a compliance with the contract upon plaintiff's part as to permit it to recover. No rescission was necessary. Field v. Austin, 131 Cal. 379, 63 Pac. 692. Courts are not vigorous in compelling an accounting by the person defrauded at the request of the party guilty of the fraud. More v. More, 133 Cal. 493, 65 Pac. 1044. "Parties so engaged are not the objects of the special solicitude of the courts." Neblett v. Macfarland, 92 U. S. 101, 23 L. Ed. 471.

Judgment of superior court affirmed.

We concur: ALLEN, P. J.; SHAW, J.

5 Cal. App. 740

## BAILEY v. ÆTNA INDEMNITY CO. OF HARTFORD, CONN. (Civ. 353.)

(Court of Appeal, Second District, California. June 18, 1907.)

1. ATTACHMENT—UNDERTAKINGS — LIABILITY OF SURETY.

An undertaking given to release property attached under a writ of attachment, which shows the title of the court and cause in which it was given, which recites the amount of plaintiff's claim against defendant, the issuance of the attachment and levy on "certain property and effects of" defendant, the desire of defendant to release the property, and which declares that the surety, in consideration of the premises and the release of the property, undertakes in a specified sum and promises that, in case plaintiff recover judgment in the action, defendant will pay the amount thereof with costs, substantially conforms to Code Civ. Proc. § 540, relating to undertakings on attachment, and, if voluntarily given to secure a redelivery of the property, is valid at common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 638.]

2. SAME — RECITALS — CONCLUSIVENESS ON SURETY.

The recitals in an undertaking given to procure the release of property attached under a writ of attachment are conclusive against the obligor therein, whether the underaking is a statutory or a common-law bond.

3. SAME—VALIDITY.

Where a writ of attachment directs the sheriff to take an undertaking, and either not attach the property or release the same, as the circumstances require, an order for the release of the property attached on the giving of an undertaking to procure the release thereof is not necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 637.]

4. SAME—RECITALS—CONCLUSIVENESS.

The surety, in an undertaking given to release property attached under a writ of attachment, is estopped by the recitals therein from asserting that no property was levied on by virtue of the writ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 1243, 1244.]

5. SAME.

The recitals, in an undertaking given to procure the release of property attached under a writ of attachment, that the writ of attachment was issued and property levied on thereunder, etc., are conclusive on the surety on the questions of the sufficiency of the affidavit on which the attachment was based and of the writ itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, §§ 1243, 1244.]

6. SAME—ACTIONS—TIME TO SUE.

Under Code Civ. Proc. § 552, providing that, where an execution be returned unsatisfied, plaintiff may prosecute any undertaking given pursuant to sections 540 and 555, relating to the giving of an undertaking on attachment, an action on an undertaking given to procure the release of property levied on under a writ of attachment may be brought immediately on the return of the execution against the judgment debtor unsatisfied, and it is not necessary to postpone the bringing of the action for six months from the date of the judgment.

7. TRIAL—FINDINGS—CONSTRUCTION.

A finding that each and every allegation contained in plaintiff's complaint is true is but the express finding of that which is impliedly found by judgment for plaintiff on the pleadings.

8. JUDGMENT—JUDGMENT ON PLEADINGS.

Under Code Civ. Proc. § 581, prescribing when an action may be dismissed or a nonsuit entered, and section 582, providing that in every other case judgment must be rendered on the merits, a judgment on the pleadings is a judgment on the merits, so far as its conclusiveness is concerned.

9. ATTACHMENT — UNDERTAKING — ACTIONS—DEFENSES—PLEADING.

A surety, when sued on his undertaking given to procure the release of property attached under a writ of attachment, cannot avail himself of the defense that the judgment in the attachment action was rendered without a fair trial, without alleging the particular facts not presented on the trial, and a surety, claiming that there was a collusive failure to introduce available evidence constituting a defense to the action, must plead the details and his ability to supply on a new trial the evidence willfully suppressed.

10. APPEAL — REVIEW—IMMATERIAL QUESTIONS.

Where a judgment was properly rendered on the pleadings, questions relating to the introduction of evidence and of the weight thereof are immaterial on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3331.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by C. C. Bailey against the Ætna Indemnity Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Drew Pruitt, Charles L. Batcheller, and Thomas C. Ridgway, for appellant. Sidney J. Parsons and O. P. Widaman, for respondent.

TAGGART, J. This is an action to recover from the surety, on an undertaking given to release an attachment, the amount of the judgment rendered against the attached debtor. Judgment was for plaintiff, and defendant appeals from the judgment, and from an order denying its motion for a new trial.

Plaintiff brought an action in the superior court of Los Angeles county against the Pacific Furniture & Lumber Company to recover judgment on two promissory notes with interest, and attorney's fees as provided therein, and on an account for work and labor. He caused an attachment to be issued and levied on the property of the said Pacific Furniture Company at the time the action was begun. On the same day (April 14, 1904) the defendant herein, the Ætna Indemnity Company, executed and delivered to the sheriff, who held the attached property of the furniture company, the instrument here sued on, and the attached property was released and the attachment discharged. On the trial in the attachment suit the indebtedness was admitted by the defendant furniture company, but it was claimed that it was not due by reason of the execution by plaintiff and certain other creditors of the furniture company of a certain contract for forbearance extending the time of payment to September 23, 1903. Findings on this issue were for plaintiff, and on the 15th day of June, 1905, judgment in his favor was rendered against the Pacific Furniture Company for the full amount claimed. The present action was begun July 24, 1905, to recover from defendant herein, as surety on the undertaking given to release the attachment, the amount of such judgment. Defendant set up the same defense pleaded in the attachment suit, and alleged that the issues so raised were not fairly tried because of collusion between plaintiff and the defendant in the attachment suit, and asks that they may be tried on its answer in this action.

In support of the appeal, it is urged that it appears from the complaint that the action was prematurely brought because the judgment was not final under section 1049, Code Civ. Proc.; that there is no allegation of indebtedness from defendant to plaintiff; that the writ of attachment was void; that it was not alleged that any property was levied upon by virtue of said writ of attachment; and that, if the writ of attachment was not void, the property was not shown to have been released as required by law. The instrument sued on is attached to and made a part of the complaint. The allegations as to the manner of its execution and delivery would justify the assumption that it was given pursuant to the provisions of sections 554 and 555 of the Code of Civil Procedure, although these sections are not named. Some of appellant's objections to the pleading are based upon the instrument being so given, and upon this theory it is urged that the complaint fails to state a cause of action because it does not allege a compliance with all the steps and proceedings taken under those sections. To avoid these objections respondent claims the instrument to be an undertaking given under section 540 of the Code of Civil Procedure. An examination of the instrument itself shows that it is not strictly in the form required by either section 540 or section 555. The former section applies where the intention is to prevent the levy of an attachment, and the sheriff may accept an undertaking "in an amount sufficient to satisfy such demand (plaintiff's), besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached." The latter section (555) provides for the release of an attachment by the court; in which event the court must require an undertaking, "to the effect that in case the plaintiff recover judgment in the action defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released."

The instrument pleaded shows the title of the court and cause in which given, recites the claim and amount of plaintiff's claim against defendant, the issuance of the attachment, and levy thereof on "certain property and effects of said defendant," and that defendant desires to release said property from the attachment; that the surety (defendant herein), in consideration of the premises and the release of the property attached, undertakes in the sum of $4,350, "and promises that in case the plaintiff recovers judgment in the action defendant will pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the percentage interest and costs."

The bond is not a forthcoming or delivery bond, but, as shown by its own provisions and the allegations of the complaint as a whole, was given to the sheriff under section 540 for the purpose of preventing a continuance of the levy upon or further holding of property which had already been attached. It is not strictly such an undertaking as that section directs him to take, but is an indemnity bond given for the benefit of plaintiff to secure the release of the property of defendant, and it accomplished that purpose. The condition of it is that the obligors will pay the judgment in consideration of the release of the attachment. It substantially conforms to the requirement of one clause of section 540 and the fair presumption, aided by the allegations of the complaint, is that it was executed with reference to that section. It would be immaterial here under which section it was given, if it were not that the meaning and intentions of the parties are to be ascertained by the light of the statute. Heynemann v. Eder, 17 Cal. 434. Such an undertaking may be given either to prevent or to release an attachment. Section 540; Curiac v. Packard, 29 Cal. 200. If voluntarily given to the sheriff to secure a redelivery or release of the property attached, it would be valid at common law (Palmer v. Vance, 13 Cal. 553), and its recitals are conclusive as against the obligor whether it be a statutory or common-law bond. McMillan v. Dana, 18 Cal. 339, p. 347. Quoting approvingly from the opinion in the case last cited, the Supreme Court says, in McCormick v. National Surety Co., 134 Cal. 513, 66 Pac. 741: "Nor does it matter whether the property was subject to the attachment or not, That matter cannot be tried in this collateral way. It is enough that the plaintiff had this property levied on as subject to his debt, and that the sureties procured its release upon the stipulation that in consideration of such release they would pay the amount of the judgment to be recovered by the plaintiff in the attachment suit." The same rules apply if the bond be considered as a common-law bond. Speaking of a bond given to release an attachment which was held not to have been given pursuant to either section 540 or section 555, Code Civ. Proc., the Supreme Court says: "Whatever the obligor recites in a bond to be true may be taken as true against him, and need not be averred in a complaint on such bond, or proved on the trial." Smith v. Fargo, 57 Cal. 157. Whether the undertaking be in statutory form or good only as a common-law bond is immaterial. Gardner v. Donnelly, 86 Cal. 372, 24 Pac. 1072.

Considering the points urged by appellant in the reverse order of their mention, its contention that the attachment was not released as required by law is based upon the assumption that the undertaking was given under section 555 and an order of the court necessary for the release of the attached property. No order was required, as the writ of attachment itself directed the sheriff to take such an undertaking and either not attach, or release the property attached, as the circumstances required. The allegation of the complaint that the Pacific Furniture Company "appeared in said action" may be treated as surplusage. The defendant is estopped by the recitals in its own written obligation, the bond, from saying that no property was levied on by virtue of the writ of attachment.

The complaint alleges an indebtedness from defendant to plaintiff with sufficient clearness, and the case of Provident Mutual, etc., v. Davis, 143 Cal. 253, 76 Pac. 1034, cited by appellant, has no application here. The recitals in the bond also conclude the defendant here as to the sufficiency of the affidavit upon which the attachment was based, and of the writ itself. That the former was false, or the latter did not state the amount of the plaintiff's demands in conformity with the complaint, cannot be questioned by defendant. If these matters, or either of them, were open to question at this time and in this manner, the rulings of the trial court in this connection would still have to be sustained. Porter v. Pico, 55 Cal. 173; Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609; Harvey v. Foster, 64 Cal. 296, 30 Pac. 849.

This is an action on a bond, and not on the judgment rendered in the action of Bailey v. Pacific Furniture Co. The bond was given to take the place of the security obtained by attaching certain personal property of the defendant in that action. The attachment issued and the property was seized that it might be available for the execution of the judgment which plaintiff expected to and did subsequently obtain against the Pacific Furniture Company in the superior court. Unless an appeal had been taken at once, and a stay bond given, the plaintiff could, and no doubt would, have proceeded to sell the property attached to satisfy the judgment of the superior court. This, it is admitted, could have been done, but it is claimed that it is so only because of express statutory authorization. It is provided by section 552 that, if the execution be returned unsatisfied in whole, or in part, the plaintiff may prosecute any undertaking given pursuant to either section 540 or section 555; and the complaint alleges an execution was issued on the judgment and returned wholly unsatisfied.

The attachment proceeding is merely auxiliary to the main action (Porter v. Pico, 55 Cal. 173), and the latter would go forward to execution whether the sheriff held the attached property or the undertaking given for its release. There is nothing in the statute to suggest that the bond given to release attachment shall operate as a stay bond to prevent execution on the judgment for six months after its entry. For the protection of the surety, it is required that an effort shall be first made to execute against the judgment debtor. Failing in this, the substitute for the attached property is immediately available, and the bond may be enforced at once.

In Cook v. Ceas, 143 Cal. 221, 77 Pac. 65, claimed by appellant to be decisive of this case, the Supreme Court, on page 226 of 143 Cal., page 67 of 77 Pac., says: "The question, then, is reduced to this: When did the order settling the account of the guardian become a binding order?" The answer to this question was: "Not until the time for appeal had passed." The question here is: "When was execution on the judgment in the attachment suit enforceable? The answer is: As soon as entered (Code Civ. Proc. § 681), unless an appeal was taken at once and stay bond given. As well could it be said that it would be necessary to await the six months within which an appeal might be taken before a demand for the return of the property taken from the sheriff on a forthcoming bond could be made, or the redelivery of the property compelled. We think the case of Cook v. Ceas is easily distinguishable from the case at bar.

The findings and judgment recite: A trial of the cause before the court on its merits; the introduction of evidence by the plaintiff and by the defendant; that the latter sought to introduce testimony which was objected to on the ground that the answer failed to state a defense, and that the defendant thereupon announced that it elected to stand upon the answer as framed and declined to amend or offer further testimony. The transcript of the proceedings at the trial support these recitals in every particular. This, appellant contends, shows that the judgment was on the pleadings, and that therefore a new trial should be ordered, that the findings on the evidence introduced may be stricken out and the judgment be made to declare on its face that it is based on the pleadings. Considering the judgment as one rendered on the pleadings (which it is), the conclusion suggested by appellant does not necessarily follow. There is but one finding of fact by the court, and that is the general one that "each and every allegation contained in the plaintiff's complaint are true." This is but the express finding of that which is impliedly found by a judgment for plaintiff on the pleadings. A judgment on the pleadings is a judgment on the merits under our Code. Sections 581, 582, Code Civ. Proc.

The ruling of the trial court as to the sufficiency of the answer was correct. The denials therein are of conclusions of law and of those matters as to which defendant is concluded by the recitals in the bond. The facts alleged in the affirmative defense are not sufficient to constitute either a defense or counterclaim. An answer claiming the relief here sought by defendant must show not only the facts constituting the fraud which prevented a fair judgment from being rendered in the former action, but it must also show that there was a good defense to the original action upon the merits, and that the defendant will be able to present this defense upon a new trial. These matters must be alleged, not in the form of conclusions, or ultimate facts, but in the same manner as the facts constituting the fraud. That is, the particular facts which were not presented upon the trial of the original action, by reason of the fraud complained of, must be set out, and accompanied by an allegation that the complaining party has the ability to produce evidence upon any new trial that may be granted to establish such facts as alleged. In reaching this conclusion we recognize the rule invoked by appellant that each case of fraud must be determined upon its own circumstances. Here it is claimed that there was a collusive failure to introduce available evidence constituting a defense upon the original trial. The details of this failure should be pleaded and the ability of the defendant in this action to supply, upon a new trial, the evidence which was willfully suppressed upon the former trial should be clearly alleged. This is required to support a bill in equity to set aside a decree for fraud, or because of newly discovered evidence. The same rule is proper here. Mulford v. Cohn, 18 Cal. 46, concurring opinion, Harrison, J.; Whitney v. Kelley, 94 Cal. 153, 29 Pac. 624, 15 L. R. A. 813, 28 Am. St. Rep. 106.

The other objections to the count's rulings assigned as error need not be considered, as they relate to the introduction of evidence and its sufficiency. The judgment being on the pleadings, the introduction of evidence becomes mere surplusage, and questions of its weight and admissibility are immaterial.

Judgment and order appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J

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6 Cal. App. 131

## DOHERTY v. CALIFORNIA NAVIGATION & IMP. CO. (Civ. 358.)

(Court of Appeal, Third District, California. July 12, 1907.)

1. SHIPPING — INJURY OF PASSENGER — EVIDENCE.

In an action for injuries to a steamship passenger by the negligence of the captain in letting plaintiff stand unsupported while helpless from intoxication, after the captain had lifted him from the floor, so that plaintiff fell and broke his arm, evidence *held* to sustain a finding that the captain, with knowledge that plaintiff was intoxicated to a helpless degree, lifted him to his feet from the floor where he had been discovered asleep, and left him standing without any support, by reason of which plaintiff fell to the floor and broke his arm, without contributory negligence on his part, and that by reason thereof he suffered pain and loss to the amount of $575.

2. SAME—CARE REQUIRED.

Where the captain of a steamship discovered a passenger lying in a drunken and helpless condition on the floor, and, with knowledge of his helplessness, lifted him to his feet, and left him without any support, whereupon he fell and broke his arm, the captain did not exercise the full degree of care required by rendering assistance sufficient in the case of a sober man, but was bound to exercise such care as he could to avoid an accident in the situation presented to him.

3. APPEAL — REVIEW — MATTERS OF DISCRETION—AMENDMENT.

Under Code Civ. Proc. § 473, authorizing the court to grant amendments in the interest of justice, the exercise of the court's discretion in that regard will not be disturbed on appeal except where abuse of discretion is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3825.]

4. PLEADING—AMENDMENT—CONFORMITY TO PROOF.

Where, in an action against the owners of a vessel for injuries to a drunken passenger, the case was submitted without argument, whereupon the trial judge stated what facts he regarded as proven, and called for authorities on the duty which the officers of the boat owed to a drunken man, it was a proper exercise of discretion to permit plaintiff then to amend his complaint to conform to the facts so proven.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 603.]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Barney Doherty against the California Navigation & Improvement Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Arthur L. Levinsky, for appellant. D. M. Young and W. N. Rutherford, for respondent.

CHIPMAN, P. J. Action for personal injury. The cause was tried by the court sitting as a jury. Findings and judgment were for plaintiff, and the damages for the injury received by him were assessed at $575. Defendant appeals from the judgment and from the order denying its motion for a new trial.

Plaintiff paid his fare and took passage on defendant's steamer at San Francisco bound for the city of Stockton. The circumstances attending the injury and the facts upon which the judgment rests are concisely set forth in the following findings:

"Fourth. That after the payment by said plaintiff to the defendant of said fare, and while plaintiff was on said steamer as a passenger on his way from said city, of San Francisco to said city of Stockton, and before the completion of said trip, the servants and agents of the defendant, employed by said defendant in and upon said steamboat, 'T. C. Walker,' and in the operation thereof, and who were at said time in charge of and in the management and control of said steamer, 'T. C. Walker,' to wit, the captain of said boat, carelessly and negligently raised plaintiff from the floor of said steamboat where plaintiff was lying in an intoxicated condition, and placed plaintiff upon his feet, and carelessly and negligently turned plaintiff loose, and left him standing upon the floor of said boat unsupported while intoxicated and unable to stand without support, and that by reason of thus being raised from the floor and left standing without support when intoxicated, and being unable to stand without support, plaintiff was caused to fall upon the floor of said steamboat, and by reason of said fall plaintiff's left arm was broken.

"Fifth. That at the time the said captain of said boat raised plaintiff from the floor of said boat and left him standing unsupported plaintiff was intoxicated to a degree of helplessness and was unable to stand unsupported, was asleep or apparently asleep, and was limp and made no attempt to get on his feet, or to either assist or resist being placed upon his feet, and that before placing plaintiff upon his feet and turning him loose the said captain had knowledge of plaintiff's drunken and helpless condition, and of the fact that he was asleep or apparently asleep, and knew that he was liable to fall and sustain injury if placed on his feet and left standing unsupported.

"Sixth. That plaintiff was intoxicated when received as a passenger by defendant as herein found, and that at and before the time plaintiff was so received the said captain of said boat knew that plaintiff was intoxicated to such an extent as rendered it necessary for him to have support to enable him to stand upon his feet; and said captain knew that plaintiff continued to drink after taking passage on said boat and before he was injured.

"Seventh. That plaintiff's said injury was not proximately caused by his own carelessness or negligence or contributory negligence, or by his drunkenness, but was proximately caused by the negligent act of the captain of said boat in placing him on his feet and turning him loose unsupported when drunk to a degree of helplessness and asleep or apparently asleep.

"Eighth. That, by reason of the breaking of plaintiff's arm as above found, he suffered physical pain, and was for five months incapacitated from working, and that his arm is still sore and painful, and will be for some time, when employed at labor, by reason of all of which plaintiff has been damaged in the sum of $475, and that plaintiff was compelled to and did employ a physician and surgeon to treat his said arm and incurred an indebtedness therefor of $100, and that he was thereby further damaged in the sum of $100."

Appellant's main contention is that the decision and judgment are not supported by the evidence. There is evidence that plaintiff was intoxicated when he came aboard the steamer. The captain testified: "When I first saw him on the dock, he was drunk, but he was able to walk; that is, by steadying himself against the passenger gangway. He always steadied himself. I did not see him walk without any support. I was apprised of the fact by what I saw that he needed support to stand alone." Plaintiff found his way to the cabin, and not long after the steamer was under way he was found lying on the cabin floor in the smoking room. An unsuccessful effort was made to arouse him and set him onto a seat, but he soon resumed his sprawling position on the floor. The attention of the captain was called to him by Mr. Fraser, the purser. The captain testified: "I went with Mr. Fraser, and told him to get off the floor, and he never paid any attention to me. He was asleep. I picked him up off the floor; that is, I picked him up off the floor and stood him on his feet. When I got him on his feet, he was standing very nearly erect, and I let go again, and when I let go of him he stood for a second, and then fell backwards." Again he testified: "I saw the cabin watchman lift him off the floor previous to the time I saw him there, which was after I had collected the tickets. I would say he was drunk. He was not beastly drunk. He didn't know hardly what he was doing, anyhow. I had already seen it was necessary to pick him up when he was down." It further appeared from the captain's testimony that, when he lifted plaintiff to his feet, he made no effort to support him or prevent his falling or attempt to catch him as he was falling; that plaintiff did not help himself in being put upon his feet, but was "perfectly helpless" in the captain's hands. "He looked like he was asleep—apparently asleep. * * * Q. You were watching him? A. Yes, sir. Q. To see what he would do? A. Yes, sir. Q. You knew he was drunk? A. I knew he was drunk; yes, sir. Q. You wanted to see if he would fall down or not? A. Yes, sir. Q. You stood him on his feet to see whether he could stand or fall down? A. No, sir; I did not. I picked him up to take him downstairs. Q. The first time, though, you wanted to see whether he could stand up or not? A. Yes, sir; I stood him up; yes, sir." There was much testimony as to the condition of intoxication in which plaintiff was suffering at the time and as to his treatment by the captain at the time of the injury. We are satisfied that there was sufficient evidence to justify the fourth, fifth, sixth, seventh, and eighth findings. Of the sixth finding it should be remarked that there is no direct evidence that the captain knew that plaintiff had been drinking after he came aboard the steamer, although there is evidence that the purser knew it, as is conceded by appellant. The fact is not material in view of the findings as to the drunken condition of plaintiff.

The seventh finding being a finding savoring of both fact and conclusions of law raises the question most seriously urged by appellant, and will next receive attention. Appellant's position is thus stated by its learned counsel: "It is our contention that the servants of the defendant were called upon to give the plaintiff, who was in a state of intoxication, no other or further care than they would have to, when called upon, under the law, to give him sober." "The cases," it is further contended, "all support the following rule, 'Intoxication does not excuse the omission to use the same care and prudence which are required of a sober man under the same circumstances to protect himself against injury' "—citing Fisher v. W. Va. & P. R. Co., 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69; Price v. Pha. W. & R. R. Co., 84 Md. 506, 36 Atl. 263, 36 L. R. A. 213. In further support of its contention appellant cites Milliman v. N. Y. C. & H. R. R. Co., 66 N. Y. 643; Beach on Contributory Negligence, § 151; 1 Thompson on Negligence, p. 450; Shearman & Redfield on Negligence, § 25. There was evidence that plaintiff was lying near the cabin door, and so that, when being opened, it would strike his head, and that in lying on the floor plaintiff was violating a rule of the vessel. We cannot see that these additional facts are material in determining defendant's liability under the circumstances disclosed. Conceding that the captain was discharging a duty in removing plaintiff from a place of danger which plaintiff occupied in violation of a rule of the vessel, still the captain had no right, knowing as he did the helpless condition of plaintiff, to remove him in such a manner as he must have known would in all probability, and in fact did, cause the injury. We cannot subscribe to the doctrine contended for by appellant, that no greater duty was cast upon defendant in dealing with plaintiff drunk than with plaintiff sober. In discussing the effect of plaintiff's drunkenness as contributory negligence, the court, in Wheeler v. Grand Trunk Ry. Co. of Canada, 50 Atl. 103, 70 N. H. 607, 54 L. R. A. 955, correctly stated the law as follows: "For an injury resulting from prior or concurrent negligence contributed he could not recover; but, if the defendants with knowledge of the plaintiff's danger in the performance of the duty owed by them could have prevented the injury, they were bound to do so, and their breach of duty would be the legal cause of the injury, unless at the time of the injury the plaintiff by the exercise of due care could have avoided it. If the plaintiff could not have prevented the injury to himself and the defendants could by the care the situation required of them they are liable if they did not, although the plaintiff's inability resulted from his prior negligence or intoxication. 'If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except it may be as one of the circumstances by which the requisite measure of care is to be determined. In such a case the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior misconduct. The latter * * * is the cause of the danger, the former is the cause of the injury. (Citing numerous cases.) * * * The defendants' answer is that the plaintiff's incapacity was produced by his voluntary intoxication. But, if it were established that the plaintiff's incapacity and irresponsibility were known to the defendants, the cause of his condition is entirely immaterial.' " The true principle is enunciated by our Supreme Court: He who knows of a danger and can avoid it as against one who does not in fact know the danger, or as against one within whose power does not lie the ability to avoid the accident, is responsible for the injury. Esrey v. S. P. Co., 103 Cal. 541, 37 Pac. 500; Lee v. Market St. Ry. Co., 135 Cal. 293, 67 Pac. 765; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. Or, as is otherwise stated: "One having an opportunity by the exercise of proper care to avoid injuring another must do so, notwithstanding the latter has placed himself in a situation of danger by his own negligence." Lee v. Market St. Ry. Co., supra.

Appellant calls attention in his brief to several exceptions taken in the course of the trial. We find no prejudicial error in any of the rulings of the court. Exception numbered 19 is the only one noticed in appellant's brief, and calls only for passing comment. At the conclusion of the evidence counsel for both parties stated that they would submit the case without argument. The trial judge then stated what facts he regarded as proven in the case, and called for authorities "upon the duty which the officers of the boat owe to a man that is drunk." In view of the statement made by the judge, as to the facts, counsel for plaintiff asked and obtained leave to amend the complaint to conform thereto. Defendant objected to leave being granted and took exception to the ruling of the court. Under section 473, Code Civ. Proc., the power to allow amendments in the interest of justice is within the discretion of the trial court, and its action will not be disturbed, except where an abuse of discretion is shown. Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955.

There are no facts disclosed in the present case of which an abuse of discretion may be predicated.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

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6 Cal. App. 101

## NORTHUP v. ALTADENA MINING & INVESTMENT SYNDICATE et al.

(Civ. 344.)

(Court of Appeal, First District, California. July 10, 1907.)

CONTRACTS—AGREEMENT FOR BENEFIT OF THIRD PERSON—RIGHT TO SUE.

Where a syndicate executed a note to plaintiff for part of the price of a business, which the syndicate thereafter transferred to a corporation in return for stock and the corporation's agreement to pay the syndicate's debts, including the note, plaintiff was entitled to sue the corporation on its agreement to pay the note, under Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties rescind it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 798.]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by E. J. Northup against the Altadena Mining & Investment Syndicate and another. From a judgment for plaintiff against both defendants, and from an order denying their motion for a new trial, they appeal. Affirmed.

A. A. Caldwell, for appellants. W. A. Beasly and H. Ray Fry, for respondent.

KERRIGAN, J. This is an action upon a promissory note. Plaintiff had judgment against both defendants, and from this judgment and an order denying their motion for a new trial defendants appeal.

In June, 1903, plaintiff, who for several years prior to that time had been a piano and music dealer in the city of San Jose, conducting business under the name of the "Northup Piano House," sold that business to the Altadena Mining & Investment Syndicate (hereinafter called the Altadena Syndicate), and took from it in consideration therefor the note in suit, payable August 27, 1904. September 19, 1903, the business conducted under the name of the Northup Piano House was incorporated. December 29, 1903, the business of the Northup Piano House, including all accounts, leases, books, fixtures, etc., by an instrument in writing, was transferred from the Altadena Syndicate to the newly organized Northup Piano House, a corporation. The latter corporation, as a consideration for the transfer, gave the Altadena Syndicate 3,000 shares of its capital stock, and agreed to pay its debts, including the promissory note in suit here of $2,000. The Northup Piano House corporation has paid all the debts of the Altadena Syndicate thus assumed except this note, and it has paid part of that. The Northup Piano House business was the principal asset of the Altadena Syndicate.

The question for decision is whether the appellant Northup Piano House, a corporation, is liable to respondent on this contract; respondent claiming that it was made for his benefit. To recapitulate the terms of the contract, appellant corporation Northup Piano House accepted a transfer from the Altadena Syndicate of the Northup Piano House business, and as a part of the consideration therefor agreed to pay the debts of the latter, including respondent's note. This contract was made for the benefit of respondent, and he has a right of action founded on it. See section 1559, Civ. Code; McLaren v. Hutchinson, 22 Cal. 190, 83 Am. Dec. 59; Sacramento Lumber Co. v. Wagner, 67 Cal. 295, 7 Pac. 705; Malone v. Cresent M. & T. Co., 77 Cal. 44, 18 Pac. 858; Tevis v. Savage, 130 Cal. 411, 62 Pac. 611; Washer v. Independent M. & D. Co., 142 Cal. 702, 76 Pac. 654. In the case of McLaren v. Hutchinson, 18 Cal. 180, Hutchinson purchased land from Beach, and as a part of the consideration therefor agreed to pay the debts due to McLaren from Beach. It was held that McLaren, the plaintiff, was not a party to the agreement, and the action could not be maintained. Speaking of this case, the Supreme Court, in Lewis v. Covillaud, 21 Cal. 189, said: "Since the case of McLaren v. Hutchinson has been decided the matter has frequently been called to our attention, and we are by no means satisfied with the rule laid down. The agreement was founded upon sufficient consideration, and the modern doctrine in such cases seems to be in favor of the maintenance of the action." In the case of Sacramento Lumber Co. v. Wagner, supra, it is said: "We are satisfied that an action like that described in McLaren v. Hutchinson may be maintained."

This disposes of the principal point in the case. Other matters discussed in the briefs do not merit attention.

It follows that the judgment and order appealed from should be affirmed; and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

6 Cal. App. 111

**McGINN v. WILLEY et al. (Civ. 286.)**

(Court of Appeal, Third District, California. July 10, 1907.)

SCHOOLS AND SCHOOL DISTRICTS—CONTRACT WITH TEACHER—VALIDITY.

Where school trustees in their individual capacity agree with one to employ him as a teacher and afterwards in regular session as a board repudiate or disregard the agreement, such person is without redress, since the agreement was void, as against public policy.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Annie McGinn against Charles Willey and another. From a judgment of dismissal upon failure to amend the complaint after order sustaining a demurrer, plaintiff appeals. Affirmed.

J. F. Rooney, for appellant. E. W. Holland, for respondents.

BURNETT, J. The action is for damages for the violation by defendants of their agreement to employ plaintiff as teacher in the primary department of the public school of the Poverty Hill school district, Tuolumne county. The appeal is from a judgment of dismissal upon failure to amend the complaint after order sustaining a demurrer.

The complaint alleges "that the said defendants, as trustees of the said Poverty Hill school district, on the 1st day of July, 1905, and at other times prior thereto, promised and agreed to employ this plaintiff to teach the pupils who might attend the primary department of the public school of the said Poverty Hill school district for the ensuing term, commencing on or about the 11th day of September, 1905, and ending on ——— day of June, 1906, at the salary of $60 per month." Then follow the averments that plaintiff agreed with said defendants to teach said school upon said terms, and that she made her application on said date to the board of trustees to be appointed to said position, and "that the said defendants on the said 1st day of July, 1905, without any cause or justification, disregarded and violated their said agreement made with this plaintiff as aforesaid, and refused to appoint this plaintiff as the teacher to teach said department, and the said defendants then and there appointed Laura Hartvig to teach said primary department." It is clear that the court below properly sustained the demurrer to the complaint. The agreement upon which plaintiff relied is against public policy, and void. If the trustees of a public school district in their individual capacity agree with a person to employ him as teacher and afterwards in regular session as a board of trustees they repudiate or disregard their agreement and employ some one else, the former person is without redress. The matter is well stated in McCortle v. Bates, 29 Ohio St. 419, 23 Am. Rep. 758: "Clothed with such powers, and charged with such duties and such responsibilities, it will not be permitted to them to make any agreement among themselves, or with others, by which their public action is to be, or may be, restrained or embarrassed, or its freedom in anywise affected or impaired. The public for whom they act have the right to their best judgment after free and full discussion and consultation among themselves of, and upon, the public matters intrusted to them, in the session provided for by the statute. This cannot be when the members, by pre-engagement are under contract to pursue a certain line of argument or action, whether the same be conducive to the public good or not. It is one of the oldest rules of the common law that contracts contrary to sound morals, or against public policy, will not be enforced by courts of justice, and the court will not enter on the inquiry, whether such contract would, or would not, in a given case, be injurious in its consequences if enforced. It being against the public interest to enforce it, the law refuses to recognize its claim to validity." The party who brings an action for damages for the violation of such an agreement is in no better position than one who should sue for specific performance. In either case the law leaves the parties where it finds them.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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6 Cal. App. 83

**CODONI v. DONATI. (Civ. 352.)**

(Court of Appeal, Second District, California. July 8, 1907.)

1. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—DESERTION.

Desertion of a wife by her husband is a necessary element of an action by her against another for alienation of her husband's affections.

2. SAME—DESERTION—EVIDENCE.

That plaintiff's husband went to an adjoining county without her knowledge, where he remained for seven days, was insufficient of itself to establish desertion sufficient to entitle her to maintain an action for alienation of affections.

3. DOMICILE—SELECTION OF HOME—RIGHT OF HUSBAND.

It is the right of a husband to select the home and the duty of the wife to go to him at his request, when he furnishes the means for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Domicile, § 25.]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Rufina Codoni against V. L. Donati. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed and remanded.

A. E. Campbell and W. H. Spencer, for appellant. Louis Lamy and Wm. Mallagh, for respondent.

PER CURIAM. An action for damages claimed by reason of defendant having alienated from plaintiff the affections of her husband.

The principal matter relied upon by appellant relates to the sufficiency of the evidence to support the findings. An examination of the record indicates that there is no testimony in support of the implied finding that the affections of plaintiff's husband were actually alienated. There is in the record that which may be said to be sufficient to establish an attempt upon the part of defendant to create dissatisfaction upon the part of the husband, and had such effort been followed with desertion, or with proof of facts tending to show that the affections of the husband had been actually alienated, we would not be inclined to disturb the verdict. It appears, however, from the record that the relations between plaintiff and her husband were pleasant up until his departure from this country on a visit to his native land; that while the husband was on such visit defendant wrote a letter to him which might well have had the effect to induce a separation, but, notwithstanding this letter, the husband returned to his wife, brought back with him presents, resumed marital relations, and on the 26th day of September, in company with his wife, attended a picnic near their home. After their return from the picnic, the husband accepted an invitation from defendant to attend a dinner at the house of defendant, to which function the plaintiff was not an invited guest, for the admitted reason that she and the wife of defendant were not on friendly terms. The husband, however, returned to his home on the day following, spent the night of the 27th of September with his wife, and everything was pleasant and agreeable between them, on which occasion he opened his valise and distributed the presents to his wife and daughter. On the 28th of September the husband went to Salinas, from which point he wrote two letters to his wife, and also telephoned her. On the 31st of October he inclosed in one of the letters written the sum of $5 with which to pay the railroad fare of the plaintiff and her child to Salinas Neither of these letters was answered, nor did the plaintiff go to her husband. She used the money for another purpose, and her reason for not going to him upon his demand was that she thought he might be playing her a trick, and for the reason that he had published a card in the newspaper, after this suit was brought, in which he stated that he had not abandoned his wife and did not intend so to do. There is not a particle of testimony in the record from which it may be inferred that the husband ever intended to abandon his wife, or that he had lost affection for her.

This action was brought on the 5th day of October, within a week after the husband went to Salinas, and the record shows that after this action was brought the husband made all reasonable efforts to induce the wife to go to Salinas and live with him. We are satisfied that the facts of this case bring it within the rule announced by Mr. Justice McFarland in the case of Driscoll v. Cable Railway Company, 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203: "When a jury catches at a mere semblance or pretense of evidence for the purpose of somewhat equalizing financial conditions by taking money from one party and giving it to the other without legal cause, the trial judge should, without hesitation, set the verdict aside; and, in the event of his not doing so, this court will grant a new trial." In our opinion there was no evidence of desertion, without which the verdict was unwarranted. The mere fact that the husband without his wife's knowledge had gone to an adjoining county where he had remained for a period of seven days is not sufficient to establish desertion within the meaning of the statute. It was his right to select the home, and it was the duty of the wife to have gone to him when he sent her the money with which to come. The verdict in this case seems to have been rendered upon what, at most, is "a mere semblance of evidence." The court should have granted a new trial.

The judgment and order are reversed, and cause remanded for a new trial.

(6 Cal. App. 80)

## STOWER v. KAMPHEFNER. (Civ. 350.)

(Court of Appeal, Second District, California. July 8, 1907.)

1. Partnership — Dissolution — Character of Assets—Findings.

Where, in a proceeding for the dissolution of a partnership, the referee's report found that the assets at the date of the report consisted of "unsold personal property, wagon scales, barn, two tanks, one coalhouse, one oilhouse," the report sufficiently found that the oilhouse, coalhouse, and barn were personal property.

2. Same—Interests in Realty.

Where a referee's report in proceedings for the dissolution of a firm purported to cover all its assets, but did not include any interest in land on which certain buildings belonging to the firm were located, it was immaterial that the court failed to find what interest, if any, the firm had in the lands.

3. Appeal—Review—Presumptions.

A store building occupied by a firm was destroyed by fire in June, 1903, at which time the walls of the building belonged to the firm. A referee's report in dissolution proceedings failed to include the walls of the building as a part of the assets, but showed that a valuation had been placed thereon, and that defendant had been charged with "building" at the amount of such valuation. *Held* sufficient to justify a presumption on appeal that the walls had been legally disposed of, and that the proceeds had been applied in reduction of liabilities.

4. Partnership — Dissolution — Accounting—Findings—Description of Real Estate.

In a proceeding for the dissolution of a firm, findings as to the assets of the firm were not objectionable for failure to specifically describe certain real estate owned by it.

5. Same—Personal Decree.

No personal decree should be rendered in partnership dissolution proceedings against in-

**dividual partners until the assets have been converted into money.**

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by A. C. Stower against Rosa Kamphefner. From a judgment for plaintiff, defendant appeals. Affirmed.

John E. Daly, A. D. Laughlin and R. B. Bidwell, for appellant. E. A. Miller and Bowen & Miller, for respondent.

SHAW, J. Action for accounting and dissolution of copartnership. The appeal is from the judgment. The issues were referred to a referee, and upon the filing of his report the court adopted the same as its finding, and rendered an interlocutory decree dissolving the partnership and ordered the referee to sell the assets then belonging to the firm and pay the proceeds received from the sale thereof to the creditors. The referee, after making the sale and disbursement of the proceeds in accordance with the order, so reported to the court, which thereupon rendered its final decree, from which this appeal is taken.

Appellant contends for a reversal of the judgment upon the ground that there is no finding as to whether or not certain buildings belonging to the partnership constituted real or personal property. The buildings in question consisted of an oilhouse, coalhouse, barn, and walls of a store building. The objection as to all of said buildings, other than the walls of the store building, is fully answered by that part of the report wherein it is found: "The assets at this date are * * * unsold personal property, wagon scales, barn, two tanks, one coalhouse, one oilhouse."

It is further contended the court failed to find what interest, if any, the partnership had in the lands upon which such buildings were located and in whom the title in said lands vested. The real estate upon which the buildings were erected was not included in the report of the referee, which purports to cover all the assets of the firm, and, as the assets did not include the land, it was immaterial in whom the title vested, inasmuch as it was not a partnership asset. The store building was destroyed by fire on July 16, 1903. The report of the referee was filed November 22, 1904. Among other assets, it was found that the firm at the time of the fire owned "walls of store building." These walls were not included in the assets at the time of making the report, and we must, therefore, conclude that, like other assets of the copartnership, they had been legally disposed of and the proceeds arising from such disposition applied in reduction of the liabilities. The valuation placed upon these walls is $400. Appellant is charged with "building" in the sum of $400, and it is apparent that the "walls of store building" reported among the assets after the fire and thereafter charged to appellant as "building" are identical.

It is further objected that the findings do not describe the lot in Glendora, and hence there was no finding to support the description of this lot as set forth in the interlocutory decree. We can see no reason for giving a particular description of the lot any more than to particularly describe other of the assets belonging to the copartnership; nor does appellant cite us to any authority requiring such description.

There is no ground for the contention that the findings are inconsistent. The "sundry unpaid accounts, amounting to $392.80," added to the "balance due A. C. Stower," separately found, constitute the "present liabilities" of $1,610.26. "No personal decree is to be rendered against individual partners until the assets have been converted into money." Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303; Rosenstiel v. Gray, 112 Ill. 282. It sufficiently appears there was a full and complete accounting of the copartnership affairs before the rendition of the final decree, and that all the partnership assets had been marshaled and converted into money before the decree was rendered.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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## DENNIS v. CROCKER-HUFFMAN LAND & WATER CO. (Civ. 285.)

(Court of Appeal, Third District, California. June 26, 1907.)

1. WATERS AND WATER COURSES—IRRIGATION—OVERFLOW—ACTION FOR INJURIES—COMPLAINT—SUFFICIENCY.

A complaint alleging that defendant owned and operated a canal through which water was conducted for irrigation purposes, and, in connection therewith, at a place near plaintiff's land, a headgate, that the water washed out the headgate and portions of the bank and overflowed plaintiff's land, and that the damage thus caused was due to defendant's gross and willful negligence in failing to properly construct the canal and headgate, and in failing to properly maintain the headgate and to control the water in the canal, was sufficiently specific as to the manner in which defendant was guilty of the negligence charged.

2. APPEAL—REVIEW—HARMLESS ERROR—RULING ON DEMURRER.

Error, if any, in overruling a demurrer to a complaint on the ground of uncertainty, was cured where the answer denied all the material averments, and issues involving all the important questions which could arise were fairly made and squarely presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4098.]

3. SAME—DISCRETION OF COURT—ALLOWANCE AND PERFECTING OF APPEAL.

Code Civ. Proc. § 661, provides that where a motion for a new trial is made on the minutes of the court, the judgment roll, and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal, such statement to be proposed within 10 days of the entry of the order, or such further time as may be allowed, and to be served on the adverse party. *Held*, that where an order for an extension of the time within which to prepare and serve a statement was signed at his home county within the 10 days by the judge who tried the case, and who resided in another county, at a considerable distance from that in which the action was tried, but through inadvertence on his part was not forwarded by him to the clerk of the court until after the expiration of 10 days, it was not an abuse of discretion to thereafter settle and allow the statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2503–2505.]

4. EVIDENCE—BEST EVIDENCE—DESTRUCTION.

Plaintiff, a part of whose land was overflowed by water from defendant's canal, thereafter in gathering the potatoes grown on the land mingled those gathered from the unflooded portion with those from the flooded portion, so that it was impossible to state which part of the entire crop was from the portion not flooded and which was from the flooded portion. There was testimony that the portion not flooded was not as well adapted to raising potatoes as the flooded portion, and that a comparison of the potatoes gathered on the two portions of the land showed that those from the unflooded portion were larger in size and more extensive in yield. *Held*, that the fact that plaintiff did not keep the potatoes separate did not prevent him from showing the yield on adjoining lands, on the ground that by mingling the potatoes he destroyed the best and most accurate evidence on the questions of quantity and quality.

5. SAME—SIMILAR FACTS—SHOWING VALUE.

In an action for the destruction of a crop of potatoes caused by the overflow of the land where same were raised, other potato raisers in the neighborhod, whose lands were similarly situated and of the same character of soil, and who were raising their potatoes under the same conditions, were properly permitted to testify as to the yield from their lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 401.]

6. DAMAGES—GROWING CROPS—DESTRUCTION.

The measure of damages for the destruction of a growing crop is the value of the crop in the condition it was at the time and place of destruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 276½.]

7. EVIDENCE — COMPETENCY — WATERS — OVERFLOW—INJURIES—DAMAGES.

In an action for the destruction of a crop of potatoes caused by the overflow of land where they were planted, a witness was properly permitted to testify as to the crop gathered by him from the same land several years before the flood.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 434.]

Appeal from Superior Court, Merced County; Geo. E. Church, Judge.

Action by Howard Dennis against the Crocker-Huffman Land & Water Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank H. Farrar and James F. Peck, for appellant. J. K. Law and H. S. Shaffer, for respondent.

HART, J. This is an action for damages claimed to have been sustained by plaintiff by the destruction, through the alleged negligence of the defendant, of certain crops of sweet potatoes and beans while the same were under cultivation and growing on the land of the respondent, and also for alleged injury to said land. It is alleged that the plaintiff, after all the necessary preparations therefor, in the year 1903, planted 10 acres of his land, situated in Merced county, in sweet potatoes and 3 acres thereof in beans; that "said crops grew well, and were cultivated, tilled, irrigated, and cared for by plaintiff at great expense, and were in fine growing condition and in high state of cultivation, and of great value until the damage thereto and destruction thereof caused by defendants as herein alleged, and would but for said damage and destruction have produced large and valuable crops of beans and sweet potatoes." The defendant is a corporation created, organized, and existing and operating its business under the laws of the state of California, and it is averred that it is and was, at and before the time at which this action was brought, the owner of and maintained, operated, and controlled, in the said county of Merced, in close proximity to the said land of plaintiff, a "canal or ditch into which and through and by means of which water has been conducted, collected, flowed, and carried and furnished to farmers and others by defendants, and in conjunction and connection with said canal or ditch defendant has during all of said times owned, operated, maintained, and controlled, at a place thereon near plaintiff's said land, a headgate constructed and used to control and regulate the flow of water in and through said canal or ditch." It is alleged that in the month of July, 1903, and while the crops of potatoes and beans mentioned were growing on said land of plaintiff, the water in said canal washed out said headgate and portions of the banks of the canal, and flowed therefrom upon and over the said land and through and over the said crops of plaintiff, washing out and carrying away a large quantity of said land and the soil thereof, and damaging and destroying the said crops growing thereon. It is alleged that the damage to and destruction of plaintiff's said property in the manner and by the means thus charged was through "the gross and willful negligence of the defendant in failing to properly construct said canal or ditch and said headgate, and its gross and willful negligence in failing to properly maintain, care for, and control said headgate, and to care for, manage and control the water in said canal." The specific damages alleged to have been thereby suffered by the plaintiff are: (1) Because of the washing out and carrying away of a certain part of the land and soil thereof, $350. (2) For the damage to and destruction of the growing crop, $1,200, the total amount being $1,550, for which sum plaintiff prayed for judgment. A general and special demurrer to the complaint was overruled by the court. The answer makes general and specific denial (the complaint was verified) of all the material averments of the complaint. The cause was tried by a jury, and a verdict returned for the plaintiff for the sum of $500, and thereupon judgment entered in his favor for that amount. The appeal is from the judgment, accompanied by a statement of the case.

1. It is insisted that the court should have sustained the demurrer to the complaint on the ground of uncertainty. The particular objection to the complaint in this particular is that the allegations charging the defendant with the negligence in the management, control and operation of its ditch and the headgate thereto, and through which it is claimed the destruction of plaintiff's crops and damage to his freehold was caused, are not sufficiently direct and specific. The rationale of the rule requiring certainty in pleading is that the opposing party may be made fully cognizant of the facts upon which the plaintiff relies and which the defendant must meet by denial or in avoidance. The complaint might perhaps have been more particular and direct in its averments as to the manner in which the defendant was guilty of the negligence charged against it, yet we think its allegations are sufficient, and that by them the defendant was fully notified of the facts it was required to answer or otherwise combat, as the exigencies of its defense might demand. Moreover, the answer specifically denies all the material averments, and thus the issues involving all the important questions which could arise were fairly made and squarely presented. Therefore, even if it were conceded that the court erred in its ruling on the demurrer, the same was cured by the full and complete denials of the answer. Besides, it is not every erroneous ruling of the trial court in this regard that demands a reversal of the judgment. Substantial injury to defendant must have resulted from the action of the court. Holland v. McDade, 125 Cal. 353, 58 Pac. 9; Jager v. Cal. Bridge Co., 104 Cal. 542, 38 Pac. 413; Stephenson v. Deuel, 125 Cal. 656, 58 Pac. 258; Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380; Rooney v. Gray Bros., 145 Cal. 753, 79 Pac. 523; Code Civ. Proc. § 475. The issuable facts having been tendered in such manner by the pleadings as to present for trial a clear-cut issue upon the two important questions of damage and negligence, the defendant could have suffered no injury, and, as the answer and the trial clearly attest, did not suffer any injury.

2. The defendant made a motion for a new trial upon the minutes of the court, and the same was denied. No appeal was taken from the order refusing a new trial. Objection is made by counsel for the respondent to the consideration upon this appeal of the statement of the case for the alleged reason "that the same was not served within the time allowed by law, and was received too late." It appears from the transcript that the motion for a new trial was denied by the court on the 28th day of December, 1905. On the 4th day of January, 1906, the defendant prepared and forwarded to Hon. George E. Church, a judge of the superior court of the county of Fresno, who presided at the trial of this cause, a blank order and application for an extension of the time within which to prepare and serve his statement to and including the 29th day of January, 1906. Said blank order was received by Judge Church on the 5th day of January, 1906, and on that day signed by him; but through inadvertence on the part of the judge the order was not forwarded to the clerk of the court in which the cause was tried until the 9th day of January, 1906, on which day the order was received by said clerk, and thereupon filed with the other papers as a part of the record of the case. It will thus be observed that while the order extending the time was signed by the judge before the expiration of the time within which, under the statute, the statement may be proposed and served, it did not become a matter of record until two days after the lapse of that time. It is contended by the respondent that, because the statement was not served within the ten days allowed by the express mandate of the statute, the judge lost jurisdiction to settle and allow the same, and that appellant should, in order to have been relieved of the default, have made application for such relief under section 473 of the Code of Civil Procedure, upon the ground of "mistake, inadvertence, surprise or excusable neglect." Several cases are called to our attention which, it is claimed, support the contention of respondent. But the cases cited, upon the facts, are not precisely in point, nor have we been directed to any cases where exactly the same state of facts marks the proceedings involving the proposal, service, settlement and allowance of the statement. In Vinson v. L. A. Pac. R. R. Co., 147 Cal. 483, 82 Pac. 53, where the defendant failed altogether to propose and serve the statement within the statutory time, and the court upon a showing of excusable neglect relieved him of his default by granting him further time within which to propose and serve such statement, the Supreme Court, speaking through Mr. Justice Angellotti, inter alia, says: "Whether or not the circumstances of a particular case are such that the mistake or inadvertence should be excused is a question the determination of which must of necessity be left largely to the court to which application is made, and it is well settled that this court will not interfere with the exercise of the discretion of that tribunal, except in a case where a clear abuse of discretion is apparent. Particularly is this so where the discretion is exercised in favor of the granting of the relief sought, as such action tends to bring about a conclusion on the merits, which is always to be desired" —citing O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105. In the case at bar it is patent that the failure to file the order

extending the time with the clerk of the court before the expiration of the time for the proposal and service of the statement expressly prescribed by the statute (section 661, Code Civ. Proc.) was not due to negligence on the part of the appellant or his counsel. Application for the extension was made and the order signed by the judge in ample time for the filing of the same before the lapse of the statutory period of 10 days. The fact, of which we are authorized to take judicial notice, that the judge who tried the case and to whom application was made for the extension of time resides in another and different county and a considerable distance from that in which the action was tried, and the further fact appearing in the record that he was at the time of such application at his own home, should also be considered in determining whether there was an abuse of discretion in the settlement and allowance of the statement. The statute in terms does not require an order extending the time within which to propose and serve a statement of the case to be filed, and, while we do not hold that the filing of such an order should not be made, we feel justified in declaring that, under all the circumstances shown by the record upon this point, there was no abuse of discretion by the judge in the settlement and allowance of the statement, but that under the principles announced in Vinson v. L. A. Pac. R. R. Co., supra, it was properly settled and allowed. Besides, we cannot see how the appellant could have based an application for "relief," if the circumstances with reference to the proposal and service of the statement show that "relief" of any kind was necessary, upon "accident, surprise, inadvertence or excusable neglect" upon his part, in view of the fact that the delay in filing the order was imputable to the oversight or inadvertence of the judge himself. Without attempting to decide what would be the proper legal course in such a case, it may be suggested that it would, indeed, be rather a severe rule which would prevent a litigant from exhausting every means made available to him by the law for a full and final determination of questions involving what are at least claimed to be his rights through a circumstance over which it is impossible for him to exercise the least control. There are some other technical objections to the consideration of the statement which we think need not be noticed.

3. According to the evidence, the banks of the defendant's ditch broke opposite the land of plaintiff and flooded all said land, except a small piece in the southwest corner of the lot, and embracing about one-half of an acre planted in sweet potatoes. The land had been irrigated twice, and cultivated the same number of times. The plaintiff testified that "there was a good average stand of potatoes" growing on the land at the time it was flooded. The plaintiff harvested the potatoes growing on the small portion untouched and uninjured by the water, and also gathered a few potatoes from that part of the land inundated. After gathering the potatoes he mingled them together; that is, he placed the potatoes from the unflooded land with those gathered from the flooded portion, so that it was impossible for him when testifying to definitely state which part of the 44 crates he succeeded in harvesting was from the land not injured by the water and which part was gathered from the land thus injured. Plaintiff testified, however, that there were about three times as many potatoes to the hill grown upon and harvested from the land not flooded than were taken from the flooded land, and that they were much larger than those taken from the flooded portion. It is contended by the appellant that it was the duty of respondent to have kept the potatoes harvested from the flooded and unflooded portions, respectively, in separate and distinct lots, because approximately the exact quantity and quality of the damaged potatoes could then have been determined by the quantity and quality of the potatoes not damaged. It is argued that in thus mingling the potatoes respondent destroyed the best and most accurate evidence which could have been offered upon the questions of quantity and quality, and therefore should not have been permitted by the court to introduce evidence as to the quantity or extent of the harvest upon adjoining lands for the purpose of establishing the probable yield upon his land had the same been unimpaired or uninjured by the overflow water from the ditch. The contention is without substantial merit. The fractional portion of the land undisturbed by the overflow waters from the ditch is not, according to the testimony, as well adapted to sweet potato culture as the other or flooded portions, because the latter is lower in altitude and possesses a sandy soil peculiarly suitable for the growing of such crops. Therefore, to take the crop gathered from the higher land, not so productive as the other, as the criterion, would, of course, have been unfair and unjust. Besides, the testimony shows that the plaintiff, after the water had receded and disappeared from the land, harvested about 2½ acres of the potatoes, the least damaged by the water, on the flooded land, and that a comparison in quantity and quality of the potatoes harvested on the two portions of the land—the part flooded and the part not flooded—showed that those from the latter portion were, as before stated, larger in size and more extensive in quantity. Other witnesses—farmers growing sweet potatoes on land in the neighborhood of the plaintiff's land, and which land is similarly situated and of the same character of soil and cultivated under the same conditions—were permitted to give testimony, without objection, as to the number of sacks of potatoes grown on their lands the year in which the damage here complained of was sustained, and also as to the average weight

of the sacks. This testimony was competent and relevant, because it tended to show what, under ordinary circumstances, would have been, in all probability, the yield of the crop but for the damage sustained by the overflow of the water from the ditch.

4. It is claimed that the court erred in admitting testimony as to the market value of sweet potatoes raised in the neighborhood of the plaintiff's land in the year in which the alleged damage was suffered. This testimony was, of course, directed to the question of the ascertainment of the value of the growing crop at the time of its alleged destruction. In the recent case of Teller v. Bay & River Dredging Company (Cal. Sup.) 90 Pac. 942, the Supreme Court declares that the true rule upon the point under consideration, as well as upon the character of the evidence generally which is admissible for the purpose of determining the amount of compensation which should be awarded in cases like the one at bar, is stated in the case of Lester et al. v. Highland Boy Gold Mining Company et al. (a Utah case), reported in 76 Pac. 341, 27 Utah, 470, 101 Am. St. Rep. 988, as follows: "In cases of destruction of growing crops, it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land not destroyed and other similar lands in the immediate neighborhood, cultivated in like manner, the stage of the growth of the crops at the time of injury or destruction, the expense of cultivating, harvesting, and marketing the crops, and the market value at the time of maturity, or within a reasonable time after the injury or destruction of the crops, and, while all such evidence may be considered by the jury in determining the amount of damages, if any, still the true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction." And the rule is so declared in Teller v. Bay & River Dredging Company, 2 Cal. App. Dec. 224; Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62, and Ellis v. Tone, 58 Cal. 289. The rule as thus enunciated answers many other objections urged by the appellant against the record in the case at bar, both as to evidence admitted and instructions given and refused by the court.

5. Evidence was offered and received for the purpose of showing that the land of respondent was peculiarly adapted to the cultivation of sweet potatoes. The appellant, in his answer, denies that the land in question ever produced at any time "any crops or crop of beans or sweet potatoes of any value whatever." The witness James was allowed to testify that several years previously to the year in which the alleged damage occurred he had planted a portion of said land in sweet potatoes, and had harvested therefrom seventy or eighty sacks to the acre. It is objected that this testimony related to a time too remote from that at which the alleged injury was inflicted to render it admissible in any view. The objection goes rather to the weight than to the competency and relevancy of the evidence. We think it was clearly proper as showing or tending to show that the soil of the land was of a nature which rendered it peculiarly suitable for the cultivation of potatoes, and for that purpose the land had special value. The fact that the land was profitably used for potato growing five or six or eight years previously to the year in which the damage was done bore directly upon its value for such purpose at the time of the injury or destruction.

Errors are assigned in the giving and the rejection of certain instructions by the court. We have examined with solicitous care the instructions presented to the jury by the court, and are of the opinion that the law upon all the vital points involved was fully and clearly declared.

We do not regard it necessary to notice all the points urged here involving criticism of the rulings of the court in the admission and rejection of evidence. It is sufficient to say that we have given the record careful consideration, and are convinced that it discloses no errors prejudicial to the defendant. The case seems to have been carefully and fairly tried, and the judgment is, in our opinion, just, and should not be disturbed.

The judgment is, therefore, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

6 Cal. App. 5

## Ex parte ACKERMAN. (Cr. 48.)

(Court of Appeal, Third District, California. June 20, 1907. On Rehearing, July 18, 1907.)

1. ANIMALS — LICENSES — ORDINANCES — DOGS—REPEAL.

An ordinance imposing a license tax on the keeping of dogs is not repealed by implication or a subsequent ordinance imposing a license tax on every kind of business authorized by law, all shows, etc.; no reference being made to the keeping of dogs.

2. MUNICIPAL CORPORATIONS—ORDINANCES—REPEAL—HOW ACCOMPLISHED.

To accomplish the repeal of an ordinance, there must either be language employed expressly declaring such intention, or there must exist in the subsequent ordinance language so inconsistent with the provisions of the former as to necessarily effect a repeal by implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 268.]

3. STATUTES—REPEAL—HOW ACCOMPLISHED.

To accomplish the repeal of a statute, there must either be language employed expressly declaring such intention, or there must exist in the subsequent statute language so inconsistent with the provisions of the former as to necessarily effect a repeal by implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 229.]

4. MUNICIPAL CORPORATIONS—ORDINANCES—LICENSES—DOGS.

An ordinance imposing a license tax on and regulating the keeping of dogs is not inconsistent with Pol. Code, § 3366, as amended in 1901, authorizing cities to license any kind of business not prohibited by law; the ordinance being one of police regulation, and the evident object of the Code being to restrict the power exercisable by municipalities to impose license taxes to the purpose of regulation only.

5. SAME — POLICE POWER — NECESSITY FOR LEGISLATIVE AUTHORITY.

Municipalities need not look to the Legislature as the source of their power to enforce local, police, sanitary, and other regulations deemed needful for their welfare and that of their inhabitants, since Const. art. 11, § 11, expressly vests in them plenary power to enforce such police, sanitary, and other regulations as they may determine shall be necessary for health, peace, comfort, and happiness of the inhabitants, provided such regulations do not conflict with general laws; and the Legislature may not limit the exercise of such power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1308.]

6. ANIMALS—LICENSES—ORDINANCES—DOGS.

An ordinance imposing a license tax on the keeping of dogs is not invalid for unreasonableness or uncertainty in not fixing any particular time at which the tax must be paid, and in not defining the term "current year."

7. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LICENSES.

An ordinance imposing a license tax on the keepers of dogs is not invalid for unreasonableness and as providing for the taking of property without due process of law, because providing for the destruction of a dog upon which no license tax has been paid two days after the dog had been impounded unless it has been redeemed, without notifying the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 831.]

8. ANIMALS—LICENSES—DOGS.

An ordinance requires keepers of dogs to pay the town marshal an annual license tax, and to attach a seal or device to the dog's collar, provides that the marshal shall seize and impound any dog upon which a license shall have not been paid, and that at the end of two days no person claiming such dog and paying the license therefor, the marshal shall destroy such dog, and provides that every person violating the ordinance shall be guilty of a misdemeanor, etc. *Held*, that the ordinance is not objectionable as uncertainly stating what specific acts shall constitute a violation thereof, as not certainly showing whether one accused must violate all or only a part of the provision of the ordinance before he can be adjudged guilty, as authorizing the marshal to commit a trespass by going on the premises of a citizen without a warrant or other process.

On Rehearing.

9. MUNICIPAL CORPORATIONS—POWER TO IMPOSE LICENSE TAX ON DOGS.

A municipality may impose a license tax upon dogs as an incident of the regulation of their management or control.

10. SAME—ORDINANCE—CONSTRUCTION.

An ordinance providing that the owner of a dog upon the payment of a required license tax shall attach to a collar to be worn by the dog a seal or device as evidence of the dog's ownership and of the payment of the tax, providing for destruction of dogs upon which the tax has not been paid, and providing a penalty for noncompliance with its terms, is an exercise of the police, and not the taxing power.

11. ANIMALS—DOGS—REGULATION—POWER OF STATE.

The power of the state to regulate the control or use of dogs is not dependent upon the

Application of Walter Ackerman for a writ of habeas corpus. Petitioner remanded.

J. W. Preston, for petitioner. A. J. Thatcher, for respondent.

**HART, J.** The petitioner was arrested and is detained in custody by the city marshal of the town of Ukiah, under a warrant of arrest issued upon a complaint filed in the recorder's court of said town, charging him with a misdemeanor under the provisions of an ordinance designated and known as "Ordinance No. 15" of said city of Ukiah, passed by the board of trustees thereof on the 14th day of November, 1887. It is alleged in the petition for the release of petitioner upon habeas corpus that the complaint upon which the warrant of arrest was issued against the prisoner "does not state a public offense or any offense whatever either against the laws of the state of California or against any or either of the ordinances of the town of Ukiah City." Among the particular objections urged against the ordinance, the provisions of which petitioner is charged with having violated is the contention that said ordinance "is invalid and void for the reason that the same has been repealed by section 3366 of the Political Code and also by the provisions of Ordinance No. 119 of said Ukiah City," and, furthermore, that said ordinance "is illegal and void for the reason that the same is ambiguous and uncertain upon its face and is also uncertain in its terms." The ordinance reads as follows, after the title and enacting clause:

"Section 1. Every person who owns or harbors a dog within the limits of the town of Ukiah City, shall pay to the marshal of said town an annual license therefor of two dollars.

"Sec. 2. It shall be the duty of the marshal to collect the same, and to deliver to the person paying the same a license, which shall describe said dog, together with a seal or device impressed thereon, which the owner shall attach to a collar to be worn by said dog.

"Sec. 3. It shall be the duty of the marshal to seize and impound any dog owned or harbored within the corporate limits of such town on which such license shall not have been paid.

"Sec. 4. At the end of two days, no person claiming said dog, and paying the license therefor, or producing a license showing previous payment for the then current year, the marshal shall destroy and bury such dog.

"Sec. 5. Every person who shall wilfully and knowingly violate this ordinance shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten, nor more than fifty dollars, or by imprisonment not exceeding fifty days, or by both such fine and imprisonment."

The sixth and last section of the ordinance marshal as compensation for the services which the ordinance requires him to perform in the matter of the enforcement of its provisions.

Section 3366 of the Political Code, as amended by the Legislature of 1901, with whose provisions it is claimed that the ordinance under which the petitioner is held in custody is at cross purposes, authorizes "boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise," to license "all and any kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions," etc. The purpose of Ordinance No. 119 of the city of Ukiah, which was passed by the board of trustees of said city on the 20th day of June, 1904, and which, it is contended, repealed the ordinance under consideration, may be shown by its title, which is as follows: "To license, for the purpose of revenue and regulation, of every kind of business authorized by law and transacted and carried on within the town of Ukiah City, and all shows, exhibitions and lawful games carried on therein. To fix the rate of license tax upon the same and to provide for the collection of the same by suit or otherwise." This ordinance then prescribes the amount of the annual license tax which shall be paid for carrying on and conducting the various kinds of businesses and occupations prosecuted within the corporate limits of said town of Ukiah. There is no attempt made in the last-mentioned ordinance to license or regulate the ownership of dogs within the municipal limits of said town, nor is there any reference whatever therein to those animals. As Ordinance No. 15 and Ordinance No. 119 deal with entirely and widely different subjects, we are unable to appreciate the force, if any it possesses, of the suggestion of counsel for the prisoner that the former ordinance has been repealed by the latter. There is no language to be found in Ordinance No. 119 expressly repealing Ordinance No. 15, nor are the subject-matters of the two ordinances so correlated or connected as to impart to Ordinance No. 119 the effect of repealing by implication Ordinance No. 15. The general object of the two ordinances is, it is true, the same—the regulation of certain matters of local concern to the municipal corporation and its members—but the particular subjects of regulation treated by the two ordinances are so diverse that if one of them should, in fact, be repealed, and the other omitted to expressly provide for the licensing and regulation of the subject-matters or occupations dealt with by the abrogated measure, such matters or occupations would be immune from interference by the local authorities (unless, of course, they should become nuisances by the manner of their operation) and could be maintained and prosecuted without a municipal license or other authorization from the corporation. It is scarcely necessary to suggest that the adoption of an ordinance licensing and regulating the business of a banker or a baker or a laundry could not operate, per se, to repeal an ordinance, previously passed, licensing and regulating the retail sale of intoxicating liquors. To accomplish the repeal of an ordinance or of a statute, there must either be language employed expressly declaring such intention, or there must exist in the subsequent ordinance or statute language so inconsistent with the provisions of the former as to necessarily effect a repeal by implication. The salient parts of the two must, in other words, be so incongruous and wanting in harmony as to make it impossible for the two to stand together.

Nor is there anything inconsistent between the provisions of the ordinance in question and those of section 3366 of the Political Code. Ordinance No. 15 was undoubtedly designed as and is one of police regulation, and the evident object of the section of the Political Code referred to, as amended by the Legislature of 1901, is to restrict the power exercisable by boards of supervisors and of the legislative bodies of the incorporated cities and towns of the state, to impose license taxes, to the purposes of regulation only. But counties, cities, and towns are not required to seek in any legislative enactment for the source of their power to make and enforce within their respective limits all local, police, sanitary, and other regulations which they may deem needful and requisite for their welfare and that of their inhabitants. The Constitution has, by direct grant, vested in them plenary power to provide and enforce such police, sanitary, and other local regulations as they may determine shall be necessary for the health, peace, comfort, and happiness of their inhabitants, provided such regulations do not conflict with general laws. Article 11, § 11, Const. And the Legislature has no authority to limit the exercise of the power thus directly conferred upon cities, counties, and towns by the organic law. The only test is, therefore: Do such regulations conflict with any general law of the state? If they do not, then they have binding authority upon all inhabitants of the city or county or town for which they are established upon all the subjects to which they relate and which legitimately come within the scope of the power granted by the Constitution. Ex parte McClain, 134 Cal. 111, 66 Pac. 69, 54 L. R. A. 779, 86 Am. St. Rep. 243; Ex parte Lacey, 108 Cal. 326 et seq., 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93. Our attention has been directed to no general law, with the provisions of which the ordinance, whose validity is here challenged, is in conflict.

But the learned counsel for petitioner declares that the ordinance is unconstitutional because it is unreasonable and uncertain, and therefore oppressively burdensome. The argument in support of this contention is that the ordinance does not fix any particular time at which the tax must be paid; that the words "current year," as used in the ordinance, are indefinite and uncertain as to the time when the tax shall be paid, and it is said that, if it be meant by those words that the tax is to cover the period "from January 1st to December 31st, any person who became the owner of a dog on the 31st day of December, 1907, would be liable for the full amount of the tax, although he owned the dog less than a day, whereas, another person who owned the dog on January 1st, 1907, would pay no more than he would." The unreasonableness of the ordinance is also found in the fact that it provides for the destruction of a dog upon which no license tax has been paid two days after the animal has been impounded, unless he has been redeemed, without notifying the owner of such contemplated destruction, and this is said to be the taking of property without due process of law. Other objections to the reasonableness of the ordinance are that it does not with certainty provide what specific acts shall constitute a violation thereof to thus render the violator amenable to the punishment prescribed therein; that it is uncertain in that it does not appear clear whether the accused must violate all or only a part of the provisions of the ordinance before he can be adjudged guilty of a misdemeanor thereunder; that the ordinance authorizes the city marshal to commit a trespass by going upon the premises of a citizen without a warrant or other process and capture and take to the pound a dog upon which a license tax has not been paid. In short, no conceivable ground or reason upon which an objection could be urged against the validity of the ordinance has been overlooked. But a careful examination of the provisions of this local regulation does not, in our opinion, bear out or sustain any of the points which counsel has rather ingeniously attempted to maintain against the constitutional soundness of the measure, or against its validity for any reason. It is not only not ambiguous and uncertain in its terms, but its language is clear and unmistakable and easy of comprehension, nor are its provisions and terms characterized by unreasonableness. On the contrary, the ordinance appears to represent only a wholesome and salutary exercise of the power of police. The purpose sought to be attained by the ordinance is not only commendable in the highest degree, but is of paramount importance to all communities possessing a considerable number of inhabitants. Common experience justifies strenuous opposition to (and wisely sanctions the curbing of) unbridled, and, it may be added without facetiousness, unmuzzled, liberty in the canine species, particularly in urban communities. Much has been written and spoken of the dog and his many noble qualities. It may truthfully be admitted that innumerable instances of the unflinching loyalty and faithfulness of that quadruped to his master or to a friend to whom he has become attached are recorded, and have justly inspired writers of intense and ardent natures and of vivid and lively imaginations to soar to supernal heights of eloquence and of poetic fancy in their descriptive song of the noble attributes of the dog. There can be nothing farther from the purpose or disposition of the writer of this opinion to detract from or underestimate the worth of a good, conscientious, law-respecting dog—a canine content to remain at all times within the limits of his own bailiwick and there regale himself in an atmosphere of perfect ease and comfort, with frequent delightful excursions to the land of Hypnos, and at the same time ever alert to the highest interests of his master, and, generally speaking, scrupulously faithful to all the pacific and innocent pursuits which have come within the curriculum of his education. There can be no doubt that many dogs, for their acts of heroism in saving human life or preventing injury to their masters when surrounded by appalling circumstances of danger, deserve a conspicuous place in poetry and song; but there is no inconsistency between this observation and the suggestion that when the poet, as, under the entrancing spell of ethereal dreams, in winged boat, he flits "from mount to mount through Cloudland," permits fancy to get the upper hand of fact, and thus unconsciously wanders from concrete cases to abstractions in his perfervid panegyrics upon the canine, he slips far over and beyond even the boundary line established and tolerated by poetic license. It is, we think, safe to say that those writers who have written such glowing tributes to the dog in the abstract have never had any actual experience with a monstrous canine of the bull family, to which they were strangers. There is neither poetry nor sentiment in the dog, as a rule, especially when one meets him upon what he conceives to be his own preserves, for such an occasion is generally conceded to be an appropriate time to cast song and sentiment to the winds and to get busy by moving with all possible haste a comfortable distance beyond the danger line. But it must be admitted that there are really some good-tempered, well-behaved dogs, which are, it may be granted, quite useful in their way. But the other kind become good dogs only when they have ceased to be able to exercise the power of respiration.

At the common law, the dog was classed in the category of animals feræ natura, and many of them should be so classed now. We are safe in going further and declaring that the very best of them can, with less effort and in a shorter space of time, make themselves more of a nuisance to the square inch than any other domestic quadruped of which we have any knowledge. Even those having the good fortune to have received the fullest measure of civilizing care, nursing, petting, and general disciplinary domestication, from puphood to the danger point of maturity, have not had the instincts of savagery inherited from their distinguished ancestrial relative and implacable enemy of the human race, the wolf, so mollified as to render them altogether disposed to maintain uniformly peaceful relations with the human family. For it may be accurately declared that nearly all dogs are friendly only with their masters and immediate family, and that strangers, however honest and peaceful their intentions may be, are almost invariably treated by them as intruders, having no rights that a dog is compelled to respect. In these observations, though rather *dog*-matically asserted, we think no one of ordinary experience in the common, all-around affairs of this mundane sphere will hesitate to con*cur*. If the killing by the marshal of a dog, without formally notifying the owner of the time and place of the proposed execution, is violative of the injunctions of our constitutions against the taking of property without due process of law, how much more flagrantly is that sacred fundamental principle outraged in the vicious act of an ill-tempered, snapping dog, which, without previous warning or other due notice and without provocation, wantonly deprives a human individual, who has never trespassed upon or otherwise invaded his rights, of a quantity of his avoirdupois! This suggestion is offered only in illustration of one of easily a hundred available reasons which could be advanced in support of a local legislative measure whose object is to regulate the ownership and consequently, as far as it can be done, the behavior of dogs. To effectually accomplish this end, the owner of the dog, by the provisions of the ordinance under review, for the privilege of such ownership, is required to pay a license tax, or, in default thereof, must bear the penalty prescribed; or, in case the dog has no owner, or his owner does not think enough of him to pay the license, then the marshal may destroy him.

Many other reasons than those already suggested could be given why the ordinance here is not only reasonable, but an important, regulation. The dog is subject to hydrophobic fits, and the laceration of the flesh of a human by a dog thus afflicted will almost invariably inoculate such person with the poison of the malady, usually with a fatal result. And, too, as some of the cited authorities suggest, if a dog commits damage for which his owner may be held liable, such an ordinance as the one here would materially aid in the identification of the owner, assuming that he has paid the tax, and would therefore the better enable the injured party to invoke the rule of respondeat superior! But it is unnecessary to enumerate all the excellent and unanswerable reasons, any one of which is sufficient to sustain the policy and the necessity of such an ordinance. Every city, town, and county should have such a measure and give its provisions full, hearty, and complete enforcement.

Certain of the complaints urged against the validity of the ordinance before us necessarily assume that the officers, in the enforcement of its provisions, will themselves commit infractions of the law. No such assumption or presumption can be indulged. Two modes of executing the terms of the ordinance are prescribed: (1) Where, because of failure or refusal to pay the license tax, the owner of the dog may be complained of in the city court, arrested upon a warrant and prosecuted in the manner prescribed by the law in all such cases. (2) Where the dog is found upon the public streets, bearing no proper evidence of the tax having been paid, the animal may be impounded, and after two days from such impounding may, unless redeemed by the owner, be by the marshal destroyed. The marshal would, of course, have no right to go upon the private premises of a citizen upon an official mission without being "armed with process," except where, upon such premises, he might himself witness the commission of a crime. The objection as to the time at which and the exact period for which the license is to be paid has no merit. As we understand the terms of the ordinance, the license tax of $2 is to cover a calendar year, and it is, so far as the proposition may affect the validity of the ordinance, immaterial at what particular time it is paid. The illustration submitted by counsel in his effort to sustain his contention of the unfairness and unreasonableness of the ordinance of where a person might become the owner of a dog on the 31st of December, 1907, and is forced to pay the license tax for the entire year just closing, suggests nothing militating against the reasonableness of the measure. The new owner or master of the dog in that case would have no license to pay for the year about to terminate if the previous owner had already paid the tax. If the previous owner had not done so, it would only be reasonable and just that the subsequent owner should do so, not only because the tax upon the dog is due from somebody, if there is and has been an owner, but also for the reason that a person who becomes, by purchase or gift, the owner of a dog upon which an authorized license tax remains unpaid assumes, in acquiring rights under such ownership, the burden of any duty with reference thereto, which the government, under its power, may have seen fit to impose. There is nothing in the point that it is difficult to determine from the ordinance how much thereof—whether all or only a part—an accused person must violate before he may be adjudged guilty of a misdemeanor. It is as clear as language can make it that a refusal by a citizen owning or harboring a dog within the corporate limits to pay the license as required would bring his conduct within the penal purview of the ordinance. The regulation requires nothing else at the hands of such citizen than the payment of the license. There are certain provisions prescribing the duties of the marshal under the ordinance. The willful failure of that official to perform those duties would undoubtedly subject him to the penalty of a misdemeanor under the terms of the measure.

Counsel questions the purpose of the ordinance to be that of regulation because it contains no provision prohibiting the ownership of dogs within the corporate limits of the town. A conclusive answer to this unique suggestion is, first, that there is no power in municipal or other authorities to prohibit the ownership of dogs, no more than there is such power to prohibit the ownership of any other species of property; second, if such power existed, there certainly would be a striking incongruity between the clause prohibiting such ownership and the one licensing it.

The ordinance is, as we have declared, a reasonable and appropriate exercise of the power vested by the Constitution in the cities, towns, counties and townships of the state.

The petitioner will be remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

### On Rehearing.

HART, J. In his petition for rehearing counsel for petitioner suggests that in the decision of the case we overlooked the main point upon which he relied, and misconceived his point "as to the force of section 3366, Pol. Code." The main point referred to, although stated by counsel in his petition in the nature of a number of queries, is briefly this: That the ordinance in question represents the taxing rather than the police power, because the license provided for therein amounts to a per capita tax upon dogs, and therefore there is imposed by the ordinance a restriction upon the ownership of those animals. In other words, his contention is that the ordinance authorizes a tax upon the ownership of dogs and not an attempt to regulate their use. We think that perhaps in one part of the main opinion we unhappily used language which might imply that we held that a license for regulatory purposes might be imposed upon the ownership of dogs. What we intended to say then and what we do say now is that a license tax upon dogs may be imposed as an incident of the regulation of their management or control, or, as counsel prefers to express it, of their use. The very terms of the ordinance before us show it to be a regulatory measure. It provides that the owner of the dog, upon the payment of the required license tax, shall attach to a collar to be worn by said dog a seal or device as evidence of the ownership of the dog and of the payment of said license tax. It further provides for the enforcement of a penalty for a noncompliance with the law, or "for the doing of some prohibited act." And in that manner the power of police is exercised. Merced County v. Helm, 102 Cal. 163, 36 Pac. 399. The ordinance also provides for the destruction of a dog upon which a license tax has not been paid, and which does not, therefore, bear a collar to which is attached the seal or device referred to. All these provisions, in their very nature, demonstrate that the ordinance is intended as an exercise of the police and not of the taxing power. No American court has ever questioned the right under the police power to regulate the control, management or use of dogs. The dog became a domestic animal originally by virtue of legislative enactments, and but for statutes imparting to him the status of property in all the states and countries where the common law is the foundation of their jurisprudence the dog would now have no standing before the law, except where, as in the case of other wild animals, he was reduced to possession, and even then, should he depart from his possessor without animo revertendi, he thus placed himself again beyond the protection of the law. As illustrative of some of the reasons upon which laws regulating property in dogs are founded, we shall here present extracts from some of the many authorities upon the subject. In 67 Am. St. Rep. p. 298, the editor, in an extended note upon the subject, says: "That property in dogs may be subjected to regulation by the state in the exercise of its police power cannot be questioned. * * * Such regulation usually runs in the direction of imposing license taxes upon the keeping of dogs, and it is well settled that the summary destruction of dogs may be authorized when such regulations are not complied with." In Jenkins v. Ballantyne, 8 Utah, 245, 30 Pac. 760, 16 L. R. A. 689, it is said: "The police power of the state has been used to regulate and control property in dogs to a greater extent than property in any other class of domestic animals. It is a peculiar kind of property. Such animals increase rapidly. They are usually of but little expense to their owners when allowed to run at large, and in a domestic state they retain to a considerable degree their wild, mischievous, and ferocious natures. Their trespasses and invasions of rights not belonging to their masters are often such as are impossible to prevent and when the mischief is done sometimes it is impossible to identify the dog or his owner, and when found the latter is sometimes as irresponsible as the former. In fact, judicial process and inquiry is altogether inadequate to redress such wrongs. Hence such laws and ordinances as those in question are adopted, requiring the owner of dogs to register and collar them. By such means the owner is ascertained and made responsible.

and all dogs not deemed worth the trouble and expense of registration are outlawed when at large and liable to be killed."

Counsel undertakes to discover a distinction between the law as expounded by the courts in certain other jurisdictions and the law in California because in the former the dog is only qualified or base property, whereas, in this state the statute impresses him with the full status of property. So far as the vital question involved in this discussion is concerned, it can make no difference whether the dog is property or not. The power in the state to regulate its control or use is not dependent upon that proposition. The dog is not, because of having been constituted property by legislative enactment, hedged about by a sacredness or surrounded by a halo that will prevent the police power from extending to him if the governing or other duly constituted authorities of an incorporated city or town deem it necessary for the peace and comfort of the community to regulate its use or control within the limits of such city or town. Ordinances prohibiting the running at large within the limits of towns and cities of horses, cows, sheep, hogs, and other useful domestic animals, and authorizing their impounding when found so running at large and even their sale, if not redeemed, might be said with equal reason to restrict in effect the ownership of those animals within the limits of such cities and towns, and such ordinances have been upheld as a wholesome exercise of the police power. Of course, such ordinances are designed only as a regulation of the use and management of those animals, and do not, in fact restrict or interfere with ownership. The ordinance here does not, it will be readily noted, either expressly or by implication, attempt to interfere with the ownership of dogs. As stated in the main opinion, the authorities could not by ordinance or otherwise disturb the right of ownership of those animals. Any person ambitious to own a dog of any kind which may best suit his fancy may not only exercise the right of such ownership, but may keep and maintain the animal within the limits of Ukiah City, if he complies with the regulations as to its management, control, or use prescribed by the ordinance. The owner of a cow must, in order to maintain and keep that useful animal within the limits of a city or town, obey the regulations of such city or town with reference to such animals, or be subjected to the penalties of the ordinance. And his ownership of the cow is thus in no manner or degree interfered with. In short, the terms of the ordinance only involve the application of the familiar principle that every person shall so use his own property as not to injure the rights of other persons or of the public.

We do not think we misconceived counsel's position as to the effect of section 3366 of the Political Code. His argument upon this point is that that section at the time of its enactment declared the full power of a municipal corporation to license for regulation. What we said in the main opinion was: "Nor is there anything inconsistent between the provisions of the ordinance in question and those of section 3366 of the Political Code," and then declared that incorporated cities and towns derived their power to make all needful police regulations from the Constitution itself. Our position in the main opinion was, and we know of no reason for changing it, that section 3366 of the Political Code does not, nor has the Legislature the right to do so at all, limit the power granted by the Constitution to counties and to cities and towns to which that section may be applicable to adopt such police regulations as they may decide to be requisite for their welfare, and, if a license tax be deemed to be essential to the full accomplishment of the purposes of such regulations, any attempted legislative inhibition against it is absolutely void. The only qualification to be found in this constitutional grant of power to counties and incorporated towns and cities is that such local regulations shall not conflict with general laws. By this is clearly meant that the Legislature may itself, by general laws, exercise the power thus conferred upon such cities and towns and upon counties, and that local regulations adopted by municipal boards not in harmony with such general laws would, of course, be void and inoperative. In other words, the Legislature may itself exercise the power granted by the Constitution, but cannot limit the exercise of such power either by itself or by the local governing bodies. As we understand counsel, his contention is that the section of the Code referred to limits the power of licensing for regulation to a "business" of some character, and that a dog is not a "business" in contemplation of that section; hence any attempt to license a dog as an incident of a regulatory measure is contrary to the section named. The statement of the proposition operates as its own refutation. Moreover, when counsel admits, as he appears to do, the right of a municipal corporation to regulate property in a dog or the use thereof, he necessarily admits that such regulation may take the form of a license, for it has never been doubted for a moment, either by the text-writers or the courts, that when a business or other matter which may be the subject of police regulation is so regulated a license may be required as a condition to carrying on such business or to the maintenance of whatever may be the subject-matter of such regulation, and a license fee imposed. The fee exacted for such license is not, as we think we have shown, intended for purposes of revenue, but is designed to cover the expense of supervision or the proper enforcement of the ordinance. In a case like the one at bar, the fee is directed to the accomplishment of a double object: (1) To meet the expense of enforcing the ordinance. (2) The discouragement of the keeping of dogs within the limits of incorporated cities and towns, etc.

Counsel appears to be at a loss to understand what privileges a dog owner receives in return for the license fee. The obvious answer to the suggestion is that a dog upon which the license tax has been paid is, under the special protection of the law suffered to run at large with impunity. The paramount consideration in the adoption of such a regulation, however, is in the protection it affords the citizens of the city or town against the indiscriminate running at large of dangerous and nuisance-producing dogs without responsible sponsors.

A rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

5 Cal. App. 400

## CORDINER v. LOS ANGELES TRACTION CO. et al. (Civ. 336.)

(Court of Appeal, Second District, California. April 16, 1907. Rehearing Denied June 13, 1907.)

1. Damages — Personal Injury — Future Consequences—Evidence.

To justify a recovery for future consequences resulting from a personal injury, the evidence must show with reasonable certainty that such consequences will follow from the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 505, 506.]

2. Same—Admissibility.

Where, in an action for personal injury, the evidence showed that plaintiff sustained a fracture at the base of the brain, the testimony of physicians that in a majority of cases, where the injury consisted of a fracture at the base of the brain, epilepsy, paralysis, or mental deterioration would result in the future, was admissible to prove future suffering on which the jury could award damages for future injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 479–481.]

3. Causes — Injury to Passenger — Joint Liability — Defenses — Last Clear Chance.

Where a passenger on a street car injured in a collision between the car and a car operated by another company sued both companies, and showed that the collision was due to the joint or concurrent acts of negligence of the two companies, an instruction confining a recovery against the company having the last clear chance to avoid the collision and neglecting to act on it was properly refused; the rule of last clear chance being only applicable to cases where the defense is contributory negligence.

4. Same.

One having a right to recover against either of two joint wrongdoers or both cannot, in an action against both, be involved in litigation to determine the question of the respective rights of the wrongdoers as against each other.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Margaret Cordiner, a minor, by Melissa Cordiner, her guardian ad litem, against the Los Angeles Traction Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Bicknell, Gibson, Trask, Dunn & Crutcher (N. S. Sterry, of counsel), for appellant Los Angeles Railway Co. Harris & Harris and Byron L. Oliver, for appellant Los Angeles Traction Co. Hunsaker & Britt, for respondent.

SHAW, J. This is an action to recover damages for personal injuries sustained by plaintiff while lawfully riding on a street car operated by the Los Angeles Traction Company, one of the defendants. The Los Angeles Traction Company owned a street car line on Sixteenth street, in Los Angeles, over which it was running its cars in carrying passengers. The Los Angeles Railway Company owned and operated a street car line on Grand avenue, in said city. On January 31, 1903, a collision occurred at the intersection of West Sixteenth street and South Grand avenue between the car of the Los Angeles Traction Company, on which plaintiff was a west-bound passenger on said Sixteenth street, and a north-bound car of defendant Los Angeles Railway Company on said Grand avenue, which collision, it is charged, was due to the negligence and want of care of the servants of said defendants, and wherein, as a result of said collision, plaintiff was violently thrown from the car of the Los Angeles Traction Company, on which she was riding as a passenger, by reason whereof she sustained injuries, for which, upon the trial, she had judgment against defendants for damages in the sum of $5,000. Both defendants appeal from orders of the court denying their motions for a new trial. Defendants ask for a reversal, first, upon the ground of error in the admission of testimony of medical experts as to future consequences of the injury; second, in the refusal of the court to give certain instructions requested by defendant Los Angeles Railway Company.

Appellants concede plaintiff's right to recover, but contend that the amount of recovery should be limited to the loss that she was "reasonably certain" to sustain. We are in full accord with counsel's view of the law, which appears to have been embodied in an instruction (No. 4) given to the jury by the trial court, wherein they were instructed: "In case you find for the plaintiff, you can allow plaintiff as damages only fair and reasonable compensation for such harm or damage as flows naturally from the injury complained of, and as a natural result of the injury; and the evidence must show to a reasonable certainty that such harm or damage has or does exist, or will result, before you can allow compensation therefor. No damages can be allowed that are merely conjectural, or flow from sympathy." No attack is made upon this instruction, but counsel contend that the evidence of the physicians who testified as experts, over objections made by appellants, was of a character from which no certainty could be deduced, and that the testimony consisted of mere speculation and conjecture as to possible future consequences of the injury, which was calculated to, and did, influence the minds of the jury, and resulted in their rendering a verdict for a sum unsupported by the evidence, except upon the theory that plaintiff would at some future time be subjected to the conditions which might follow as a result of the injury sustained.

The evidence tended to show that plaintiff had sustained a fracture at the base of the brain; and, referring to this fact and other conditions shown to exist, Dr. Dukeman, a witness on behalf of plaintiff, was asked: "Would there be any danger of a relapse on the part of the patient after a considerable period of time during which the patient had apparently made a complete recovery?" To which he answered: "There is some danger." And in reply to, "What is the occasion of the danger?" stated: "After a fracture there is always more or less thickening due to the reparative processes that go on in the recovery of a fracture. That thickening may produce pressure on the brain and produce various symptoms. * * * One of the main symptoms may be convulsions; may be paralysis of some form." Referring to his answers in regard to the probability of future trouble, the witness said there would be danger of a recurrence of such symptoms as he had indicated for a period of days, weeks, months, or years. On cross-examination the witness further stated: "I should look for more serious and fatal results from a fracture at the base of the brain than at any other place. I should look for this after apparent recovery, apparent recovery so far as anybody can tell. I would always be looking for something. * * * The doctor is frequently mistaken in the diagnosis of a case. I think he is more often correct than incorrect. * * * In the majority of cases I would look for future trouble. I can't tell what will happen in this case. My experience and knowledge as a physician has taught me that in a majority of cases of this kind, where there has been, to even the eye of a doctor, a complete recovery, convulsions or paralysis, or some other symptoms, various symptoms, would happen. I should look for convulsions in the majority of cases of that kind where there had been a complete recovery, to the eye even of a doctor." Dr. H. G. Brainard, another physician called as a witness on behalf of plaintiff, and having reference to the condition of plaintiff after an apparent recovery, was asked: "What results are still likely, or what injury is a patient still likely to experience as a result of the injuries received?" And replied: "The condition would show that the patient had not thoroughly recovered from the effect of the injury, and we might expect from the injury the symptoms that rise frequently from a case of suffering from a fracture at the base of the brain. There is danger of convulsions or epilepsy, danger of mental deterioration, danger of paralysis."

To justify a recovery for future consequences, the evidence must show with reasonable certainty that such consequences will follow. The fact that in the minds of the jurors the disability indicated may follow, or is likely to or will probably follow as a result of the injury, will not warrant a verdict for damages. This, however, does not mean that the testimony of a witness should be excluded unless he is reasonably certain that the indicated results will follow, nor that isolated portions of his testimony should, standing alone, or considered with other evidence, extend to the degree of strength required to establish reasonable certainty as to future resulting consequences. It is the province of the jury to weigh and determine its value as proof. The evidence here tended, in an appreciable degree, to prove the ultimate fact—that is, the reasonable certainty that future evil consequences would result from the injury—and was properly admitted for the consideration of the jury; it being its function, upon a consideration of the evidence as a whole, to determine its sufficiency as proof of the ultimate fact. Its competency should not be confounded with its sufficiency; nor should the technical definition of words constitute a controlling factor in determining the question of admissibility. But, as stated in Ballard v. Kansas City, 86 S. W. 479, 110 Mo. App. 391: "The main object is not to draw fine distinctions based upon accurate definitions of words, but to ascertain the real idea expressed." See, also, Block v. St. Ry. Co., 61 N. W. 1101, 89 Wis. 371, 27 L. R. A. 365, 46 Am. St. Rep. 849. It is often impossible to show by positive proof whether or not an impairment of health or faculties will follow as a result of injury. Hence, of necessity, in determining the question, courts and juries must rely upon the testimony of properly qualified physicians for such testimony as will in the minds of the jury establish the fact in issue to a reasonable certainty. Such evidence must be clearly distinguished from conjecture, or that which merely establishes a possibility of future trouble. As a rule, the physician whose opinion is most reliable is loath to give an opinion as to what consequences will or will not follow as a result of an injury in a certain case, but at the same time willing, as here, to state the result of his own professional experience and observations in treating cases where like injuries have occurred, and as a result of that experience say that we might or might not expect like results to follow in this case. Testimony of duly qualified experts which shows that in a majority of cases, where the injury consists of a fracture at the base of the brain, such injury results in future epilepsy, paralysis, or mental deterioration, tends to prove the reasonable certainty that such consequences will follow in any given case of like injury.

In this view considered, the evidence, while it may not have been by the jury considered sufficient proof, nevertheless tended to establish to a reasonable certainty that, notwithstanding the apparent recovery of the plaintiff, she would in the future suffer from the effects of the injury. Dr. Dukeman testified that there was some danger of a relapse, and gave his reasons for so stating. That after apparent recovery he should look for serious results; that in the majority of such cases he would look for future trouble; that in a majority of such cases where there was an apparent complete recovery to the eye of a doctor, convulsions, paralysis, or other conditions of disease followed as a result of the injury; that he should look for convulsions in a majority of such cases. Dr. Brainard testified that epilepsy and mental deterioration might be expected to follow (not that they might follow), and that there was danger of such conditions.

In Peterson v. Chicago, etc., Ry. Co., 39 N. W. 485, 38 Minn. 511, and Nichols v. Brabazon, 69 N. W. 342, 94 Wis. 549, the court held that questions which called for the opinion of the witness as to the probability of the patient recovering was not subject to the objection made here; the court in the latter case observing: "Certainly the effect of the whole testimony must be to establish to a reasonable certainty that the effects of the injury will be suffered in the future." In Block v. St. Ry. Co., 61 N. W. 1101, 89 Wis. 371, 27 L. R. A. 365, 46 Am. St. Rep. 849, a question asked as to the reasonable probability of the ultimate recovery was sustained; the court saying: "While it is true that the whole testimony must establish, in the minds of the jury, more than a mere 'reasonable probability,' and must amount to proof to a 'reasonable certainty,' this ultimate fact is susceptible of proof by items of testimony which do not separately fully establish it." Mitchell v. Tacoma Ry. & M. Co., 43 Pac. 528, 13 Wash. 560; Ballard v. Kansas City, supra; Peterson v. Chicago, etc., Ry. Co., 39 N. W. 485, 38 Minn. 511; Filer v. N. Y. C. R. Co., 49 N. Y. 42; Hallum v. Village of Omro, 99 N. W. 1051, 122 Wis. 337. We have carefully examined the great number of authorities submitted by counsel for appellants. Many of them relate to the form of instructions given for the guidance of the jury where damages for future results of injuries were sought. Others are clearly distinguishable from the case at bar. In Lentz v. Dallas, 72 S. W. 59, 96 Tex. 258, an objection was sustained to an abstract question upon the ground that it was not confined to the probable effects of the injury. Yaeger v. Railway Co. (Cal.) 51 Pac. 190, falls within the same rule. The case of Strohm v. Railroad Co., 96 N. Y. 305, has been frequently cited in support of the proposition that consequences which are contingent, speculative or merely possible are not proper to be considered in ascertaining the amount of damages sustained by reason of personal injuries. In that case the court recognizes the rule that, "to entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." In the Strohm Case the questions and answers upon which the court based its ruling were: "You said it [the injury] might develop in worse signs or conditions? What do you refer to?" To which the witness answered: "A patient * * * may develop," etc. Both question and answer related to what conditions might develop, not to conditions that might be expected to develop, as a result.

Neither of the defendants questioned the right of plaintiff to recover such damages as she had sustained in the collision, but each contended that the other should be held responsible therefor, and, with the view of having the jury pass upon the question, the Los Angeles Railway Company asked the court to instruct the jury, in effect, that notwithstanding the negligence of its motorman in driving his car upon the crossing, still if the traction motorman could, after he saw that it was beyond the power of the motorman of the Los Angeles Railway car to avoid the accident, have, by proper care, prevented the collision, then the negligence of the defendant Los Angeles Traction Company was the proximate cause of the injury. In other words, while admitting that plaintiff's injury resulted from the collision due to the joint or concurrent acts of negligence of defendants, she must be confined in her recovery for such damages to a judgment rendered against the defendant who had the "last clear chance" to avoid the collision and neglected to act upon it. Appellant seeks to apply the well-established principle that "he who last has a clear opportunity of avoiding the accident, by the exercise of proper care to avoid injuring another, must do so." Esrey v. S. Pacific Co., 103 Cal. 541, 37 Pac. 500. This rule is only applicable to cases where the defense is based upon the contributory negligence of plaintiff, due to his want of care in placing himself in a position of danger, and where he may, notwithstanding his negligence, recover from a defendant, who by the exercise of proper care could have avoided the injury. We are unable to perceive why this rule should apply to plaintiff, who was in no way chargeable, by imputation or otherwise, with negligence, nor are we referred to any authority which supports the proposition. Indeed, all the authorities recognize the right of recovery against either or both of the defendants whose concurring acts of negligence united in producing the injury. 1 Shearman & Red-

field on Neg. p. 122; 1 Thompson on Neg. p. 75; Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; Tompkins v. Clay St. Ry. Co., 66 Cal. 163, 4 Pac. 1165; Pastene v. Adams, 49 Cal. 87.

Plaintiff, having a right to recover against either or both defendants, could not, while in pursuit of her rights, be involved in a litigation having for its purpose the determination of questions involving the respective rights of defendants as against each other.

It follows that the orders appealed from must be affirmed; and it is so ordered.

We concur: ALLEN, P. J.; TAGGART, J.

5 Cal. App. 766

## DILLON v. CROSS. (Civ. 203.)

(Court of Appeal, First District, California. June 20, 1907.)

1. PLEADING — COMPLAINT — SUFFICIENCY—FAILURE TO DEMUR—EFFECT.

A complaint which alleges an essential fact only inferentially or as a conclusion of law is good, in the absence of a demurrer or an objection to evidence offered under it.

2. SAME—AIDER BY JUDGMENT—COMPLAINT—SUFFICIENCY.

A complaint in an action for an accounting of moneys alleged to have been delivered by plaintiff to defendant in trust, which alleges that plaintiff handed to defendant various sums of money aggregating a specified sum, "to be kept deposited and invested by him" for plaintiff, "and to be returned to plaintiff on demand," and that defendant deposited of the sums so received in trust for plaintiff a specified sum in a bank, sufficiently alleges the existence of a trust as against an objection raised for the first time after judgment.

3. SAME—OBJECTIONS—SUFFICIENCY.

A demand that a suit for an accounting of moneys alleged to have been delivered by plaintiff to defendant in trust, to be held and invested for plaintiff, be tried by a jury, is not sufficient to point out a defect in the complaint arising from its alleging merely inferentially or as a conclusion of law the existence of a trust.

4. LIMITATION OF ACTIONS — ACCRUAL OF RIGHT OF ACTION—CONTINUING TRUSTS.

Where the pleadings and the evidence established a continuous trust, limitations did not commence to run until demand and a refusal to account for the property delivered pursuant to the trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 506–510.]

5. EVIDENCE—SUFFICIENCY.

Where the evidence sustains a finding for plaintiff as to all the relief demanded by him, it is sufficient to sustain a finding awarding relief only in part.

6. LIMITATION OF ACTIONS — ACCOUNTING—COUNTERCLAIM.

Where, in a suit for an accounting of moneys alleged to have been delivered by plaintiff to defendant in trust, to be held and invested for plaintiff, the latter testified that, at a time defendant claimed to have advanced money to plaintiff, defendant held large sums of money belonging to plaintiff, for which he was asking defendant to account, the right of defendant to require the court to credit the amount advanced by him to plaintiff could not be defeated by limitations; Code Civ. Proc. § 440, providing that, where cross-demands have existed between persons under such circumstances that, if one had sued the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Patrick F. Dillon against Patrick Dillon continued after his death against his executor, C. W. Cross. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Judgment modified and affirmed, and order denying motion for new trial affirmed.

See 87 Pac. 379.

C. W. Cross and Robert Harrison, for appellant. J. F. Riley and Crittenden Thornton, for respondent.

HALL, J. Appeal from judgment and order denying defendant's motion for a new trial. Plaintiff, Patrick F. Dillon, brought this action against Patrick Dillon, the father of plaintiff, for an accounting of moneys claimed to have been delivered to said defendant by plaintiff in trust to be held and invested for plaintiff, and for general relief. The cause was tried, and judgment rendered for plaintiff, during the lifetime of defendant, who subsequently dying, the executor of his last will was substituted as party defendant. By the term "defendant," when used in this opinion, we refer to the original defendant.

The action was tried upon the issues raised by the amended complaint and the answer thereto; no demurrer having been filed to the amended complaint. Before the case came on to be tried defendant made a demand that the cause be tried by a jury; but the court, taking the view that the action was one in equity, refused the demand for a jury, but allowed a jury as advisory to the court only, and made findings in favor of plaintiff, and gave judgment accordingly. Acting upon the same theory as to the nature of the action, the court found that the action was not barred by the statute of limitations. Appellant contends that the court erred in refusing a jury trial, and in finding that the action was not barred. Whether the court erred or not depends upon whether or not the complaint alleges a trust by defendant for plaintiff.

It is insisted that no trust is alleged. Although it is alleged that plaintiff handed to defendant various sums of money, aggregating $2,542, "to be kept, deposited, and invested by him, the said Patrick Dillon, for this plaintiff, and to be returned to plaintiff on demand," and "that the said defendant, Patrick Dillon, did deposit of the said sums of money so received by him in trust for this plaintiff in the Hibernia Savings & Loan Society in the City and County of San Francisco * * * the sum of about $1,100," it is contended that it does not appear from the complaint that defendant accepted the money, or agreed to keep, deposit, or invest it for plaintiff. It certainly is not alleged in direct terms that defendant accepted the money, or agreed to keep, deposit, or invest if for plaintiff, and, if the complaint had been attacked by demurrer, it must have been held bad. In the face of an attack by demurrer, especially by a special demurrer, it is not sufficient that essential facts be alleged inferentially or as a conclusion of law; but such facts must be directly stated. On the other hand, it has been uniformly held that, in the absence of a demurrer or an objection to offered evidence, a complaint that alleges an essential fact only inferentially or as a conclusion of law is good. Russell v. Mixer, 42 Cal. 475; Hill v. Haskin, 51 Cal. 175; City of Santa Barbara v. Eldred, 108 Cal. 294, 41 Pac. 410; Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111; Estate of Behrens, 130 Cal. 416, 62 Pac. 603; Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; Penrose v. Winter, 135 Cal. 289, 67 Pac. 772. In City of Santa Barbara v. Eldred, supra, the complaint was attacked by a general demurrer, which was overruled. The court said: "He now specifies a great many alleged defects in the complaint. Many of them are, in effect, that the complaint is ambiguous or uncertain. Such objections cannot be reached by general demurrer. Nor can the other objections, which merely amount to criticisms upon the sufficiency of the statement, as that the essential facts appear only inferentially, or as conclusions of law, or by way of recitals, prevail on such demurrer. There must be a total absence of some material fact to justify us in sustaining a demurrer of this character."

In the complaint before us, after alleging that plaintiff handed to defendant moneys to be kept, deposited, and invested by him, the said Patrick Dillon, for plaintiff, it is alleged that defendant did deposit in a bank $1,100 "of the said sums of money so received by him in trust for this plaintiff." It is thus inferentially alleged that defendant received the money in trust for plaintiff. In paragraph 5 of the complaint the money is repeatedly referred to as money held in trust for plaintiff by defendant. It thus appears that plaintiff was attempting to charge defendant as a trustee; and while the complaint is uncertain for not alleging directly what is alleged inferentially, it is not a case of a total absence of allegations of essential facts going to charge a trust. It should have been attacked by demurrer, when it doubtless would have been amended. The mere demand that the case be tried by a jury was not sufficient to point out the defect now complained of, and the court was justified in treating the action as one in equity, and defendant was not entitled to a jury trial. The case made by the pleadings and the evidence was a continuous trust, and the statute of limitations did not commence to run until demand and a refusal to account for the money, which occurred shortly before the action was begun. Baker v. Joseph, 16 Cal. 173.

Appellant concedes that the evidence supports the findings save in one respect. The court found that as to money delivered by plaintiff to defendant prior to the 2d day of December, 1892 (during the minority of plaintiff), defendant never relinquished the right he had thereto by reason of the minority of plaintiff, but also found, as to the money delivered by plaintiff to defendant subsequent to said date, that the same was delivered to defendant in trust, to be kept, invested, and deposited for plaintiff. Appellant urges that the only evidence of any agreement whereby defendant promised or agreed to keep, or deposit, or invest any money for plaintiff was of an agreement entered into in 1888. He argues that the finding of the court in favor of defendant as to the money delivered prior to plaintiff's majority necessarily determines that the evidence of such agreement was false, and that as a result no evidence is left to support the finding in favor of plaintiff as to the money delivered to defendant after plaintiff's majority. In other words, the appellant admits that, if the court had found in favor of plaintiff as to all the money delivered to defendant, such finding would have been supported by the evidence; but, because the court in part found in favor of defendant, the finding in favor of plaintiff cannot stand. We cannot agree with this contention. It requires too nice an examination into the mental processes by which the trial court arrived at its conclusions. If the evidence was sufficient to sustain a finding in favor of plaintiff as to all the money in question, it was sufficient to sustain such finding as to a part thereof.

This disposes of the principal points in the case, and leaves but one other question to be considered. Defendant pleaded in his answer, "by way of counterclaim and otherwise," that during the years 1900 and 1901 "defendant loaned, gave, and intrusted to the said plaintiff various sums of money, aggregating, to wit, $390, none of which sums have been returned or repaid to said defendant." Upon the objection of plaintiff, however, the court struck out the evidence of defendant tending to support this allegation, upon the theory, apparently, that it was a counterclaim, and as such was barred by the statute of limitations. In this we think the court erred. The plaintiff claimed, and had testified, that, at the time defendant claimed to have advanced money to plaintiff defendant held large sums of money belonging to plaintiff, for which he was asking defendant to account in this action, and the court was then engaged, in effect, in taking an account between these parties. If defendant, during the existence of this trust, had advanced money to plaintiff, either out of the trust moneys or out of his own money, the plainest principles of justice and equity require that in such accounting he should be allowed credit therefor. "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other. * * *" Code Civ. Proc. § 440.

Plaintiff at the oral argument stipulated in open court that, if this court should be of the opinion that the evidence should have been allowed we might order such a modification of the judgment as should give the defendant the full benefit of the matter alleged and attempted to be proved. The amount alleged by defendant to have been by him advanced to plaintiff is $390. The court charged defendant with interest at varying rates to February 19, 1902, and from that date to entry of judgment at 7 per cent. With the aid of counsel we have calculated the interest on $390 from January 1, 1901, to February 1, 1902, at 3¾ per cent., the highest rate charged against defendant up to the latter date, and find that the principal and interest then amounted to $405.85, which, at 7 per cent. up to the date of the entry of the judgment, would make the principal and interest amount to $455.91.

The judgment is therefore modified, by deducting therefrom the sum of $455.91 as of the date of the entry thereof, and, as so modified, it is affirmed; and the order denying the motion for a new trial is likewise affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

151 Cal. 534

## VALENTE et al. v. SIERRA RY. CO. OF CALIFORNIA. (Sac. 1,474.)

(Supreme Court of California. July 22, 1907.)

1. Carriers — Death of Passenger—Collision—Negligence—Instructions.

In an action for death of a passenger on a railroad train by a collision, an instruction that the burden of showing that the collision occurred by no fault of defendant, and from some inevitable casualty or unavoidable accident or cause beyond the power of human care or foresight to prevent, was on the defendant, merely required the carrier to comply with Civ. Code, § 2100, providing that carriers shall use the utmost care and diligence for the safe carriage of passengers, and was not objectionable as requiring too high a degree of care.

2. Same—Burden of Proof.

In an action against a carrier for death of a passenger in a collision, the court charged that the burden was on the carrier to show that the collision occurred without its fault, and from inevitable casualty or unavoidable accident, etc., and that it must establish by a preponderance of the evidence that the collision resulted from such unavoidable accident, etc. *Held* erroneous, as relieving plaintiffs from the burden of establishing their allegation of negligence in the first instance, the court having nowhere instructed that the burden was on plaintiffs to establish the truth of their allegation of negligence by a preponderance of the evidence.

3. Evidence—Judicial Notice—Expectancy Tables.

Courts take judicial notice of the standard mortality tables.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 17.]

4. Same — Authenticity — Proof — Discretion.

The admission of mortality tables without preliminary proof of authenticity and reliability is within the discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 17, 362.]

5. Death—Expectancy of Beneficiaries—Evidence.

In an action for death, it was not error for the court to admit evidence of the life expectancy of the beneficiaries as shown by a mortality table; the jury being instructed that no recovery could be had in any event for a period longer than the probable term of decedent's life.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 84.]

6. Carriers — Death of Passenger — Care Required—Instructions.

In an action for the death of a passenger, an instruction that railroad companies engaged in transporting passengers for hire are bound to use the best precautions in practical use to secure the safety of passengers was objectionable; such carriers being only required to use the best precautions in "known" practical use.

Department 1. Appeal from Superior Court, Tuolumne County; L. W. Fulkerth, Judge.

Action by Frank Valente and others against the Sierra Railway Company of California. From a judgment in favor of plaintiffs, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

J. C. Campbell, S. D. Woods, and F. W. Street, for appellant. Nicol & Orr, F. P. Otis, and J. F. Rooney, for respondents.

ANGELLOTTI, J. On June 25, 1904, a collision occurred on the railroad of defendant corporation, between a passenger train and a work train, in which Marie Valente, a passenger on the passenger train, was killed. This is an action by her surviving husband and children for the damages resulting to them from her death, due, it is claimed, to the negligence of defendant. The trial was by jury, and a verdict for $12,000 damages was given. The defendant appeals from the judgment entered thereon, and from an order denying its motion for a new trial.

The complaint alleged the happening of the collision and the death of Mrs. Valente resulting therefrom. These allegations were admitted by defendant in its answer. The complaint further alleged "that said collision was caused by and resulted from the carelessness and negligence of said defendant, and its servants and agents, in the management and operation of its said train, and the death of said Marie Valente was caused by and resulted from the said carelessness and negligence of said defendant, and its servants and agents, in the management and operation of its said train." These allegations were denied by the answer, which further alleged as follows: "On the contrary, said defendant alleges that said collision and the death of said Marie Valente therefrom was and were caused by and resulted from inevitable accident, without any fault or negligence on the part of the said defendant, or of its servants or agents, in any way whatsoever." Upon the trial evidence was introduced by the defendant to meet the prima facie case of negligence made by the showing of the accident. The collision occurred on a very heavy grade, the work train, consisting of an engine, and oil car about half filled with oil, and several flat cars, going down this grade and running into the rear of the passenger train. There was evidence tending to show that the work train was properly equipped, and in first-class order, and that the train hands carefully managed the same, and that the accident was due to the fact that the oil car had sprung a leak, allowing oil therefrom to drip upon the rails, with the result that the train could not be stopped. It is not intimated by plaintiff that the evidence would not have supported a conclusion by the jury that the defendant was free from negligence. Under these circumstances the trial court, after instructing the jury that, by reason of the admission as to the collision and the death of Mrs. Valente therefrom, a presumption arose that the accident resulted from defendant's negligence, and that, in order to rebut such presumption, defendant must show that the collision resulted from some inevitable casualty or unavoidable accident, or from some cause which human care and foresight could not have prevented, instructed the jury as follows: "The burden of showing that the collision occurred by no fault of the defendant and from some inevitable casualty or unavoidable accident or cause beyond the power of human care or foresight to prevent is on the defendant. *In order to absolve itself from liability from any loss which may appear from the evidence to have been occasioned by such collision, it must establish by a preponderance of the evidence that such collision was caused by or resulted from some inevitable casualty or unavoidable accident or cause beyond human care or foresight to prevent.*" The court nowhere instructed or intimated to the jury that, upon the whole case, the burden was upon the plaintiffs to establish the truth of their allegation of negligence by a preponderance of evidence.

Complaint is made that these instructions charged defendant with a degree of care entirely unwarranted. This matter was very fully considered by this court in the recent case of Kline v. Santa Barbara, etc., Ry. Co., 90 Pac. 125, and decided against the contention of defendant. It was shown in the opinion that, as to the particular matter under discussion, it was thoroughly established by our decisions that the language of such instructions was "the equivalent and no more than the equivalent of the rule" enacted in section 2100 of the Civil Code, requiring a carrier of passengers to use the "utmost care and diligence for their safe carriage," and was a correct statement of the rule of law applicable in such cases. The criticism that the words "beyond the power of human care or foresight to prevent" and "cause beyond human care or foresight to prevent" might be construed as meaning that, although the carrier had used the utmost care and diligence, he would still be liable if, after the accident, it appeared that it could have been avoided by a precaution which a very cautious person, not knowing that the accident was about to occur, would not have taken, was also made in that case. The court there, recognizing the true rule to be that the question as to whether the carrier has exercised the proper care and diligence is to be determined in view of the facts and circumstances which existed prior to the accident, declared, in reply to this objection: "It cannot be error, therefore, for a trial court, in submitting a case of this kind to the jury, to state the rule in its approved form, and, if counsel have reason to fear that the jury may understand the rule so expressed as requiring more than the utmost caution of very cautious persons, in view of the circumstances known or imputed to the knowledge of the carrier before the accident, they have the right to propose an instruction embodying the proper qualifications."

We can, however, find no valid answer to another objection made by defendant to the portion of these instructions that we have italicized. By it the jury was clearly instructed that the defendant must show by a preponderance of evidence that it was not negligent, or, in other words, that it used the utmost care and diligence, in order to avoid a recovery of the damages resulting to plaintiffs from the death of Mrs. Valente. This also was the plain effect of all the instructions taken together. Such is not the law.

In any action for damages resulting from negligence, it is essential to the statement of a cause of action that negligence on the part of the defendant be alleged, and, if the allegation be denied, it must be proved by the plaintiff by a preponderance of the evidence. The affirmative of such an issue is primarily upon the plaintiff. This is elementary law, and, of course, it is not disputed by learned counsel for plaintiffs. Their contention in support of such instruction rests upon the well-settled doctrine, stated in Shearman & Redfield on Negligence, § 59, as follows: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." In accord with this doctrine, it is the rule in this state that, when such an accident is shown by the plaintiff, or admitted by the pleadings, for there can be no difference in effect between the establishment of the fact by evidence on the trial and the admission of that fact by the pleadings, a prima facie case of negligence on the part of the defendant is made, which is sufficient to call upon the defendant to show the exercise of the requisite care, and thus offset the presumption of negligence arising from the happening of the accident. This presumption, however, is simply evidence in the case, having no greater or different effect than the evidence of witnesses showing negligence would have, and in no degree changes the rule as to the burden of proof, in the strict sense of that phrase, viz., the burden of producing a preponderance of evidence. That burden does not shift from side to side in the trial of a case, but constantly remains with the party having the affirmative of the issue, who, in an action for damages for negligence, is the plaintiff. Instructions declaring that, when such an accident is shown, the "burden of showing" want of negligence is on the defendant, do not mean, according to the decisions of this state, that the defendant is compelled to show want of negligence by a preponderance of evidence. The term "burden of showing" or "burden of proof," used in that connection, signifies simply the burden of meeting the prima facie case made by the plaintiff. This is the only theory upon which such instructions can be held to be free from error, unless we are to hold that the well-settled rule as to the burden of proof being on the party who has the affirmative of the issue has no application in the one case of an action for damages for negligence, where the damage results from an accident to a thing under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. It is eminently proper to hold that such a showing affords presumptive evidence of negligence, but it would be illogical and contrary to our well-establised practice to hold that any kind of an evidentiary showing made by the party holding the affirmative of an issue in support of his claim, however strong such showing may be, throws upon the other party the burden of doing anything more than producing evidence enough to offset the effect of the plaintiff's showing. When a defendant has made such a showing as to the exercise of the care required of him by the law as to leave the evidence upon the issue of negligence in such condition that the jury cannot conclude that the negligence has been satisfactorily shown, he has met the requirements of the law, and the verdict must be against the plaintiff. The rule in this regard is no different in the case of a carrier of passengers from the rule applicable to defendants of whom a lesser degree of care is required. The only difference between these classes of defendants is as to the amount of care required; the carrier of passengers being guilty of negligence as to a passenger if he fails to use the "utmost care and diligence."

The rule, as stated by us, is fully recognized and established by our decisions. The case of Scott v. Wood, 81 Cal. 398, 22 Pac. 871, was an action upon a contract, but, in view of an instruction to the jury to the effect that the defendant was required to have a preponderance of testimony upon a certain issue, owing to a presumption of evidence following a showing made by the plaintiff, which instruction was held erroneous, it is directly in point. It is pointed out in the opinion that the term "burden of proof" is used in different senses, sometimes being used to signify the burden of making or meeting a prima facie case, and sometimes the burden of producing a preponderance of evidence, and it was shown that, where it is used in the former sense, it means no more than that it is incumbent on the party against whom the prima facie case has been made to make such a showing that upon the whole case there is not a preponderance of evidence in favor of plaintiff's allegation of negligence. In Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164, a case where the accident, which was admitted, made a prima facie case of negligence, it was held that instructions to the effect that the burden to prove lack of care and to prove negligence is on the plaintiff throughout the case, and that plaintiff must show the same by a preponderance of evidence, were correct statements of the law, and not in conflict with the other instruction as to the effect of the admission as to the happening of the accident. It was said that the contention of the defendant was founded upon a failure to perceive the effect of the presumption as evidence. The court further said: "This presumption is itself evidence in the case, and it does not change the rule as to the burden of proof. It is merely the evidence by which the plaintiffs undertook to establish the fact which they were bound to prove. It still remained the law that, upon the whole evidence, the plaintiffs must have the preponderance in order to succeed." In Cody v. Market St. Ry. Co., 148 Cal. 90, 82 Pac. 666, a passenger carrier case, it was held that an instruction to the effect that the presumption of negligence arising from proof of the accident and consequent injury threw upon the carrier the burden of showing want of negligence did not require the carrier to show want of negligence by a preponderance of evidence, but only to make such showing "as will leave the jury, with all the evidence before it, unsatisfied as to whether there was negligence on defendant's part." It was also there declared that, in such a case, it was necessary for the plaintiff to prove negligence by a preponderance of evidence. In Patterson v. S. F. & S. M., etc., Co., 147 Cal. 178, 81 Pac. 531, also a passenger carrier case, the questions here involved were exhaustively discussed. It was held that instructions to the effect that, on the issue of negligence the plaintiff has the affirmative of the issue and must prove such negligence by a preponderance of evidence, and that any presumption arising from the accident need not be overcome by a preponderance of evidence, and that, if the railroad company introduce "sufficient evidence simply to balance such presumption without overcoming it by a preponderance of evidence, the presumption is overcome," were correct. See, also, Kay v. Metropolitan, etc., Co., 163 N. Y. 447, 57 N. E. 751.

The cases cited by learned counsel for plaintiffs contain nothing opposed to the views we have stated, with the single exception of the case of Bush v. Barnett, 96 Cal. 202, 31 Pac. 2, a department case. Here the court upheld an instruction that the proof of plaintiff that she had been injured "would cast upon the defendant the burden of proving that the injury was occasioned by inevitable casualty, or by some other cause which human care and foresight could not prevent." This instruction, as we have seen, was correct, and did not throw upon defendant the necessity of proving want of negligence by a preponderance of evidence. The court in discussing it, however, said that the defense that the injury resulted from some unavoidable accident, or from some cause beyond the power of human care or foresight to prevent, was an affirmative one, which the rule as to the burden of proof requires him to establish by a preponderance of evidence, as in any other affirmative defense. This statement was erroneous, and in conflict with every decision of this court on the subject. Other cases cited are those where the defense was clearly and strictly an affirmative defense, and it was held simply that the burden is on the defendant to prove new matter alleged as an affirmative defense, which, of course, is the law. Here there was not and could not be any affirmative defense on the issue of negligence. Negligence on the part of defendant was alleged, as it had to be in order that a cause of action be stated. If plaintiff had alleged simply the collision and consequent death of Mrs. Valente, without any allegation of negligence, there would be no claim that the complaint was sufficient. Defendant simply denied the allegation of negligence. What it said in addition as to inevitable accident, etc., was merely supplemental to the denial and superfluous, and in no degree impaired the effect of the denial. It was not the statement of an affirmative defense. We cannot say as a matter of law that this instruction was not prejudicial to defendant. It follows that the judgment and order must be reversed on account thereof.

Several other points are made for a reversal, but they require very little notice for the purposes of a new trial.

The question as to the admission of a table of life expectancy without preliminary proof as to its authenticity and reliability appears to be decided against defendant's contention by the case of Keast v. Santa Ysabel, etc., Co., 136 Cal. 256, 259, 68 Pac. 771, where it is held that the court may admit any table satisfactory to it, requiring or not requiring preliminary proof, depending upon whether of its own knowledge it is satisfied, or whether it desires evidence to satisfy itself, of the authenticity of the table. This ruling is, of course, founded upon the theory that the courts take judicial notice of the standard tables. 20 Am. & Eng. Ency. of Law (2d Ed.) p. 886. We can see no injurious effect in the admission of evidence as to the life expectancy of the beneficiaries as shown by such a table, provided the jury is clearly instructed that it cannot, in any event, award damages to any one for any period extending beyond the probable term of the life of the deceased. As damages cannot be awarded any particular beneficiary for any period extending beyond such beneficiary's life, it is proper that such beneficiary should be allowed to show that his expectancy of life is as great as that of the deceased, just as the defendant, on the other hand, would be allowed to show that the life expectancy of the beneficiary is less than that of the deceased. See Redfield v. Oakland, etc., Co., 110 Cal. 277, 287, 42 Pac. 822.

The instruction that "Railroad companies engaged in the transportation of passengers for reward are bound to use the best precautions, in practical use, to secure the safety of their passengers," is perhaps too broad a statement as an abstract proposition. The rule as stated in Treadwell v. Whittier, 80 Cal. 593, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, cited by plaintiffs, is that such companies are bound to use the best precautions in known practical use. This does not mean that such use must, in fact, have been known to a particular defendant, but simply that it must have been such that it would have been known to any company exercising the utmost care and diligence in keeping abreast with modern improvement in the matter of such precautions. We can conceive of cases where a precaution may have been in practical use to such a limited extent that it would not have become known as an improvement to those exercising the utmost care and diligence in this behalf, and in such cases the instruction would be erroneous. Under the evidence given upon the trial, this was not such a case, and the instruction was therefore not prejudicially erroneous. We have considered it necessary to point out the error therein solely for the purpose of a new trial, in view of the possibility that on such a new trial the matter may be material.

We find no other matter requiring discussion.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.

151 Cal. 548

## DAVIS v. DAVIS. (Sac. 1,464.)

(Supreme Court of California. July 23, 1907.)

DIVORCE—ADULTERY—EVIDENCE.

Evidence in an action for divorce *held* sufficient to sustain a finding of adultery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 411–441.]

Department 2. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Carrie Davis against Sam Davis. Judgment for plaintiff. Defendant appeals. Affirmed.

L. L. Chamberlain, for appellant. A. K. Robinson, for respondent.

McFARLAND, J. This is an action for a divorce brought by the wife against the husband upon the ground of the latter's adultery with a woman named Myrtle Hall. Defendant in his answer denies the adultery; but the court found as a fact that it was committed as alleged in the complaint, and rendered an interlocutory judgment declaring plaintiff entitled to a divorce. From the judgment, and from an order denying a motion for a new trial, defendant appeals.

The main contention made by the appellant, and the only one calling for special notice, is that the evidence was insufficient to support the finding of the court of the fact of adultery; but this contention is not maintainable. There was sufficient evidence to support the finding. For instance, it was proven without any conflict of evidence that at and about the time of the alleged adultery Myrtle Hall was a public prostitute; that she and defendant were socially very friendly and intimate; that part of the time appellant was confined in the county jail charged with a certain crime and during that time Myrtle Hall visited him frequently at the jail, and took him meals and delicacies; that afterwards he was released from custody on bail, and then he and said woman were together frequently on the street, and frequently took their meals together at a certain restaurant. Furthermore, Myrtle Hall lived in a "little house opposite the house known as 'The Palace,' upon a certain street in the city of Auburn; and there was testimony that he visited her in the said house at least twice. In the face of the foregoing facts and testimony there is no ground for holding here that there was not substantial evidence to warrant the trial court in finding the fact of adultery. We cannot say that the finding was not in accordance with the weight of probabilities. It is true that appellant and the woman Hall testified that appellant did not go into the latter's house, although they admit that he went to the house and conversed with her at the door; but this only made a conflict of evidence which left with the court the power and duty to determine where the truth was. Counsel for appellant says that the woman Hall was a witness for appellant in the matter of the criminal prosecution that was hanging over him and that this accounted for the apparent intimate relations between her and appellant; but it is to be presumed that the court considered this circumstance and gave it whatever weight it was entitled to. No doubt, the court, in weighing the probabilities, attached much importance to the fact that she was a woman of unchaste character and conduct.

There are two or three exceptions to rulings made by the court on the admissibility of evidence; but, in the first place, we see no error in any of these rulings, and, in the second place, they do not involve matters of importance enough to justify a reversal, even if erroneous.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

151 Cal. 675

## PEOPLE v. BRADBURY. (Cr. 1,377.)

(Supreme Court of California. Aug. 14, 1907.)

1. INDICTMENT AND INFORMATION — CONVICTION OF LESSER OFFENSE—RAPE—ASSAULT.

Pen. Code, § 240, defines assault to be an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another. *Held* that, where defendant, charged with assault with intent to commit rape, was shown to be sexually impotent, he might be convicted of assault on evidence that his acts were such as to create a well-founded fear on the part of prosecutrix that he intended to rape her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 588.]

2. CRIMINAL LAW—INSTRUCTIONS—REQUESTED CHARGE.

In a criminal prosecution, a request to charge that, if the jury believed from the acts of witnesses for the prosecution, etc., that they, or any number of them, had pursued a common object of wrongfully prosecuting defendant for any wrongful purpose, and that such prosecution was instituted, not with the belief that the defendant was guilty of any crime, but in order that they might profit from making such charge, the jury should find defendant not guilty, was properly refused, as authorizing an acquittal if the jury believed that "some" of the witnesses were actuated by improper motives, though sufficient evidence was given by other witnesses to sustain a conviction.

3. SAME—MISCONDUCT OF ATTORNEY.

Where, after the district attorney had asked an improper question, by which he sought to get certain inadmissible facts before the jury, the court, on defendant's objection, severely reprimanded him and instructed the jury not to consider such matter, and the district attorney submitted to the court's ruling and refrained from pursuing the subject, there was no reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1693.]

In Bank. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

William B. Bradbury was convicted of assault, and he appeals. Affirmed.

James W. Keyes, for appellant. U. S. Webb, Atty. Gen., and Thos. P. Boyd, Dist. Atty., for the People.

McFARLAND, J. This case was in the District Court of Appeal, First District, and an opinion was there delivered. We approve and adopt all of the following part of that opinion:

"The defendant is charged in the information herein with an assault with intent to commit rape. Upon the trial thereon the jury found him guilty of an assault, and he was sentenced to pay a fine of $150. From this judgment he has appealed:

"(1) That upon the charge set forth in the information a conviction of an assault could be had is not disputed. See People v. Green, 1 Cal. App. 432, 82 Pac. 544. It is urged, however, that, as the jury found the defendant was not guilty of an attempt to commit rape, he could not be convicted of an assault, unless there was evidence of some violent injury to the prosecuting witness, and that the record fails to show that such evidence was given. An assault is defined (Pen. Code, § 240) to be 'an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another.' The 'violent injury' here mentioned is not synonymous with 'bodily harm,' but includes any wrongful act committed by means of physical force against the person of another, even although only the feelings of such person are injured by the act. The term 'violence' as used here is synonymous with 'physical force,' and in relation to assaults the two terms are used interchangeably. State v. Wells, 31 Conn. 212; State v. Daly, 16 Or. 241, 18 Pac. 357; Am. & Eng. Enc. of Law, 'Violence.' Mr. Bishop says (2 Crim. Law, §§ 32-34): 'The kind of physical force is immaterial; * * * it may consist in the taking of indecent liberties with a woman, or laying hold of and kissing her against her will.' There was testimony before the jury to the effect that the defendant was sexually impotent, and the court instructed them that if such was the fact he would not be guilty of the offense charged in the information; but although, in view of this fact, the jury were authorized to find that there was an absence of any ability on his part to commit rape on the prosecuting witness, they were not precluded from finding that his acts were such as to create a well-founded fear upon her part that such was his intent, and if so he was guilty of an assault. If the information had charged him with merely an assault upon her, the evidence set forth in the record would be sufficient to sustain his conviction thereon.

"(2) The court did not err in refusing to give the following instruction asked on behalf of the defendant: 'If the jury believe, from the acts of the parties appearing as witnesses for the prosecution, and from all the facts and circumstances in the case, that they, or any number of them, have pursued a common object of wrongfully prosecuting the defendant with the purpose of obtaining money from him, or for any other wrongful purpose, and that such prosecution was instituted, not with the belief that the defendant was guilty of any crime, but with the purpose of wrongfully charging him with such crime, that they might profit from making such charge, the jury should find the defendant not guilty.' A fatal objection to this instruction is that it authorizes the jury to acquit the defendant, if they believe that some of the witnesses for the prosecution were actuated by illegal motives, notwithstanding ample evidence for his conviction might have been given by other witnesses."

The only other contention made by appellant for a reversal is founded upon the alleged misconduct of the district attorney. This alleged misconduct appears in the record as follows: One Quigley had testified as a witness for the prosecution, and defendant, when presenting his evidence, had called and examined as a witness one L. B. Hills, who testified to certain statements made to him by Quigley which the latter had denied making. Thereupon on cross-examination the following occurred: "L. B. Hills: I have known Mr. Quigley about five or six months. He told me that a hired man had knocked Mr. Bradbury down. Mr. Boyd: Did he tell you why he knocked him down? A. No, sir. Q. Did he say he knocked him down for insulting his wife? Mr. Kierulff: It seems to me that that is irrelevant, incompetent, and immaterial, and an improper statement. Mr. Boyd: I have the right to the conversation that occurred. Mr. Hosmer: He said he did not, and I submit that that is misconduct on the part of the district attorney, and we assign it misconduct. The Court: I think it is gross misconduct. Mr. Boyd: I submit to your honor's ruling. The Court: After the witness has stated that he did not give his reason for it, you have no right to ask him the question and attempt to get before the jury something in that way that you could not do directly. It becomes my duty, gentlemen, in view of the conduct of the district attorney, to admonish you that you will pay no attention to anything suggested by that question or by that answer. It is absolutely not in this case. It is beyond your province, and the question should not have been asked, and you must disregard it entirely." No further attempt was made by the district attorney to repeat the question, or to ask any other similar questions. He immediately obeyed the ruling of the court. Conceding that it was wrong for the district attorney to ask the question, there is no precedent and no warrant for reversing the judgment merely for the asking of the one improper question, under the circumstances disclosed by the record. The cases where a judgment has been reversed by this court for the improper asking of questions have been in some important respects similar in character to the case of the People v. Wells, 100 Cal. 459, 34 Pac. 1078, where the district attorney persisted in asking a number of improper questions, and, although the court sustained objections to these questions, it did not comply with appellant's request that the district attorney be instructed not to ask any more such questions. In that case the court did not hold that the asking of the first improper question would have warranted a reversal, but says that it "would not be, perhaps, of itself sufficient ground for reversing the judgment." In the case at bar only one improper question was asked. The district attorney was severely reprimanded by the court for asking it, and he made no attempt to repeat the question or to ask a similar one, and the jury were expressly instructed to pay no attention to anything suggested by the question. Under these circumstances we do not think that the question could have been seriously prejudicial to the appellant, or that it affords just ground for a reversal. It comes within the ordinary rule that the sustaining of the objection to an improper question is a sufficient disposition of the matter. It is only where a district attorney shows a clear and persistent attempt to influence a jury by wrongfully producing suspicions and hurtful suggestions through improper questions that his conduct in the premises becomes such misconduct as will warrant a reversal.

The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: BEATTY, C. J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.

SHAW, J. (concurring). I concur in the opinion of Justice McFARLAND. I wish to add, however, that, even in cases where a district attorney does persistently attempt to influence a jury by improper questions calculated to produce suspicions and hurtful suggestions, it is the duty of the counsel for the defendant to make timely objection to the court, and the duty of the court thereupon to instruct the jury that such suggestions must be disregarded and that such suspicions must be rejected, and that when such instructions are given it will not be presumed that the jury were influenced by the improper conduct objected to, unless the record shows extraordinary circumstances tending to show that such influence existed notwithstanding the caution of the court. I think that the language of the opinions in some of the previous decisions of this court goes too far in support of the theory that there is some sort of a presumption that the misconduct of a district attorney will prevail with the jury and influence them in the face of the positive instructions of the court that they must not consider the suggestions thus improperly made. The presumption should always be that a jury has obeyed the instructions of the court, and, unless the contrary is shown by the record, that presumption should prevail in the appellate courts.

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151 Cal. 526

## GARVEY v. LA SHELLS et al. (Sac. 1,465.)

(Supreme Court of California. July 22, 1907.)

1. Vendor and Purchaser—Contract—Possession—Rights of Purchaser.

An assignee of the purchaser of certain mining claims in possession under a contract of sale, obligating the vendor to give a warranty deed of the property conveying a perfect title thereto, could not retain both the land and the price until a title should be offered, on the vendor's failure and inability to convey a perfect title but was required either to pay the price according to the contract and receive such title as the vendor is able to give, or rescind the contract, restore possession, and recover the amount paid, if any, with the value of improvements after deducting rental value of the premises.

2. Same—Purchase of Outstanding Title.

A contract for the sale of certain mining claims obligated the vendor to deliver a warranty deed conveying a perfect title to the entire claims. Two months prior to the date fixed for the payment of the price the purchaser's assignee in possession discovered an alleged outstanding title to an interest previously owned by the vendor's co-tenant which such purchaser's assignee purchased. *Held*, that the purchase of such outstanding title inured to the benefit of the vendor, and such assignee was not entitled thereunder to possession as a tenant in common without paying the contract price, but was only entitled to claim reimbursement from the vendor for the amount paid for such outstanding title, with interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 391.]

3. TRIAL—ISSUES—FAILURE TO FIND.

Where the findings are sufficient as to all material issues, a judgment will not be reversed or new trial granted for failure to make findings on certain immaterial issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 940.]

4. SAME—CROSS-COMPLAINT—WAIVER OF OBJECTIONS.

Where the issues raised on the cross-complaint and answer and by the complaint and answer were tried together by consent, one of the defendants could not object that the issues raised on the cross-complaint and answer should have been tried before the issues raised by the complaint and answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1252.]

Department 1. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by J. J. Garvey against W. S. La Shells and others. From a judgment in favor of plaintiff, and from an order denying defendant Klamath River Gold Mining Company a new trial, it appeals. Affirmed.

W. F. Aram and Coburn & Collier (Lewis A. Heilbron, of counsel), for appellant. R. S. Taylor and James F. Lodge, for respondent.

ANGELLOTTI, J. On September 25, 1903, plaintiff and Lucien Guilbert and P. J. Garvey, claiming to own the same, were in the exclusive possession of certain mining ground known as the "Garvey Bar Placer Mining Claim," which consisted of the ground embraced in two locations, one being designated the "Garvey Boys Mine" and the other the "Last Chance." They had been in such possession for five years, mining and operating the ground. On that day they entered into a written agreement with defendant La Shells whereby they agreed to sell to him said "Garvey Bar Placer Mining Claim," with all machinery thereon, for $12,000, payable on July 12, 1904. The vendors agreed that within 10 days from September 25, 1903, they would execute "a good and sufficient deed to said property, free and clear of all incumbrances and subject only to the title of the Central Pacific Railway Company in and to such portion of said mining claim as was situated in said section fifteen, and subject only to the paramount title of the government of the United States, in and to" the remainder of said claim, and place the same in the Siskiyou County Bank at Yreka, to be by the bank delivered to the vendee on the payment of the $12,000 to the bank for the use of the vendors, provided such payment is made at any time prior to the close of banking hours on July 12, 1904. The vendee also agreed to pay $140 interest on the purchase price on November 12, 1903, and $105 interest on January 12, 1904. It was mutually agreed that if the vendee failed to pay such interest, or failed to pay the $12,000 by July 12, 1904, "this agreement is to be void and of no effect, and the deed which the parties of the first part have agreed to deposit in the Siskiyou County Bank is to be returned to them by said bank." Immediately upon the execution of this agreement, possession of the property was delivered by the vendors to La Shells, who accepted the same under the agreement. La Shells continued in exclusive possession, mining the property until April 25, 1904, when he transferred his interest in the agreement and the property described therein to the defendant corporation, the Klamath River Gold Mining Company. Ever since such transfer such corporation has been in exclusive possession, mining, working, and operating such claim. Within the time fixed by the agreement the three vendors deposited in escrow with the Siskiyou County Bank, for delivery to La Shells upon compliance by him with the provisions of the agreement as to payment, their grant, bargain, and sale deed purporting to convey the property to him. Neither La Shells nor the corporation ever paid, or, prior to answer in this action, offered to pay, any portion of the consideration agreed to be paid, and none of the interest has been paid, and on July 13, 1904, the vendors, because of such failure to pay the $12,000 or any part thereof, withdrew the deed deposited in escrow, and demanded of La Shells and the corporation the possession of said property. This demand not having been complied with, and payment having been refused, and plaintiff having succeeded to the interest of his covendors, this action was instituted for the recovery of the possession of the property, the amended complaint showing the facts before stated, and the court, upon sufficient evidence, finding the facts to be as so stated.

Defendant corporation, by its answer, alleged that it acquired La Shells' interest under the agreement on April 25, 1904, and that it has ever since been in the exclusive possession. It further alleged that one Michael Garvey was one of the original locators of both claims and continued to own an undivided interest therein to the day of his death, August 17, 1897, and that his estate continued to own such interest until April 30, 1904, on which day said defendant purchased such undivided interest from the estate. Basing its claim on such purchase, it claims to be the owner of such undivided interest and entitled to possession of the claims. Further alleging that the vendors had falsely represented themselves to be the exclusive owners of the property, subject only to the claims of the railroad company and the United States government, that the agreement was entered into by La Shells because of such representations, and that the estate of Michael Garvey was the owner of an undivided interest, which the vendors had neglected to obtain and had never been able to convey, it declared that it was ready and willing to pay the plaintiff the several sums of money specified in the contract "whenever the said plaintiff can convey to it a clear title to said property subject only to the aforesaid interests of the said Central Pacific Railway Company and to the paramount title of the United States."

By its cross-complaint filed with the answer, it alleged the ownership of the estate of Michael Garvey as to such undivided interest, its purchase thereof from the estate on April 30, 1904, and its consequent ownership and right to possession under said purchase. Further alleging the agreement between the vendors and La Shells, and the assignment thereof by La Shells to it on April 25, 1904, it alleged that by such agreement the vendors agreed not only to convey their own interest, but also the interest of the estate of Michael Garvey, that the $12,000 specified therein was the agreed consideration for the whole of said claims, and that the vendors have wholly neglected to acquire the said Michael Garvey interest and convey the same under the agreement. It further alleged that since acquiring the La Shells' interest in the agreement, it had placed improvements of the value of $10,000 on the property. On these facts, it demanded judgment decreeing that it is the owner of the Michael Garvey interest, and fixing the proportion of the whole purchase price which ought to be paid to the vendors for the remaining interests, and adjudging that, upon the payment of such proportion within a reasonable time, a deed be executed to them for such remaining interest. By his answer to the cross-complaint, plaintiff, alleging that the only agreement of sale between the parties was the one alleged in the complaint, and admitting that Michael Garvey was originally a member of the mining co-partnership owning said claims, alleged that his interest had reverted to his associates by reason of his failure and that of his representatives to pay his proportional portion of money expended in doing the assessment work upon the property. It further alleged that neither La Shells nor appellant had offered to carry out the contract.

The court, after finding facts in accord with the allegations of the complaint, as we have stated them, found that due notice of forfeiture of the Michael Garvey interest to his co-owners for failure to pay his proportion of the amount of assessment work had been given on February 23, 1904, but, as will appear hereafter, we deem this finding immaterial. It also found that on April 30, 1904, the defendant corporation acquired at probate sale for the sum of $300 all the interest of the estate of Michael Garvey in said claims, and that neither La Shells nor appellant had ever made any tender of any character other than the offer in its answer already stated, both of which findings are sustained by the evidence.

Concluding that the most that appellant could claim for the failure in part, if any, of plaintiff's title, would be the amount paid by it for the Michael Garvey interest, $300, with interest thereon from April 30, 1904, that defendant cannot in this action hold possession of the property under the agreement, and at the same time assert the adverse title of the Michael Garvey estate, and that plaintiff is therefore entitled to recover possession of the property, the court gave a judgment for such possession.

This is an appeal by the defendant corporation from such judgment, and from an order denying its motion for a new trial.

So far as the defense made by the answer is concerned, the case is simply that of a vendee who has received possession of the property from the vendor under a contract of sale, attempting to retain possession as against the vendor without fulfilling his covenants as to payment on two grounds: (1) That the title of the vendor is not good in that there is an outstanding undivided interest in the property, which title such vendee, more than two months before the date fixed by the agreement for the payment of the purchase price, had itself purchased; and (2) that by reason of such purchase the vendee became the absolute owner of such undivided interest, and is as tenant in common entitled to remain in possession. There is no merit in these claims.

As to the first ground, the position of appellant is that it may indefinitely keep possession of the property so received from the vendor, while refusing to make payment of the purchase price; in other words, may keep both the property and the purchase money. It has offered to pay nothing for the property, and confines itself now to offering to pay anything only when plaintiff can convey a clear title, which, under its claim, plaintiff can never do, as the vendee has acquired the outstanding title, and thus made a conveyance impossible. We are now referring solely to the matter set up in the answer. A purchaser cannot retain possession of property delivered to him under a contract of sale without complying with the terms of the contract as to payment, for the reason that the title of his vendor is not satisfactory. If a perfect title was to be conveyed, and the vendor is unable to give such a title, the vendee has appropriate remedies, but he cannot keep both the property and the purchase money. The rule applicable, as stated in the syllabus to Worley v. Nethercott, 91 Cal. 512, 27 Pac. 767, 25 Am. St. Rep. 209, which has since been declared to be a correct summary of the decision (Haile v. Smith, 128 Cal. 415, 60 Pac. 1032), is as follows: "A purchaser of land in possession thereof under a contract of sale, by the terms of which the vendor is to give a warranty deed of the property, conveying a good and perfect title thereto, cannot, upon the vendor's failure and inability to convey a good and perfect title, retain both the land and the purchase money until a perfect title shall be offered him, but he must pay the purchase price according to the contract, and receive such title as the vendor is able to give, if he chooses to retain the possession of the land, or he may rescind the contract, restore the possession to the vendor, and recover the purchase money paid, together with the value of his improvements, after deducting therefrom the fair rental value of the premises; and, if he fails and refuses to adopt either course, he is liable to an action of ejectment by the vendor." See, also, Bruschi v. Quail M. & M. Co., 147 Cal. 120, 81 Pac. 404; Haile v. Smith, 128 Cal. 415, 60 Pac. 1032; Hannan v. McNickle, 82 Cal. 122, 23 Pac. 271; Gates v. McLean, 70 Cal. 42, 11 Pac. 489; Haynes v. White, 55 Cal. 38; McLeod v. Barnum, 131 Cal. 605, 608, 63 Pac. 924. The claim of the appellant, in this regard, is devoid of every equitable feature, in view of the fact that the damage from the alleged outstanding title had been definitely ascertained and such claim of title had been acquired more than two months before the date fixed for the payment of the purchase money, and the least the appellant could have done, in order to show a disposition to do equity, was to tender the amount due on the contract, less the amount paid in acquiring such alleged outstanding title, with interest thereon. See Gates v. McLean, 70 Cal. 51, 11 Pac. 489. Much is said by appellant as to the placing of valuable improvements by it on said land, but both answer and cross-complaint show that all this was done with full knowledge of the facts as to the alleged outstanding title, and after appellant had purchased the same.

As to the second claim of appellant, viz., that it is the owner of an undivided interest of the property, by reason of the purchase of the alleged outstanding title, appellant, having entered into possession under the vendors' title and in subordination to it, is here estopped from denying such title in defense to plaintiff's action for possession. See Coates v. Cleaves, 92 Cal. 427, 430, 28 Pac. 580; Hicks v. Lovell, 64 Cal. 14, 20, 27 Pac. 942, 49 Am. St. Rep. 679; Holden v. Andrews, 38 Cal. 119. See, also, 29 Am. & Eng. Ency. of Law (2d Ed.) pp. 706, 707. There is no circumstance in this case excluding the same from the operation of the general rule on this subject.

Appellant was not entitled to any relief under its cross-complaint. The rule declared in Marshall v. Caldwell, 41 Cal. 611, as to the right of the vendee in possession, who discovers that his vendor owns only a portion of the land agreed to be conveyed, and is, therefore, unable to perform his contract as to the remainder, to proceed to have the contract specifically enforced to the extent of the vendor's interest in the property, and to have abatement out of the purchase money for the deficiency, without restoring or offering to restore possession of the property, is undoubtedly the law, but it does not assist appellant. The only defect in the vendor's title alleged is the outstanding title of the Michael Garvey estate to an undivided interest in the property. This defect was removed by the appellant itself by the purchase by it, while in possession under the contract, and more than two months before the date for the payment of the purchase price, of the alleged outstanding title, for the sum of $300. The generally accepted rule is to the effect that, if the purchaser in possession perfects the title of the vendor pending the executory contract by buying in an outstanding claim, the perfected title inures to the benefit of the vendor for all the purposes of the agreement, and the utmost that the vendee can ask is to be reimbursed for his outlay in obtaining such title, with interest thereon. See 1 Warville on Vendors, § 186; 29 Am. & Eng. Ency. of Law (2d Ed.) p. 618; Stephens v. Black, 77 Pa. 138; Fuson v. Lambdin, 66 S. W. 1004, 23 Ky. Law Rep. 2245; Austin v. McKinney, 5 Lea (Tenn.) 488; Wilkinson v. Green, 34 Mich. 221; Frink v. Thomas, 25 Pac. 717, 20 Or. 265, 12 L. R. A. 239. This rule is in full accord with the well-recognized doctrine that no one who goes into possession of land under another will be heard to dispute the title of that other during the continuance of the relation. Acquiring such outstanding claim during such continuance, in the language of the Supreme Court of Pennsylvania in Stephens v. Black, supra, "he becomes the trustee of his vendor." Under this rule, assuming the outstanding title to have been good, the title of the vendors was, for all the purposes of the agreement, perfected on April 30, 1904, and the deed then in escrow, ready to be delivered on payment of the purchase price, and which so remained until after appellant's default, offered a perfect title. Assuming that appellant would have been entitled to a conveyance of the whole property upon tendering, within the time fixed by the contract, the amounts specified therein, less the amount paid for the outstanding title, with legal interest thereon, it appears that no tender or offer of any kind has ever been made, and there is nothing in the case excusing such lack of tender. Under these circumstances, appellant was not entitled to specific performance as to the whole property, and certainly was not entitled, as it sought by its cross-complaint, to specific performance of a portion only upon payment of a proportionate amount of the purchase price, upon the theory that it was the owner of the remaining portion agreed to be conveyed, by reason of its purchase of an adverse title thereto, while it was in possession under the contract of sale. Appellant did not seek in this action any allowance on account of the money expended in acquiring the alleged outstanding title, and no question is here involved as to the right of appellant to relief on account thereof. Under these circumstances, and in view of what we have heretofore said, it is not necessary to determine whether the finding regarding the forfeiture of the interest of Michael Garvey to the other owners is sustained by the evidence. It is immaterial here whether the alleged outstanding title of Michael Garvey was good or bad.

Complaint is made that the court failed to make findings as to certain issues, but, in our judgment, the findings are sufficient as to all material issues, and a judgment will not be reversed or a new trial granted for failure to find as to immaterial matters.

It is further urged that the court should have tried the issues arising on the cross-complaint and the answer thereto before trying the issues made by the complaint and answer. As to this, it is sufficient to say that, so far as the record shows, all the issues were tried together by consent of the parties.

There is no other point requiring notice.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

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151 Cal. 600

## SCHOSTAG v. CATOR et al. (S. F. 4,852.)

(Supreme Court of California. Aug. 8, 1907.)

1. Elections—Primaries—Qualifications of Electors.

Pol. Code, § 1366a, provides that in all places where the primary election law is in force each elector, at the time of registering or time of transferring registration, shall declare his party affiliation, and, if he refuses to do so, he shall not vote at the ensuing primary, and section 1361a empowers the several political parties to prescribe additional tests if they desire so to do for those who offer to vote for delegates to their respective conventions. *Held*, that such sections were not in conflict nor objectionable, as violating Const. art. 2, § 2½, empowering the Legislature to provide for and regulate primary elections as constituting a partial exercise and a partial delegation of such power.

2. Same.

Pol. Code, § 1366a, requiring each elector in precincts where the primary election law is in force to declare at the time of registering or transferring registration his party affiliation as a condition to his right to participate in the primary, is not void as a violation of Const. art. 2, § 1, in that it in effect provides an additional qualification to those prescribed therein for electors.

3. Same—Reasonableness.

Pol. Code, § 1366a, requiring electors at registration desiring to vote at primaries, where the primary election law is in force, to declare their party affiliation in order to be entitled to vote at the primary, is not void for unreasonableness, in that an elector changing his party affiliation after his registration and before the primary election would be precluded from voting with his new party.

4. Same.

It was no objection to the validity of the act that one political party entitled to participate in the primary election had determined not to hold a convention or nominate candidates, so that the members of that party would be deprived of the right to vote at the ensuing primary.

5. Constitutional Law—Uniformity—Vested Rights.

Pol. Code, § 1366a, requires each elector at the time of registering to declare his party affiliation in order to entitle him to vote at the succeeding primary election, but declares that the section shall not apply to electors who registered before the act took effect, and permits them to vote at the succeeding primary, though their registration affidavits contained no declaration of affiliation. *Held*, that such excepted electors had a vested right to vote, and that the section was therefore not unconstitutional because of such exception for nonuniformity.

In Bank. Petition for a writ of mandate by Edward Gustave Schostag against Thomas V. Cator and others as constituting a board of election commissioners of the city and county of San Francisco. Writ denied.

Samuel M. Shortridge, for petitioner. Thomas V. Cator, for respondents.

BEATTY, C. J. This is a petition for a writ of mandate to compel the defendants to issue instructions to the officers appointed to conduct the approaching primary election in the precinct where petitioner is registered to permit him to vote the ballot of any political party lawfully participating therein, notwithstanding his refusal to comply with the requirements of a new section of the Political Code, known as "section 1366a," which provides, among other things, that in all places where the primary election law is in force each elector at the time of registering, or of transferring registration, shall declare the name of the political party with which he intends to affiliate at the ensuing primary election or elections, that such name shall then be stated in his affidavit of registration, and that he shall not be allowed to vote on behalf of any other party, or for delegates to the convention of any other party, by virtue of that registration, unless before the close of registration he announces and has recorded a change of his party allegiance. If he refuses at the time of registering to give the name of his party, that fact is to be stated in the record, and in such case he is not permitted to vote at all at the ensuing primary, unless before the close of registration he declares his party allegiance by affidavit stating the name of the party with which he is affiliated.

The petitioner contends that this section is unconstitutional, and the defendants are in doubt as to its validity, not only for the reasons urged by the petitioner, but for the additional reason that on the same day (March 19, 1907) that the act adding section 1366a to the Political Code was approved another act was approved adding a new section to be known as section 1361a, which, it is suggested by counsel for defendant, brings both enactments in conflict with section 2½ of article 2 of the Constitution, or, if either enactment can be held to be prior to the other, at least invalidates that act. The point of this objection is that section 2½ of article 2, which empowers the Legislature to provide for, and regulate, primary elections, while it authorizes the Legislature to prescribe tests of the right of electors to vote at primary elections by direct enactment, or to delegate to the governing bodies of the respective parties the power to prescribe such tests, does not permit the Legislature to partly exercise and partly delegate such power, but, on the contrary, by clear implication forbids any division of this function. We think this objection is overrefined. The Legislature, by section 1366a (St. 1907, p. 677, c. 352), has prescribed a test or condition to be complied with by all electors of every party who desire to participate in the primary elections, and by section 1361a (St. 1907, p. 641, c. 340) has empowered the several political parties to prescribe additional tests, if they desire to do so, for those who offer to vote for delegates to their respective conventions. There is no conflict between the two acts, and nothing in the Constitution which forbids even by implication provisions so reasonable and so just. The Legislature having the right to reserve the exercise of the power of prescribing tests to itself exclusively, or to delegate the power to the several parties, is invested with plenary control of the whole subject, and, if it deems some general test, applicable to all parties, necessary as a matter of wise state policy, it does not, by prescribing such a test, preclude the delegation of a right to prescribe more specific tests for the electors claiming to be members of a particular party. The state has a general interest in guarding the purity of primary elections, especially since party conventions have become an essential feature of our system of choosing public officers, and every party has a special interest, in reserving to its own members the control of its own affairs. It would be a deplorable construction of the Constitution which would forbid the enactment of general laws in furtherance of the general interest of the state, except upon condition of denying to the governing bodies of the respective parties the right to exclude from participation in their primaries electors who, according to their own standards of party fealty, are not entitled to act with them. This is a right which parties have always exercised heretofore without question, and is essential to their preservation. Britton v. Board of Com'rs, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115. Our conclusion is that, since sections 1361a and 1366a are entirely harmonious in themselves, neither is unconstitutional by reason of the enactment of the other.

The question which remains to be considered is whether section 1366a is unconstitutional for any of the reasons assigned by the petitioner. It is claimed in the first place, that, under the guise of providing a test upon which an elector may participate in a primary election, it, in fact, imposes an additional qualification to those prescribed for electors by section 1 of article 2 of the Constitution. We do not think so. What we call "the primary election" is really a number of primary elections equal to the number of parties participating, but conducted at the same time and at the same polling places by one set of public officers, acting in behalf of all the parties desiring to elect delegates to their respective conventions. Therefore, when an elector desires to register in a manner which will entitle him to vote at the primary election, he must be understood as desiring to act with some party, and not with any other party. The registrar is for this purpose the agent of the several parties, and is making up a list of voters for each one of them. It is therefore just as reasonable to require the elector to range himself with some particular party for the purpose of the primary election, as it is to require registration of all electors who desire to vote at the general election. By one registration is secured the right to vote at an election open to all registered electors, by the other is secured the right to vote at an election open to those only who belong to a particular party. In either case registration is merely a condition, and an entirely reasonable condition, prerequisite to the casting of a vote by a qualified elector.

These views, if correct, dispose of several other objections urged by petitioner, and relieve us of the necessity of taking them up seriatim. We shall, however, notice some of the arguments that have been most strongly urged upon our attention. It is contended that the test prescribed by section 1366a is unreasonable, because with the close of registration the elector loses his right to change his party allegiance in consequence of a change in his political convictions, and is precluded from taking part in the election of delegates to the convention of the party with which on the day of the election his more matured opinions would impel him to cast in his lot. This inconvenience certainly does result from the provisions of the act, but the Legislature, which must be presumed to have foreseen it, probably regarded such sudden conversions during the short interval between the close of registration and the date of the primary election as likely to be of such rare occurrence as not to justify the omission of a provision evidently designed to prevent unscrupulous and mercenary electors from holding themselves free down to the day of election to vote with any party, upon any corrupt motive, for the purpose of influencing the nomination of its candidates for public office, while without any interest in their success, and perhaps with an interest in their defeat. If it shall sometimes happen that a conscientious voter is converted from one political faith to another between the close of registration and the primary election, he may console himself for the loss of his vote by the reflection that his loss is trifling in comparison to his share of the advantage to the state of which he is a citizen, flowing from a measure which tends to prevent a grave abuse, especially in those centers of population where the primary election law is made obligatory.

Another inconvenience suggested by the fact that in the city and county of San Francisco one political party entitled to participate in the primary election has determined not to hold a convention or nominate candidates is that the members of that party in this instance, and the members of all parties in similar cases hereafter, will be deprived of the right to vote at the ensuing primary. This inconvenience does not seem to afford valid ground of complaint, since it amounts only to this: That the members of a party which holds no primary election are merely prevented from interfering in the management of a party to which they do not profess to belong.

As to the meaning of section 2½ of article 2 of the Constitution, we agree that it must be construed in the light of the evil to be remedied, and the course of legislation and judicial decision prior to its adoption. The evils to be remedied were the corrupt practices by which, in the absence of proper public control, primary elections were made to defeat the will of the bona fide members of political parties, and the course of legislation has been to enact one primary election law after another, which have as often been found unconstitutional by reason of various restrictions upon the legislative power contained in our fundamental law. The object of the people in adopting the amendment contained in section 2½ of article 2 was to remove these restrictions, and to give the Legislature a practically free hand in dealing with the evils which their previous legislation had vainly attempted to cure. In view of these considerations, we do not feel justified in narrowing by construction the power conferred upon the Legislature by that section to prescribe tests of the right to vote at primary elections.

The last and most serious objection to the validity of the law is that it is not uniform in its operation, that it creates classes and imposes more onerous conditions upon one class than another. The point of this objection is that the act contains a saving clause in favor of all electors who were registered before its enactment, permitting them to vote at this primary election notwithstanding their affidavits of registration contain no declaration of affiliation with any particular party. We do not regard this feature of the law as fatal to its validity. As a permanent law of the state it creates no classes, and will be entirely uniform in its operations upon all electors. It is no ground for holding such a law unconstitutional that it saves the rights of some electors, who by complying with the law as it existed at the date of their registration secured the privilege of voting at all primary elections to be held during the time such registration holds good. We are not aware of any case in which a saving clause protecting vested rights has ever been held to invalidate a law general and uniform in other respects, and we think it not unreasonable to treat the rights secured by registration as meriting the same consideration in this connection as rights more strictly entitled to be ranked as vested rights.

Writ denied.

We concur: SHAW, J.; HENSHAW, J.; SLOSS, J.; LORIGAN, J.

151 Cal. 616

## SAVINGS & LOAN SOCIETY v. BURKE, Tax Collector. (L. A. 1,643.)

(Supreme Court of California. Aug. 9, 1907. Rehearing Denied Sept. 5, 1907.)

TAXATION—IMPERFECT ASSESSMENT—EQUITABLE RELIEF.

Even if the provisions of Pol. Code, §§ 3628, 3650, as to assessing land by sections, applies to the assessment of a mortgage interest in lands, and such an interest was not so assessed, execution of a tax deed of such an interest will not be enjoined on this account, the owner of such interest not having tendered the amount of tax justly due from him, or at any time offered to pay to the tax collector the tax on such interest in any section, the amount of which is deducible from the deductions made on account thereof in the assessment of the mortgagor's interest.

In Bank. Appeal from Superior Court, Santa Barbara County; James W. Taggart, Judge.

Action by the Savings & Loan Society against Edmund M. Burke, tax collector of the county of Santa Barbara. Judgment for defendant. Plaintiff appeals. Affirmed.

Canfield & Starbuck, for appellant. U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Deputy Atty. Gen., and E. W. Squires, Dist. Atty., for respondent.

SLOSS, J. This is an action brought to restrain the execution of a tax deed to the state, following a sale for nonpayment of taxes. A demurrer to the second amended complaint was sustained, and, plaintiff declining to amend, judgment went for the defendant. The plaintiff appeals.

The complaint in question sets forth these facts: The plaintiff in 1897 was, and ever since has been, the owner and holder of a mortgage interest in certain lands in Santa Barbara county. The mortgaged lands, consisting of some 8,800 acres, were included in territory which had prior to 1897 been divided into townships and sections pursuant to the laws of the United States. The owner of the fee was J. W. Calkins, and the land was assessed to him for the year 1897 by sections, as required by sections 3628 and 3650 of the Political Code. The mortgage interest of the plaintiff was, however, assessed in a lump sum, without apportionment or division among the subdivisions or sections composing the mortgaged property. The amount of the tax was likewise computed in the assessment book in a lump sum, and appears therein as amounting to $1,316.86. No part of the tax having been paid, the property was sold to the state (Pol. Code, § 3771), and the plaintiff, claiming that the failure to assess his mortgage interest by sections is fatal to the validity of the assessment and tax, seeks to enjoin the execution of a deed. For the purposes of this decision, we assume, but do not decide, that the provisions of the Political Code as to assessing land by sections are applicable to mortgage interests.

It is the law of this state, as declared in two decisions rendered since this appeal was taken, that the execution of a tax deed based on an imperfect assessment will not be restrained at the suit of one who does not offer to do equity by paying such tax as is, in morals and justice, chargeable against him. Couts v. Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168; Grant v. Cornell, 147 Cal. 565, 82 Pac. 193. 109 Am. St. Rep. 173. The appellant does not dispute the correctness of this rule, but seeks to distinguish the case at bar from those cited. It is said that in Couts v. Cornell the defect in the assessment was that the property was not sufficiently described for purposes of identification, and that such defect in the description did not affect the moral obligation of the landowner to pay the tax. Here, however, it is claimed that the failure to assess the mortgage interest in parcels, according to the governmental subdivisions of the land, directly affected the obligation to pay a tax at all; that it is the privilege of the taxpayer, where the land is required to be assessed in sections, to pay (or redeem) as to some sections, allowing the taxes on the remaining sections to become delinquent; and that if the state does not, by separately assessing and taxing the sections, put the owner of the property in a position to exercise his right to make such partial payment, he is under no moral obligation to pay any part of the tax. Whatever apparent force this argument might have is destroyed by an inspection of the complaint and an examination of the provisions of the Political Code regarding assessment for taxation. The complaint contains a copy of a portion of the assessment roll. This includes the assessment to Calkins, the owner of the fee, showing a valuation of the property by legal subdivisions, and a deduction, on account of the mortgage, from the valuation of each parcel. On the same page follows the assessment of the mortgage interest to plaintiff. The sum of the deductions from the assessment to Calkins equals the amount at which the appellant's mortgage interest is assessed. This assessment to the owner of the fee was in accordance with the requirements of the Code. Under our system of taxation, the mortgage is treated as an interest in the land, and assessed at its full cash value. Pol. Code, § 3628. The land is entered in the assessment book by sections, with its cash value, and, where it is subject to a mortgage security, the assessor must enter "in the proper column, the value of such security, and deduct the same." Pol. Code, § 3650. The value of the mortgage security which is to be so deducted is the same as the "full cash value" at which the mortgage security is to be assessed. Since such deduction was made as to each section of the mortgaged land, the plaintiff could have readily ascertained, from the data necessarily appearing on the face of the assessment book, the amount of the tax justly chargeable against its interest in any one of the sections covered by its mortgage.

It is suggested that a payment as to a part of the mortgage interest which had been assessed as a whole would not have been accepted by the tax collector. If plaintiff in fact desired to free any specific sections of the land from the lien of the tax, there was nothing to prevent its offering to pay the tax properly chargeable to those sections. Such offer, even if refused, would have put it in a position to ask and receive the aid of a court of equity. If it never had the intention or desire to pay the tax as to any part of the land less than the whole, the failure to assess by subdivisions did not affect its obligation to pay the entire tax.

In either view, the appellant's failure to make any payment or tender leaves its case as devoid of equity as that of the plaintiff in Couts v. Cornell.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

151 Cal. 589

## JONES v. SUPERIOR COURT OF KERN COUNTY et al. (L. A. 2,071.)

(Supreme Court of California. Aug. 6, 1907.)

JUSTICES OF THE PEACE — APPEAL — BOND — SUFFICIENCY.

Code Civ. Proc. § 978, provides that an appeal from a justice court is ineffectual, unless an undertaking is filed in the sum of $100 for the payment of costs "on appeal," or if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment including costs, when the judgment is for the payment of money. *Held*, that where a plaintiff before a justice's court, desiring to appeal, filed a bond reciting such appeal, claiming a stay of proceedings and providing a sufficient penalty for the payment of the judgment appealed from "and all costs," if the appeal was withdrawn or dismissed, etc., and all costs that might be recovered against it in the action in the superior court, the bond sufficiently provided for the payment of costs "on appeal," and was therefore sufficient.

In Bank. Petition for writ of prohibition by E. E. Jones against the superior court of Kern county and others, to the District Court of Appeal of the Second Appellate District. Case transferred to Supreme Court. Writ denied.

William W. Keye, for petitioner. George E. Whitaker and H. M. Barstow, for respondents.

McFARLAND, J. This is an application originally filed in the District Court of Appeal, Second Appellate District, for a writ of prohibition to restrain and prohibit the superior court of Kern county from proceeding with the trial of a cause pending therein, entitled Kern Valley Bank v. E. E. Jones. All of the justices of the said district court were not able to concur in a judgment, and the case was transferred to this court. The said Kern Valley Bank brought an action in the justice's court against the petitioner herein, E. E. Jones, to recover of the latter a money judgment, and Jones answered and demanded judgment against the bank; and after trial judgment was rendered in favor of the defendant Jones for $190.76, and from this judgment the bank appealed to the superior court. Jones moved to dismiss the appeal upon the sole ground that no undertaking for the payment of costs had been given. The superior court denied the motion to dismiss, whereupon Jones commenced this present proceeding to prohibit the superior court from trying the case.

The law governing the matter of undertakings on appeal from a justice's court to a superior court is found in section 978, Code Civ. Proc., and that part of it which is material is as follows: "An appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on appeal; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money;" etc. In the instrument filed by the respondent as an undertaking on appeal the judgment in the justice's court is fully recited. It is then stated that "the said plaintiff, Kern Valley Bank, is dissatisfied with said judgment and is desirous of appealing therefrom to the superior court of Kern county, state of California, and, pending such appeal, claims a stay of proceedings, and is desirous of staying the execution of the said judgment so rendered as aforesaid." Then the instrument states that, "in consideration of the premises, of such appeal, and of such stay of proceedings and execution, all as aforesaid," the two sureties bind themselves jointly and severally and undertake in the sum of $500, "and promise on the part of said appellant that the said appellant will pay the amount of the said judgment so appealed from and all costs, if the appeal is withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against it in the action in the said superior court." We think that this instrument is a sufficiently clear undertaking to pay the costs on appeal. It provides that, if the appeal be withdrawn or dismissed, the sureties will pay the judgment appealed from "and all costs" or the amount of any judgment and "all costs which may be recovered against appellant in the action in the superior court." It is somewhat difficult to imagine what "costs" are alluded to in the undertaking, unless costs on appeal be intended, for the costs incurred at the trial in the justice's court had become inserted in and were a part of the judgment, and were therefore included in the promise to pay the "judgment." However, it is quite clear that "all costs" include costs on appeal; and if in the case at bar the appeal should be withdrawn or dismissed, or a judgment should be rendered against appellant in the superior court, the sureties on the said undertaking are in either event liable for any costs that accrued on the appeal. There is no valid objection to the form of the undertaking. If it provide for the costs on appeal, it matters not that it also provides in the same instrument for a stay of proceedings. If after the words "all costs" there had been inserted the words "on appeal," no one would have objected to the form or sufficiency of the instrument as an undertaking on appeal; but if, as we hold, "all costs" as used in the instrument includes costs on appeal, then the undertaking is as effectual as if the words "on appeal" had been used. It is quite evident from the face of the instrument that it was intended to be an undertaking on appeal as well as for a stay, and the penal sum is more than twice the amount of the judgment, and the $100 in addition.

We do not think that the above view is in conflict with any former decisions of this court cited by petitioner. The case mainly relied on is McConky v. Superior Court, 56 Cal. 83. But in that case the appellant contended that an undertaking for costs on appeal need not be given at all where there was an undertaking for a stay of proceedings, because in section 978, after the provision for the $100 undertaking, the word "or" is used; and the only point decided in the McConky Case is that the word "or" as there used must be considered to mean "and," so that, even where there is an undertaking for a stay, there must also be an undertaking for costs on appeal. But in the McConky Case the undertaking there given does not appear in the record, and it was assumed that it did not contain any covenant which was the equivalent of a promise to pay the costs on appeal; and the case is therefore not authority on the point here under discussion.

The views above expressed make it unnecessary to consider other points made by respondent.

The application for the writ is denied, and the proceeding is dismissed.

We concur: BEATTY, C. J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.

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151 Cal. 638

## PEOPLE v. HOWER. (Cr. 1,388.)

(Supreme Court of California. Aug. 12, 1907. Rehearing Denied Sept. 5, 1907.)

1. Homicide — Appeal — Instructions — Prejudice.

Where the only conflict in instructions with reference to the issue of drunkenness in a prosecution for assault with a deadly weapon was that caused by the giving of an erroneous instruction at defendant's request, which stated the rule more favorably to him than he was entitled to, he was not injured by the conflicting instructions, which properly stated the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 715.]

2. Homicide—Assault with Intent to Murder — Defenses — Drunkenness — Instructions.

In a prosecution for assault with intent to murder, an instruction given at defendant's request, which merely informed the jury that if defendant, while under the influence of liquor, was unable to tell what he was doing and to distinguish between right and wrong, and was under the influence of liquor at the time of the alleged assault, they must acquit, was in conflict with Pen. Code, § 22, providing that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but that, when the actual existence of a particular motive or intent is a necessary element of a particular species or degree of crime, the jury may consider intoxication in determining such fact.

3. Same—Degrees of Offense—Intent.

Defendant was informed against for assault with a deadly weapon with intent to commit murder, and was convicted of assault with intent to murder. The court correctly charged as to the various kinds or grades of offense included in the information, and instructed that evidence of drunkenness could only be considered for the purpose of determining the degree of the crime. *Held*, that the instruction should be construed to authorize the jury to consider the fact of intoxication in determining which of the various kinds or grades of offense included in the information the defendant was guilty of, and not as instructing that they should consider such evidence in determining the degree of the offense of assault with intent to commit murder with which defendant was charged which is not divided into degrees.

4. Criminal Law — Examination of Witnesses—Prejudice.

Accused was not prejudiced by the court's refusal to permit him to cross-examine certain witnesses examined for the state in order to obtain evidence on the issue of drunkenness as to which they had not been examined in chief, where accused subsequently examined the witnesses on such issue either as his own or when recalled by the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3148.]

5. Same—Trial—Jury—Misconduct.

Where, in a prosecution for assault with a deadly weapon with intent to murder, there was nothing in support of defendant's allegation of misconduct of the jury in examining the coat and shirt worn by prosecutor at the time of the assault after submission of the case but the bare "information and belief" statement of defendant's attorney and the affidavits of the state on motion for a new trial supported a conclusion that the articles had been fully inspected by the jury at the time they were received in evidence, defendant was not shown to have been prejudiced by the fact that the garments were left in the courtroom, which was used by the jury after submission of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3170, 3176.]

6. Same — Appeal — Instructions — Witnesses—Credibility.

An instruction that a witness who testifies falsely as to one fact is to be distrusted in other parts of his testimony merely stated a commonplace matter, which the jury would be apt to know without instruction, and was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3154.]

In Bank. Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

J. W. Hower was convicted of assault with intent to murder, and he appeals. Affirmed.

John A. Wall, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for respondent.

ANGELLOTTI, J. The defendant was found guilty of the offense of assault with intent to commit murder, upon an information charging him with the offense of an assault with a deadly weapon with intent to commit murder, and was adjudged to suffer imprisonment in the state prison therefor. He appealed from the judgment and from an order denying his motion for a new trial, and the cause was ordered transferred to this court for hearing and decision, after decision in the District Court of Appeal for the Third district.

1. Error is alleged in the matter of certain instructions given upon the subject of drunkenness. There was some evidence tending to show that the defendant was to some extent under the influence of intoxicating liquor at the time of the commission of the offense. The defendant testified that during the last four years "the drink habit had held him absolutely, that when under the influence of liquor he did not know right from wrong, that when the craving and desire for liquor came over him he could not resist it, and that on the day in question he commenced drinking, and remembered nothing about any trouble with the prosecuting witness." Upon defendant's request, the court gave to the jury the following instruction: "If you believe that in consequence of long intemperance that defendant has arrived at that stage whenever he is under the influence of liquor that he is unable to tell what he is doing, that he is unable to distinguish right from wrong, and that at the time defendant com-

mitted the alleged assault upon Frank Judeas he was under the influence of liquor, then I charge you that it is your duty to acquit." At the same time, the court on its own motion, instructed the jury as follows: (1) "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but, whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act. (2) It is a well-settled rule that drunkenness is no excuse for the commission of a crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for, when a crime is committed by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution."

It is not claimed by appellant that these instructions so given by the court on its own motion did not correctly state the law as to voluntary intoxication. The first was in the words of section 22 of the Penal Code, and the second has been held not to be erroneous in a long line of cases commencing with People v. Lewis, 36 Cal. 531. The claim of learned counsel for defendant is that these instructions are in conflict with the instruction given at his request, hereinbefore set forth, which, it is further claimed, was a proper instruction under the circumstances of this case. That there is such a conflict is apparent. It does not, however, follow that defendant can complain thereof. The instruction given at defendant's request was clearly erroneous. By it the jury were informed simply that if the defendant, while under the influence of liquor, was unable to tell what he was doing and unable to distinguish between right and wrong, and if he was under the influence of liquor at the time of the alleged assault, they must acquit. It disregards entirely the question as to whether the intoxication was voluntary, requiring an acquittal under the circumstances specified, whether the intoxication was voluntary or not. It was therefore in plain conflict with the provisions of section 22, Pen. Code, set forth in the first of the instructions given on this subject by the court on its own motion, and with the decisions of this court, and, so far as we have discovered, with the decisions of courts generally upon this subject. In People v. Blake, 65 Cal. 275, 4 Pac. 1, relied on by defendant in support of the instruction, the court, after declaring that it has been so frequently and so generally held both in England and in the highest courts of this and other states that drunkenness voluntarily brought on is no excuse for crime, that it may be considered as settled law, said, quoting approvingly from People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484: "It will moreover occur to every mind that such a principle is absolutely necessary to the protection of life. * * * But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow men, and to society, to say nothing of more solemn obligations, to preserve, so far as lies in his power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable, but if, by a voluntary act, he temporarily casts off the restraints of reasons and conscience, no wrong is done him if he is considered answerable for any injury which, in that state, he may do to others or to society." In People v. Travers, 88 Cal. 233, 239, 26 Pac. 88, 91, it was said by the court in bank, speaking through Mr. Justice McFarland: "As to the instructions asked by appellant on the subject of delirium tremens, etc., it is sufficient to say that settled insanity produced by a long-continued intoxication affects responsibility in the same way as insanity produced by any other cause. But it must be 'settled insanity,' and not merely a temporary mental condition produced by recent use of intoxicating liquor." The law upon this subject was so clearly and concisely stated by this court, speaking through Mr. Justice Henshaw, in People v. Fellows, 122 Cal. 233, 239, 54 Pac. 830, 832, that we quote therefrom at length: "No act committed by a person while in a state of voluntary intoxication is less criminal for this reason, saving that, when the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any specific species or degree of crime, the circumstance of voluntary intoxication may be considered by the jury in determining the fact whether or not that particular purpose, motive, or intent was present. Pen. Code, § 22. *But a sane person who voluntarily becomes intoxicated is not relieved from responsibility because of any mental derangement mala a potu, or insanity produced by and consequent upon his own voluntary act.* Such is the import of the instruction in People v. Lewis, supra, and it is that form of insanity, if insanity it may be called (for we do not think the word happily chosen), to which the instruction has reference. *A sane man, therefore, who voluntarily drinks and becomes intoxicated, is not excused because the result is to cloud his judgment, unbalance his rea-*

*son, impair his perceptions, derange his normal faculties, and lead him to the commission of an act which in his sober senses he would have avoided.* Upon the other hand, if one, by reason of long-continued indulgence in intoxicants, has reached that stage of chronic alcoholism where the brain is permanently diseased, where the victim is rendered incapable of distinguishing right from wrong, and where permanent general insanity has resulted, then, and in such case, he is no more legally responsible for his acts than would be the man congenitally insane, or insane from violent injury to the brain." The italics are ours. See, also, note to Knight v. State (Neb.) 76 Am. St. Rep. 91. It may possibly be that, in view of the evidence of the defendant, he would have been warranted in requesting an instruction embodying the doctrine to the effect that, where permanent general insanity resulting from long-continued indulgence in intoxicating liquors, it has the same effect as to the responsibility of a person, as permanent insanity resulting from any other cause, although the foundation in the evidence for such an instruction is very slight. But no such instruction was requested, the instruction in fact requested and given being simply a statement absolutely at variance with section 22, Pen. Code, and the well-settled doctrine stated in the decisions above cited. The evidence was such as to warrant a conclusion on the part of the jury that the defendant, when sane and responsible, voluntarily made himself intoxicated, and therefore it must be held, under the decisions, that the instructions given by the court on its own motion were correct. The only conflict in the instructions given was that caused by the giving of the erroneous instruction at the request of the defendant, which stated the rule more favorably to him than it should have done. Under such circumstances the defendant has no good ground of complaint. People v. Suesser, 142 Cal. 354, 364, 75 Pac. 1093; Williams v. S. P. Co., 110 Cal. 457, 462, 42 Pac. 974; Dennison v. Chapman, 105 Cal. 447, 458, 39 Pac. 61. People v. Blake, supra, relied on by defendant in support of the instruction, is not opposed to the views we have stated. The question there was as to the admissibility of evidence in a case where an intent to defraud was a necessary element of the offense charged, and evidence tending to show that the defendant was unable or incapable of forming such intent was held admissible. This ruling was in full accord with section 22, Pen. Code.

The learned Court of Appeal held that the second instruction given by the court on its own motion was prejudicially erroneous in stating that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime," the offense charged—assault with intent to commit murder—not being divided into degrees. But embraced in the charge made by the information were the lesser offenses of assault with a deadly weapon and simple assault, to constitute either of which the specific intent, which was an essential element of the higher charge, was not necessary. The court correctly instructed the jury as to the various kinds or grades of offense included in the information. We are of the opinion that, under these circumstances, the last-quoted portion of the instruction given could only be understood by the jury as authorizing them to take the fact of intoxication into consideration in determining as to which of the various kinds or grades of offense included in the information the defendant was guilty. So construed, the instruction was certainly not prejudicial. People v. Phelan, 93 Cal. 111, 28 Pac. 855, in which such an instruction was held erroneous, is not in point. The offense there charged was burglary, which is divided into two degrees, the only distinguishing feature between such degrees being as to the time when the crime is committed, burglary in the nighttime being of the first degree, and burglary in the daytime being of the second degree. The specific intent essential to that offense is the intent at the time of the entry to commit larceny or some other felony. The defendant introduced evidence to show that he was intoxicated at the time of entry for the purpose of showing the absence of an intent to commit any felony, in which event he was entitled to an acquittal. Under these circumstances the court instructed the jury that such evidence could only be considered for the purpose of determining "the degree of the crime." Manifestly, this could be read only as referring to the degrees into which the offense was divided by law, and as to which the court had doubtless instructed the jury. So read it was undoubtedly erroneous. See People v. Vincent, 95 Cal. 425, 429, 30 Pac. 581.

2. Four eyewitnesses of the assault were called by the people and examined as to the affair, but on their direct examination they were asked no question and gave no testimony as to defendant's condition so far as sobriety was concerned. On cross-examination each was asked as to defendant's condition for sobriety on that day, and an objection that the same was not proper cross-examination was sustained, the court stating that it would accord the privilege to defendant of recalling the witnesses as his own. One of these witnesses was called by defendant, and testified upon the subject favorably to him. The other three were called in rebuttal by the people, and testified on this subject, and the defendant was then given full opportunity to cross-examine them thereon. This right he then exercised. In view of these facts, it is unnecessary to consider whether the court erred in the rulings complained of. If it be assumed that it did err, manifestly the error was without prejudice.

3. It is claimed that the jury received evi-

dence out of court other than that resulting from a view of the premises. This claim is based upon an affidavit made by counsel for defendant showing that the coat and shirt worn by the prosecuting witness at the time of the assault, which, it is said, were in a "most horrible, revolting, and disgusting" condition, by reason of the rents and cuts therein made by defendant's knife and the "dried, matted, and putrid blood thereon" which had come from the wounds made by defendant, were, after being received in evidence and examined and inspected by the jury, left on the floor of the courtroom during the deliberations of the jury, the courtroom, in accord with the custom in said court, being used as the jury room. There is nothing but the bare "information and belief" statement of defendant's attorney to show that any examination of the coat or shirt was made by any juror after the submission of the case, and this, of course, was ineffectual for any purpose. People v. Feld, 32 Cal. Dec. 16, 86 Pac. 1100. The mere fact that they were on the floor in the courtroom and in sight of the jury, does not compel the conclusion that they were so examined. Moreover, the affidavits on motion for a new trial were such as to support a conclusion that these articles had been fully inspected and examined by the jury at the time they were received in evidence, and we are unable to see how, under the circumstances of this case, the defendant could be held to have been prejudiced, even had it appeared that the jurors or some of them had again inspected the garments.

4. The instruction as to distrust of a witness who testifies falsely as to one fact in giving his testimony, and the right of the jury to reject the whole of the testimony of a witness who is found by them to have deliberately testified falsely in one part of his testimony, noted by the learned Court of Appeal in its opinion, was not such as to call for a reversal. See People v. Dobbins, 138 Cal. 694, 72 Pac. 339. It is also to be noted that this instruction, which is word for word the instruction considered in the case last cited, belongs to that class of instructions which contain only mere commonplace matters that the jurors would be apt to know about and act upon in the absence of instructions. It is well settled that the giving of instructions of that class will not be held to be a proper ground for reversal. People v. Tibbs, 143 Cal. 100, 103, 76 Pac. 904; People v. Wardrip, 141 Cal. 229, 74 Pac. 744; People v. Farrington, 140 Cal. 656, 74 Pac. 288; People v. Wong Bin, 139 Cal. 65, 72 Pac. 505.

This disposes of all the points made for a reversal.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

McFARLAND, J. (concurring). I concur in the judgment of affirmance, because I think that the error committed by the trial court, which is hereinafter noticed, probably had no prejudicial effect upon the minds of the jury. But, in my opinion, the District Appellate Court was right in holding that the trial court committed an error in instructing the jury that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime." This is in direct conflict with section 22 of the Penal Code, and takes away from that section its most important feature. The section is as follows: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." This language is not confined to a "degree" of a crime, but embraces any "species," or kind of crime, whether divided into degrees or not. It applies to every crime of which the existence of a particular intent or purpose is a necessary element. It is true that this court, in two or three cases, used the expression that drunkenness could be considered only in determining the degree of a crime, but it was used only in murder cases where the degrees of the crime depended on a particular intent or purpose; and, as it was said in People v. Vincent, 95 Cal. 425, 30 Pac. 581, "the degrees of murder are based upon the 'intent'—the deliberation or premeditation—with which the act is done; and therefore it is not improper, in trials for unlawful homicide, to instruct the jury that they can consider intoxication only for the purpose of determining the degree of the crime, because that is telling them in substance that they may consider it in determining 'the purpose, motive, and intent' with which the act was committed." But the court did not intend to declare the invariable rule that drunkenness can be considered only to determine the degree of crime clearly appears in the case of People v. Phelan, 93 Cal. 111, 28 Pac. 855. In that case the defendant was charged with burglary, which crime consists in entering a building with intent to commit larceny or some felony. The defendant introduced evidence showing that he was greatly intoxicated at the time of the alleged commission of the crime and did not, and could not, have had any intent to commit a felony in the building, but the court instructed the jury—as the jury were instructed in the case at bar—that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of the crime." Of course, this instruction in the Phelan Case was absurd, because the degrees of burglary are founded on the time of the commission of the crime, whether in the daytime or nighttime, and have no reference to the intent of the party charged; but the case was reversed for the giving of the instruction because it took away from the jury the right to consider the drunkenness of the defendant in determining the intent or purpose with which he entered the building. The principle would have been the same if burglary had not been divided into degrees at all. The court say: "As given, the instruction withdrew from the consideration of the jury evidence which the Code says a jury may consider in determining the intent with which an act is committed. * * * The instruction that the jury could not consider that evidence for any other purpose than that of determining the degree of the crime is clearly erroneous, and for that error the judgment appealed from must be reversed." And in People v. Vincent, supra, the court, commenting upon the Phelan Case said: "Burglary consists in entering a house * * * 'with intent to commit grand or petit larceny, or any felony'; and it is apparent to the dullest apprehension that a drunken man might unlawfully enter a house without any intent whatever to commit larceny or felony. And it is equally apparent that a jury, in determining with what intent he entered, might well consider the fact that he was intoxicated; but the 'degree' of the crime would have nothing to do with it. The court, in delivering the decision in People v. Phelan, 93 Cal. 111, 28 Pac. 855, did not consider it necessary to state that they were not dealing with a murder trial." We think therefore that in the case at bar the court clearly erred in using the language which we have considered; and any instruction in that abstract form should never be given. Whenever an essential element of a crime is the particular intent or purpose with which the act is done, drunkenness may be considered by a jury in determining whether such intent or purpose actuated the defendant; and this is so whether or not there are any degrees of the crime with which the defendant is charged.

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151 Cal. 619

## PEOPLE v. SMITH. (Cr. 1,378.)

(Supreme Court of California. Aug. 9, 1907.)

1. Criminal Law—Instructions.

Defendant cannot complain of the refusal of his requested instructions, the court having given others embodying the same principles.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

2. Same—Matters Explanatory of Evidence—Declarations.

As explaining what defendant meant when, on having deceased pointed out to him by his brother, defendant asked deceased, "Can you repeat them words again?" evidence of the language previously used by deceased towards defendant's brother about their mother, though uttered in the absence of defendant, is admissible.

3. Same—Motion to Strike Out Evidence—Necessity.

There being nothing on the face of a question to indicate that an answer to it might not be relevant, material, and competent, it was necessary after its admission over the objection to the question that it was irrelevant, immaterial, and incompetent to move to strike out the answer that error may be predicated on the overruling of the objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2674.]

4. Same—Declarations of Co-Conspirator.

Though there was proof of conspiracy of defendant and his brother to kill deceased, yet the statement of the brother made after he had fled and was looking on at a distance, and between the first and second shots fired by defendant, "I knew he was going to get it," is inadmissible; it not being made while the declarant was aiding in furthering the object of the conspiracy, and not being a declaration in any manner in aid or furtherance of the conspiracy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 996.]

5. Homicide—Self-Defense—Evidence.

The defense in a homicide case being self-defense, defendant on the issue of whether he acted on a reasonable apprehension may show not only that he was much smaller than deceased, but that he had for a long time had a disease and as a result was weak and enfeebled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 419.]

6. Same—Harmless Error.

The refusal to allow a physician to testify in a homicide case, in which the defense was self-defense, that defendant was afflicted with a certain disease, and as a result was weak and sick, at the time of the homicide, is not harmless, though defendant testified that he had been afflicted with the disease for a long time, and there was no evidence to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 714.]

In Bank. Appeal from Superior Court, City and County of San Francisco; F. H. Dunne, Judge.

Henry Smith was convicted of manslaughter and appeals. Reversed, and remanded for new trial.

Frank J. Murphy, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and J. Charles Jones, Dist. Atty., for respondent.

LORIGAN, J. The appellant was charged with murder in the killing of one Joseph McCann in the city of San Francisco, and on trial was convicted of manslaughter. He appeals from the judgment and order denying his motion for a new trial.

It was insisted by the defendant upon the trial that the killing of McCann was committed by him in necessary self-defense. Several grounds are urged for a reversal, and in order that these may be properly considered it is necessary to refer to some of the evidence in the case. That evidence tended to show that on the afternoon of the day of the homicide (January 11, 1905) the deceased was in Meyerborg's saloon at the southwest corner of Taylor and Eddy streets, in the city of San Francisco, drinking, when Fred Smith, a brother of the defendant, entered. It does not appear that these two were acquainted, but as soon as Fred Smith entered McCann stepped up to him and addressed him as a "little son-of-a-bitch" and characterized his mother and sister as whores. Fred Smith, with tears in his eyes, told McCann that he (Smith) was only a little fellow and unable to defend himself, but that he had a brother who would make him "eat those words" or "repeat those words," if he would wait until he could get him. McCann said he would wait, and Fred Smith left the saloon. Some fifteen minutes later Henry Smith, the defendant, the brother of Fred Smith, walked into the saloon, took a glass of beer, and then went out. He immediately returned with Fred Smith, who had remained on the outside when defendant first entered the saloon, and as they came in the latter pointed to McCann as the person who had used the language about their mother and sister, saying, "That is the man." The defendant addressing McCann said, "Did you call my mother a whore?" Fred Smith then immediately said, "Can you repeat them words over again?" followed by the defendant also saying, "Can you repeat them again?" Before anything further could occur, save probably a response by McCann that he could, the defendant was grasped by a bystander, who, assisted by the barkeeper, put him out of the saloon. At the time the defendant entered the saloon he was armed, and there was some evidence that as he spoke to McCann when he last entered he made a motion to draw a pistol. After being put out of the saloon defendant and his brother went to another saloon on the northwest corner of Taylor and Eddy streets, where they remained about 10 minutes, came out, and started across Eddy street in the direction of their home on Taylor street. As they crossed Eddy street McCann, who was either standing in front of Meyerborg's saloon, or had just then come out of the Eddy street entrance to it, saw them approaching and started towards the defendant, called him a "little son-of-a-bitch," and said, "You got a gun," and tried to grasp him. The defendant ran out on Taylor street, followed by McCann, who overtook him and grasped him and they fell on the street, the deceased on top of the defendant. As to what occurred when McCann reached the defendant, and just when the shots which occasioned his death were fired, is in dispute under the evidence. There was evidence however, on the part of the defendant that when McCann overtook the defendant he struck him on the side of the face, then caught hold of him, threw him down on the street, got on top of him, grasped him by the throat, saying, "You little son-of-a-bitch, I will kill you with your own gun," struck him again and was bumping his head against the cobblestones, when defendant pulled his pistol from his hip pocket and fired twice, both shots taking effect in the body of McCann and causing his death the day following. While McCann was pursuing the defendant, Fred Smith, his brother, ran into a store in the vicinity and was looking out of the show window on Taylor street, when the proprietor thereof addressed him, inquiring what was the matter. The only response made by Fred Smith was, "I knew he was going to get it." This statement of Fred Smith's was proven to have been made between the firing of the first and second shots at McCann by the defendant, and was admitted over the objection of the defense. It further appeared from the evidence that McCann was a marblecutter, 45 years of age, and weighed about 240 pounds. The defendant was 21 years of age, had been employed as a solicitor in the clothing business, and, according to his own testimony, weighed some time prior to the homicide, about 105 pounds, and for 3½ years had suffered from catarrh of the stomach and had been under the care of a physician, Dr. Newton, for 2½ years prior to the date of the conflict. This is a sufficient statement of the evidence to illustrate the points made upon this appeal.

Complaint is first made of the refusal of the court to give certain instructions which were requested by the appellant. As the record, however, shows that the instructions given by the court of its own motion embraced the same principles of law contained in the instructions asked by the defendant, he has no valid ground of complaint that the instructions tendered by him embodying the same principles were refused.

It is also insisted that the court erred in allowing certain witnesses for the prosecution to state the language used by the deceased towards Fred Smith in the saloon in which he called the mother of the defendant a whore. The claim of appellant is that, as he was not present at the time the language was used, evidence relative to its use was inadmissible against him. Before any proof of the use of this language by deceased was made it was shown that defendant on his second entry into the saloon, and after his brother had pointed out the deceased as the man who used the language, said, "Did you call my mother a whore?" and, "Can you repeat them [words] again?" Under these circumstances evidence of the language used by McCann towards Fred Smith about the mother of defendant, even though uttered in the absence of defendant, was admissible as explaining what defendant meant and to what he had reference when inquiring of McCann whether he had used the language, and asking him whether he could repeat it. Particularly is this true in view of the fact that Fred Smith, the brother of defendant, at this same time, inquired of McCann whether he could "repeat them words over again," followed immediately by the same inquiry made by the defendant. The jury were entitled to know what was meant by the inquiry of defendant as to whether deceased could repeat "them words again," and to know what words of deceased defendant referred to in order to clearly understand the inquiry addressed by defendant to McCann, and as throwing light upon the purpose and motive of defendant in making it.

It is next urged that the court erred in overruling the objection of appellant to the admission in evidence of the declaration made by Fred Smith while the shooting was taking place, namely, "I knew he was going to get it." It is insisted by the respondent that the defendant cannot avail himself upon this appeal of the alleged error in the admission of this evidence, because, although he objected to the question asked, he did not, after it was answered, move to strike out the response. This point is undoubtedly good. There was nothing on the face of the question to indicate that an answer to it might not be relevant, material, and competent evidence, and hence it was not improper to overrule the objection urged against the inquiry upon the only ground urged, namely, that it was irrelevant, immaterial, and incompetent. The question only appeared to be vulnerable to all these objections when the answer to it was given, and as that was the first and only time it appeared to be so, it was the duty of the defendant to move to strike the answer out, and having failed to do so, no error can be predicated on the overruling of the objection. People v. Williams, 127 Cal. 216, 59 Pac. 581; People v. Lawrence, 143 Cal. 148, 156, 76 Pac. 893, 68 L. R. A. 193. If this were the only point made for a reversal of the judgment, we would, for that reason, have to hold that it was not well taken; but, as the cause must go back for a new trial, we feel impelled to dispose of the question as to the admissibility of this evidence upon its merits, and now proceed to do so.

The theory of the prosecution on the trial of the case was that after McCann had used the language to Fred Smith when he first came in the saloon concerning his mother and sister the latter sought the defendant and a conspiracy was entered into between them to kill McCann, and in defense of this ruling of the trial court it is insisted by respondent that there was evidence in the case tending to show such conspiracy; that it was still existent, and its object had not been finally accomplished when the declaration was made, as the second shot had not then been fired by defendant; that, as Fred Smith was a conspirator with defendant when this declaration was made by him and was made pending the conspiracy and in furtherance of its design, it was admissible evidence against his co-conspirator, the defendant. We cannot agree with the position of respondent, and are of the opinion this evidence is inadmissible.

We do not discuss the claim made by appellant that there was no evidence in the case supporting the theory of a conspiracy. It was insisted, on the trial, that there was, and evidence was introduced, which, it is asserted now, supported that claim. Whether there was, or was not, a conspiracy entered into between these brothers having for its object the killing of McCann is a question of fact to be determined by a jury from the evidence under appropriate instructions from the court, and as the question immediately under consideration does not involve any inquiry as to whether there was, or was not, sufficient proof of the conspiracy, that question is left, where it properly belongs upon a new trial, namely, to the jury. For the purposes of present consideration, if it should be conceded there was sufficient proof of a conspiracy, still we do not think that this declaration of Fred Smith was admissible. The rule allowing statements or declarations of one conspirator to be given in evidence as against his co-conspirator requires, not only that the conspiracy be pending and its object not consummated when the statements or declarations are made, but also that such statements, in order to be admissible, must be in aid and furtherance of the common purpose or design of the conspiracy.

The rule is stated in Cyc., vol. 8, p. 680: "Acts or declarations of a conspirator cannot be admitted as against a co-conspirator, unless such acts were performed or declarations made in aid or execution of the conspiracy." And, as to the admission of such statements or declarations, it is said in People v. Irwin, 77 Cal. 494, 504, 20 Pac. 56, 59: "No declarations except those made 'during the pendency of the conspiracy and in furtherance of its objects,' can be used against a co-conspirator. Declarations showing past acts, or expressing merely the opinion or desire of the conspirator making them, are not binding upon any one except himself, or those in whose presence they are made"—citing cases. Now, examining the declaration of Fred Smith admitted in evidence in the light of the principle declared in these authorities, it is readily observable that such declaration was in no manner in aid or execution of the asserted conspiracy, or in any way in furtherance of its objects. A declaration, statement, or act of a conspirator, to be admissible as in "furtherance" of the conspiracy, must, as the word "furtherance" ex vi termini imports, be an act, statement, or declaration which in some measure, or to some extent, aids or assists towards the consummation of the object of the conspiracy. How can it be claimed that the declaration in question was of this character? When this declaration was made by Fred Smith, the conflict between his brother and McCann was practically on, and he had fled from the scene to a place of safety. Certainly, it cannot be pretended that at the time he answered the inquiry of the storekeeper he was doing anything in aid of the killing of McCann, or which tended to effect that object. His declaration that he knew that the deceased was "going to get it" was simply a statement of his belief or opinion on the subject. It was not made at a time when Fred Smith was aiding in furthering the object of the asserted conspiracy, nor was it a declaration in any manner in aid or furtherance of the alleged conspiracy, and as any declaration made by him could only be admissible if it were, such declaration was inadmissible when it was not. The only authority cited by respondent in support of the ruling is the case of People v. Murphy, 45 Cal. 137, but in that case the exclamation of Mrs. Murphy, the wife of the defendant who was on trial, accompanied acts done by her in furtherance of an apparent conspiracy entered into between her husband and herself to kill the deceased, and occurred in the presence and hearing of her husband at the time of the homicide and was admissible for that reason under the rule.

The last ground for a reversal is predicated upon the refusal of the trial court to permit the appellant to show what his physical condition was on the day of the homicide. In his statement to the jury before presenting the evidence on behalf of defendant, his attorney stated that, among other matters which would be proven by the defense, it would be shown that some time prior to, and at the time of, the homicide, defendant was under the care and treatment of Dr. Newton, a physician of the city and county of San Francisco; that he was afflicted with catarrh of the stomach, and on the day of the homicide was weak and sick as a result of this disease. Dr. Newton was called as a witness by the defendant to prove these facts, but the court refused to permit him to testify on the subject. The rejection of this evidence by the court was error. The rule is uniform that, when the defense is self-defense, it is always competent to show the relative physical strength of the deceased and the defendant. The defense in this case was self-defense. It was claimed by the defendant that the deceased was a larger and more powerful man than himself; that he had pursued him, struck him, and thrown him down upon the street; that he had him clutched by the throat, had declared his intention of killing him, and was beating his head on the cobblestones; and that to prevent the deceased from inflicting great bodily injury upon him, or carrying his threat of death into execution, and under a reasonable apprehension that he would do so, he fired the shots which killed him.

In considering that defense, the defendant was entitled to have go before the jury all evidence which tended to support it. It is always a material issue to such a defense whether defendant acted under a reasonable apprehension of the infliction upon him by deceased of great bodily injury, or death, at the time he killed him. And, as bearing upon that question, evidence of a great disparity of the relative physical condition of the deceased and the defendant is always an important and material fact to be considered by the jury. Common experience teaches that, when an attack is made without deadly weapons by one who is physically weak and feeble, upon another of vigorous physical condition and of superior strength, there is no room for asserting that any reasonable apprehension of injury from such an assault could exist, which would warrant killing the assailant. When, however, the assailant is a larger and more powerful man than the assailed, and the latter is unable to resist his attack, either on account of inferior natural physical vigor, or muscular debility occasioned through disease, it is equally general experience that such inability to resist on such account would naturally operate upon the mind of the assailed to create an apprehension of danger, which, if reasonably entertained, might justify him in killing his assailant. Whether he had grounds for a reasonable apprehension would be for the jury, and any evidence is competent which has a tendency to prove that fact. Certainly, evidence tending to show that a defendant was weak and enfeebled from disease would have a bearing upon that issue. It is only natural that one unable to successfully resist a dangerous assault made upon him because suffering from disease which has impaired his strength would more readily believe he was in imminent danger than if he were healthy and vigorous. Of course, the belief of the defendant that he was in such danger would not be conclusive. It would be for the jury to determine whether as a reasonable man he was justified in so believing. But, in determining that question, a defendant is entitled to have a jury take into consideration all the elements in the case which might be expected to operate on his mind, and, as a debilitated physical condition preventing him from successfully resisting his assailant might reasonably be expected so to do, defendant is entitled to have evidence of that fact, if it be a fact, go before the jury to be considered by them, with the other circumstances in the case, in ascertaining whether the plea of self-defense is sustained. The physical condition of the defendant is always important under such a plea in determining what a reasonable man in the position of the defendant would have done under the same conditions.

This principle of law is so well established that the citation of authorities is unnecessary. In fact, we do not understand the rule to be questioned by the respondent. Its position relative to this rejected evidence is that the defendant was not prejudiced by the ruling because he testified himself on the subject of the disease from which he was suffering. It is true he did testify that he had been afflicted with the disease for almost three years and a half, and had been under the care of Dr. Newton for two years and a half prior to the homicide. He did not, however, testify as to the effect of such disease upon his physical condition; to what extent, if any, it affected him or impaired his strength or vigor—matters upon which it is to be assumed the physician would have intelligently and thoroughly enlightened the jury had he been permitted to do so. Nor would it be a sufficient answer to the claim of error in rejecting the evidence of the physician to say that no prejudice resulted to the defendant because the defendant himself testified on the subject, and no evidence to the contrary was offered by the prosecution. It was of the highest importance to the defendant that the fact of his debilitated physical condition at the time of the homicide should be presented to the jury in support of his claim that he acted in self-defense. He was not only entitled to testify himself on the subject, but to introduce evidence to corroborate his testimony. He was entitled to present the matter to the jury fully and under the most favorable circumstances. And in that regard it seems hardly necessary to suggest that the jury would be more inclined to favorably consider evidence as to the physical condition of the defendant coming from a reputable physician—a disinterested witness—qualified to speak accurately on the subject, than they might when coming from the defendant, whose testimony in that respect they might consider colored in vital self-interest, if for this same reason they did not reject it as untrue.

There is nothing further presented on this appeal for consideration. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; ANGELLOTTI, J; SHAW, J.; HENSHAW, J.; McFARLAND, J.; SLOSS, J.

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151 Cal. 592

## PEOPLE v. GRILL. (Cr. 1,382.)

(Supreme Court of California. Aug. 6, 1907.)

1. Homicide—Corpus Delicti—Evidence.

In a prosecution for homicide, evidence *held* sufficient to establish that deceased was killed by a shot from defendant's gun, fired with criminal intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 471.]

2. Same — Mitigation—Justification—Excuse—Burden of Proof.

Pen. Code, § 1105, provides that on a trial for murder, the commission of the homicide by defendant being proved, the burden of proving circumstances of mitigation, or justification, is on him, unless the proof of the prosecution shows that the crime only amounted to manslaughter, or that defendant was justifiable or excusable. *Held*, that such section was not limited to cases where defendant claimed the killing was justified as in self-defense, but extended to a case where defendant claimed the killing was accidental.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 276.]

3. Criminal Law — Trial — Instructions — Weight of Evidence.

An instruction that, on a trial for murder, "the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation," etc., was on him, was not objectionable, as an intimation that the fact that defendant intentionally fired the shot that killed deceased had been proved; the jury being otherwise charged that they were the exclusive judges of the facts, and must decide only on evidence satisfying them of the existence of every essential fact beyond a reasonable doubt, that the corpus delicti must be proved by the state by competent evidence, and if the jury had a reasonable doubt as to whether or not deceased was killed by the accidental discharge of defendant's gun they must acquit him.

4. Same—Credibility of Witnesses.

An instruction that a witness willfully false in a material part of his testimony is to be distrusted in others, as provided by Code Civ. Proc. § 2061, was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1893.]

5. Same—Former Conviction—Punishment—Effect.

Where accused after having been convicted of murder in the first degree and sentenced to life imprisonment was granted a new trial, on his application, at which he was again convicted of the same offense, his former conviction and sentence was no bar to a sentence of death on the second conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 378, 394.]

6. Same—Evidence—Photograph.

Where, in a prosecution for homicide, defendant claimed that he accidentally shot deceased, and that after the shot was fired he placed the gun on the floor of the front room of deceased's cabin in front of the bed, and there was nothing in the case which made the exact position of the gun at all important, a photograph of the front room of the cabin taken six days after the homicide was not objectionable because there was some uncertainty in the evidence as to whether the gun was in exactly the same position when the photograph was taken as when first found after the shooting, there being evidence that the articles shown in the photograph, including the gun, were respectively in the same position as when the body of deceased was found the morning of the homicide.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 893.]

7. Same — Evidence at Former Hearing — Absence of Witness.

In a prosecution for homicide, evidence *held* to sustain a finding that a witness was out of the state at the time of the trial and could not be produced, so as to authorize the introduction of her testimony taken at the preliminary examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1236.]

8. Same—Order of Proof.

That the court permitted the testimony of a witness at the preliminary examination of accused to be admitted and read to the jury before all of the evidence to show the witness' absence from the state at the time of the trial had been produced was not an abuse of discretion, where the subsequent proof fully established such fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1611.]

In Bank. Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

A. J. Grill was convicted of murder, and he appeals. Affirmed.

See 86 Pac. 613.

Ross Campbell, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

SHAW, J. The defendant was charged with the murder of one W. S. Pearse. He was convicted of murder of the first degree. His motion for a new trial was denied, and he was sentenced to death. He appeals from the judgment and order.

1. Certain statements made by the defendant, wherein he admitted that Pearse received his death wound from a shotgun which defendant at the time held in his hands, he claiming that the discharge was accidental, were introduced in evidence. It is urged that there was no sufficient proof of the corpus delicti aside from these admissions. This claim is evidently based on the assumption that the deposition of Mae Pearse, daughter of the deceased, was improperly admitted in evidence, and upon a consideration only of the other evidence of the prosecution. We have concluded, as will hereafter be shown, that her deposition was properly admitted, and with that evidence the proof of the corpus delicti is ample, without aid from the defendant's admissions.

At the time of the homicide Pearse, with his daughter, who was 14 or 15 years old, was living in a small cabin consisting of two rooms, one in front of the other, with a door communicating between them. Grill had arrived at the Pearse cabin the day before on a visit and had remained overnight, sleeping in a bed in the rear room. On the day of the homicide, which was Sunday, Pearse and Grill went hunting together, returning to the cabin about seven in the evening. Pearse then, according to the evidence for the prosecution, accused Grill of stealing some money which he said he had left in the house, and there was a quarrel between them which continued from time to time until about 9 o'clock, Pearse in the meantime having taken off his clothes preparatory to going to bed. Some noise was made by a dog on the outside of the house, whereupon both went out of the house, Grill carrying a shotgun. The noise subsided, both re-entered the house, and Pearse apparently laid down upon the bed in which he usually slept. This bed stood in the left-hand corner of the front room, with the head toward the door leading to the rear room. The quarrel continued after they re-entered the house and presently a shot was heard. Grill came out of the house, saying to the daughter that he had killed a skunk. Thereupon he and the daughter, who had remained outside, left the premises in a buggy and drove to the residence of Mrs. Stoffal, where the daughter remained. Grill had been working for Mr. Jacobs, a neighbor of the deceased, and he arrived at Jacobs' residence about midnight and stayed there the remainder of the night, sleeping in a room by himself. The following morning he went to his work without mentioning Pearse's death, or saying anything about any trouble at Pearse's residence. The next morning Pearse was discovered by the neighbors lying upon his bed dead from a gunshot wound in the back part of the head. He was lying on his back, but partly on his left side, facing towards the front of the house, with the back of his head toward the rear room, his head resting on a pillow. A double-barreled shotgun, with one barrel recently discharged, lay upon the floor in front of the bed. The position and character of the wound indicated that the shot had come from the rear, and a witness who saw the body as it was found testified that "the shot came right from the rear, right square from the rear. It couldn't come from any other direction." Five or six slits cut in the pillow a few inches from the head of the deceased, and apparently made by shots from the gun, pointed in the direction leading from the partition door to the wound. There were no powder marks on the pillow. The nature of the wound, its location in the back part of the head, the position of the body, the slits in the pillow, the absence of powder marks, and the conduct and statement of the defendant after the shooting, furnished sufficient evidence of the fact that the deceased was killed by a shot from the defendant's gun fired with criminal intent.

2. The court, in its instructions, read to the jury section 1105 of the Penal Code, which is as follows: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." It is claimed that this was error. The position of the defendant is that this instruction is not applicable, except where the defendant admits the intention to kill and claims that it was in self-defense, and that it was harmful because of the phrase, "the commission of the homicide by the defendant being proved," which, it is said, constituted an intimation or statement by the court that the fact that the defendant intentionally fired the shot had been proven. It is not the law that this instruction is applicable only where the justification offered is that the killing was in self-defense. It applies in any case where the defendant offers evidence in mitigation of the offense, that is, to reduce the degree of the crime; or in justification, as that it was in self-defense or in the lawful execution of a death sentence; or in excuse, as that it occurred by accident and not design. The defense in this case was that it occurred by accident, and this, if

proved, would have been an excuse for the homicide. The instruction was therefore applicable to the case. The phrase objected to was not inserted in the instruction as a statement by the court that the commission of the homicide by the defendant had been proved. It was meant as an expression of a condition or event, upon which the succeeding part of the instruction would become applicable, and that is its true rhetorical meaning when considered in connection with the text. Its signification is the same as if the sentence began thus, "When, upon a trial for a murder, the commission of the homicide by the defendant has been proved," etc. Thus understood, it does not constitute a statement of the fact by the court. In People v. Tapia, 131 Cal. 647, 63 Pac. 1001, this instruction was given with some additions declaring the extent of the burden of proof cast upon the defendant. It was criticised in that case upon the ground that the jury might have understood the above-quoted phrase as a declaration that the fact referred to had been proved. The defendant in that case did not attempt to mitigate, justify, or excuse the homicide, but denied that he had committed the act. Consequently, it was said, "the instruction should not have been given, for it was entirely inapplicable." The evidence that Tapia did commit the homicide was said to be very weak and unsatisfactory. It was in view of this condition of the evidence and of the inapplicability of the instruction to the case that the court considered that the jury might have misconstrued the expression as a statement by the court with regard to the sufficiency of the evidence. In the present case the instruction could not have been so understood by the jury. Other instructions repeated frequently the proposition that the jury were the exclusive judges of the facts. They were told that they must not decide upon a preponderance of the evidence, but that the prosecution must show the defendant's guilt, and every fact essential to a conviction, beyond a reasonable doubt, and must prove the corpus delicti by competent evidence beyond reasonable doubt before they could consider the admissions of the defendant; that if they had a doubt whether or not Pearse was killed by the accidental discharge of the defendant's gun they must acquit the defendant; that the burden of proof was upon the prosecution, and if upon the proofs there was a reasonable doubt of his guilt remaining the defendant must be acquitted. In view of these instructions it would be impossible for any jury of ordinary intelligence to have supposed that the instruction complained of was intended to state to them that the fact that the defendant had committed the homicide had been proven. See People v. Hawes, 98 Cal. 653, 33 Pac. 791.

3. Another instruction stated that "a witness willfully false in a material part of his testimony is to be distrusted in others." That this is a principle of the law of evidence, and one of the rules by which the court or jury must be guided in the consideration of the weight of evidence, cannot be disputed, for it is made so by statute. Code Civ. Proc. § 2061. It has been repeatedly held by this court that the giving of such an instruction is not cause for reversal, and we adhere to the precedents thus made. People v. Dobbins, 138 Cal. 694, 72 Pac. 339; People v. Tibbs, 143 Cal. 103, 76 Pac. 904; People v. Wardrip, 141 Cal. 229, 74 Pac. 744; People v. Farrington, 140 Cal. 656, 74 Pac. 288; People v. Wong Bin, 139 Cal. 65, 72 Pac. 505; People v. Wilder, 134 Cal. 184, 66 Pac. 228; People v. Kelly, 146 Cal. 123, 79 Pac. 846.

4. Upon a former trial for the same charge the defendant was convicted of murder of the first degree with the penalty of imprisonment for life. A new trial was granted upon his own motion. It is now claimed that, where there is a charge of murder of the first degree and a conviction of murder of the first degree with the penalty of imprisonment for life, such judgment is a virtual acquittal of the character of murder sufficiently atrocious to justify the death penalty and is a bar to the infliction of the death penalty upon a retrial of the same charge. There is no foundation for such claim. It has been held that a conviction of murder of the second degree, upon the trial of a charge of murder of the first degree, is no bar to a subsequent conviction of the higher degree, upon a retrial of the same case granted upon defendant's motion. People v. Keefer, 65 Cal. 235, 3 Pac. 818; People v. Carty, 77 Cal. 216, 19 Pac. 490; People v. Gordon, 99 Cal. 232, 33 Pac. 901. Upon this exact point we need express no opinion. The discretion given to the jury to mitigate the punishment upon a conviction of murder in the first degree and inflict imprisonment for life only does not divide that degree of murder into two degrees, but merely reduces the punishment. The mere substitution of imprisonment for life for the death penalty is not a determination that any element of murder of the first degree is lacking. On the contrary, such a verdict cannot be given until all the facts necessary to constitute that degree of murder are established. The former conviction was not an acquittal of the first degree of murder, nor of any degree thereof. The instruction asked by the defendant to the effect that it was a bar against the infliction of the death penalty was properly refused.

5. A photograph of the front room of the Pearse cabin, taken six days after the homicide, was admitted in evidence after proof that the articles shown therein, including a shotgun lying on the floor, were, respectively, in the same position as when the body of Pearse was found the morning after the homicide. It is claimed that there was some uncertainty in the evidence introduced as a foundation for the introduction of this photograph as to whether the gun was in exact-

ly the same position when the photograph was taken as it was when first found after the shooting, and hence it is contended that the admission of the photograph was error. The theory of the defense was that after the discharge of the gun in defendant's hands he placed it on the floor of the front room in front of the bed, and the defendant so testified. There was nothing in the case which made its exact position at all important. A witness who saw it when first found testified that the photograph showed it in practically the same place. It was admitted as a diagram or illustration. The ruling was proper and is sustained by the following decisions: People v. Crandall, 125 Cal. 132, 57 Pac. 785; People v. Phelan, 123 Cal. 564, 56 Pac. 424; People v. Figueroa, 134 Cal. 161, 66 Pac. 202; People v. Mahatch, 148 Cal. 200, 82 Pac. 779.

6. The deposition of Mae Pearse, the daughter of the deceased, taken at the preliminary examination of the defendant, was admitted at the trial, over his objection that there was no sufficient proof that she could not with due diligence be found within the state. A witness testified that he knew that Mae Pearse was, at the time of the trial, in the home of the Boys' and Girls' Aid Society in Portland, Or. Another witness, who was a relative of hers, testified that he knew her; that to the best of his knowledge she was in Portland, Or.; that it was 9 or 10 months since he had heard from her; and that at that time she was in the Boys' and Girls' Aid Society in Portland, and that the chief of police of Portland informed him of that fact. The sheriff's return on a subpœna showed that she was not found in Sonoma county. This evidence was somewhat weakened on cross-examination by showing that the relative's testimony as to her presence in Portland, Or., was based, in part at least, upon information received from the chief of police, and that the witness who testified positively that she was in Oregon had not known her while she was in California. Other circumstances were given, however, and the evidence as a whole was sufficient to sustain the decision of the court that she was absent from the state at the time of the trial and could not be produced as a witness. People v. Lewandowski, 143 Cal. 576, 77 Pac. 467; People v. Reilly, 106 Cal. 650, 40 Pac. 13. At the time the deposition was read the whole of the evidence to show her absence had not been produced. This, however, was merely a matter of the order of proof which is always within the discretion of the court, within reasonable limits. The subsequent proof upon the subject cured any error that might have been committed in admitting the deposition before the foundation was fully laid.

No other objections to the regularity of the proceedings are made by the counsel for the defendant, and upon an independent examination of the record we perceive no error committed by the court against the defendant. The trial seems to have been in all respects fair and regular.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

151 Cal. 606

## HALL v. JAMESON. (L. A. 1,905.)

(Supreme Court of California. Aug. 9, 1907. Rehearing Denied Sept. 5, 1907.)

1. Bills and Notes—Signing as Trustee—Personal Liability.

W. deeded land to J., as trustee, with power to mortgage it. J. gave a mortgage beginning "I, J., as I am trustee" under a deed from W., by virtue of the power in said deed, in consideration of $2,800, convey said land, with the condition that if he pay to the said grantee said sum the deed, and a note signed by him, whereby he promised to pay said sum, should be void, and with the covenant that he would observe the terms of said condition. J. gave a note whereby he promised to pay the $2,800. signed "J., trustee." *Held*, that as the deed of W. gave no power to J. to make a personal promise on behalf of the beneficiaries or trustor, and as Civ. Code, § 2267, providing that a trustee is a general agent for the trust property, that his authority is such as is conferred on him by the declaration of trust and by this chapter, and none other, and that his acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal, gives no such power, and as the note or mortgage contained no stipulation relieving him from personal liability or requiring the lender to look to the mortgaged property alone as security, he was personally liable on the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 260-267.]

2. Limitation of Actions—Accrual of Cause of Action—Sale under Power in Mortgage—Action for Balance.

A note and mortgage provided that the sum borrowed should be paid in three years, with interest to be paid semiannually. The mortgage provided that on default in performance of any condition the mortgagee might sell the mortgaged premises at auction, on three weeks published notice, and out of the proceeds retain all sums secured by the mortgage. *Held*, that such sale and application of the proceeds had no effect to render due the balance of the debt, so that the statute began to run against an action therefor only from the end of three years after the giving of the note.

In Bank. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by F. G. Hall against William H. Jameson. Judgment for plaintiff. Defendant appeals. Affirmed.

E. W. Freeman, for appellant. John G. North, for respondent.

SHAW, J. This is a suit upon a promissory note in the following words: "$2800. Boston, June 8th, 1897. For value received, I promise to pay to Nathaniel U. Walker, trustee under the will of Francis Jackson, for the benefit of Harriet M. Palmer, or order, two thousand eight hundred dollars, in three years from this date with interest, to be paid semiannually, at the rate of five per centum per annum, until this note is paid in full. William H. Jameson, Trustee." This note was assigned to plaintiff before suit. Judgment was given for the plaintiff, and the defendant's motion for a new trial was denied. The defendant appeals from the judgment and order.

1. It is first contended that the note is not binding upon the defendant personally, but only upon him in his capacity as trustee, and that, therefore, the personal judgment against him is erroneous. Prior to the execution of the note, one William L. Joy had executed a deed conveying to the defendant, as trustee for certain stated purposes, a tract of land in Massachusetts. The deed empowered the defendant, as trustee, "to mortgage said property, or any part thereof, from time to time for such sums, to such persons or corporations (and) upon such terms as he may deem expedient," and gave directions as to the disposition of the money thus to be obtained. In pursuance of this power the defendant borrowed of Walker, the payee of the note, the sum of $2800, for which he executed the above note, and at the same time, to secure its payment, he executed to Walker a mortgage upon the Joy land. This mortgage, being part of the same transaction, must be read in connection with the note, and the whole construed as one contract in order to arrive at the true meaning of each. The mortgage was in the common-law form, purporting to convey the land to Walker as security for the debt. It began thus: "Know all men by these presents, that I, William H. Jameson, as I am trustee under a certain deed from William L. Joy, * * * by virtue of the power in said deed contained and every other power me hereto enabling, in consideration of two thousand eight hundred dollars, * * * do hereby give, grant, bargain, sell and convey unto the said Nathaniel U. Walker," etc., the land particularly described. The condition was in part as follows: "Provided, nevertheless, that, if I, my heirs, executors, administrators, or assigns, shall pay unto the grantee or assigns, the sum of two thousand eight hundred dollars in three years from the date hereof, with interest thereon," etc., * * * "then this deed, as also a note of even date herewith, signed by me, whereby for value received, I promise to pay the grantee or order the said principal sum and interest at the times aforesaid, shall be void." There followed a covenant in these words: "And I hereby, for myself and my heirs and assigns, covenant with the holder or holders hereof to perform and observe each and all of the terms of the foregoing condition." In explanation of the meaning of the contract as affecting the personal liability of Jameson, evidence was introduced to show that he obtained no personal benefit from the transaction, and that he was acting throughout solely in the interest of the trustor and the beneficiaries. There was also testimony of a contemporaneous understanding that Jameson was not to be held personally liable, but as this was contradicted by other testimony and the finding is in favor of the plaintiff, we must disregard that testimony, even if we considered it competent.

This contract by its terms purports to make the defendant personally liable thereon, and neither the context nor the circumstances proven are sufficient to change its effect in that particular. It has been held that where a promissory note reading "we promise to pay," etc., is signed by the president of a company subscribing his own name with the addition of the words "Prest. Pac. Peat Coal Co." and by the secretary of the company with the addition of the words "Sec. pro tem.," it is the note of the company and not the personal obligation of the president and secretary. Farmers' & M. Bank v. Colby, 64 Cal. 352, 28 Pac. 118. On the other hand, a note reading "we promise to pay," etc., and signed "D. Hassett, President," was held to be the personal liability of D. Hassett. Hobson v. Hassett, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193. The court in the latter case said: "There is nothing on the face of the note to show that there was any principal back of the defendant. He signed his own name, and wholly failed to indicate, if he had a principal, who or what the principal was. The word 'president,' which he added to his name must be regarded as a mere descriptio personæ." These cases perhaps sufficiently illustrate the rule applicable to contracts thus signed where the maker claims exemption from personal liability on the ground that he is an agent. If the facts in this case brought it within the rule applied in Farmers' & M. Bank v. Colby, supra, the defendant would be exonerated. But it is not a similar case. In the Colby Case there was no question but that the president and secretary had power to bind the company by contract, and to that extent at least it is different from the case at bar. In the Hassett Case the decision went upon the ground that the contract of Hassett did not purport to bind any one but himself, and that, although he did not so intend and was in fact acting for his principal, the contract could not be varied by parol evidence. This case is governed by the latter rule. The contract made by Jameson consists of two distinct and separate parts—the mortgage on the land, and the promise and covenant to pay the money, which the latter purported to bind the trustee personally. The trust deed of Joy to Jameson gave the latter power only to mortgage the trust property. It gave no power whatever to make any promise or covenants to pay any money on behalf of Joy or on behalf of the beneficiaries. With respect to the mortgage, Jameson was acting solely as trustee, and could not act otherwise, for he had no personal interest in, or power over, the land. With respect to the note and covenant, he was acting solely in his own behalf, for he had no authority thus to contract except for himself. Where an agent makes a contract really on behalf of his principal, but which purports to be his promise and to bind himself alone, and he has not in fact any authority to make that particular contract for his principal, the general rule is that the agent will be personally bound by the contract, notwithstanding his lack of personal interest in the consideration. He will be conclusively presumed to have intended to bind himself. This rule is particularly applicable where a trustee, in dealing with trust property, makes some personal promise to pay money in furtherance of the trust, which he has no authority to make as trustee. In regard to such contracts he is a principal and must be presumed to have intended to act for himself alone. The rule is thus stated by the Supreme Court of the United States in Taylor v. Mayo, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163: "When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise. The contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name or office or employment will not discharge him. * * * If a trustee, contracting for the benefit of a trust, wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, and that the other party is to look solely to the trust estate." There is nothing in the note or mortgage of Jameson that can be construed as a stipulation relieving him from personal liability or requiring the lender to look to the mortgaged property alone as security. The reference, in that part of the instrument operating as a conveyance, to the fact that Jameson was conveying as trustee, was properly inserted therein for the purpose of designating the source of the power by which he was assuming to hypothecate the trust property. It only indicates the character in which he acted and the power which he possessed in relation to the part of the contract which constituted the mortgage, and it does not purport to qualify the direct covenant to pay contained in that instrument, nor the express promise contained in the note. The power to "mortgage" the property did not include power to make a personal promise on behalf of the beneficiaries, or the trustor, that they, or either of them, should pay the money. It carried power only to pledge, convey, or hypothecate the property as security for money. Civil Code, § 2920. The defendant's promise to pay the money was not necessary to the execution of the power, and it must be considered as his own personal obligation whereby he became surety for the payment of the money.

There is nothing in section 2267 of the Civil Code contrary to this conclusion. It is as follows: "A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal." This refers to the trust property alone. His acts respecting that property, if authorized by the terms of the trust, bind the property. He is to that extent an agent for the property and for the interested parties. Consequently, the mortgage of the trust estate in this case was valid; but nothing in this section, nor in the deed of trust, gave him an authority to bind the trustor or beneficiaries personally.

We are therefore of the opinion that the personal judgment against Jameson is supported by the evidence.

2. It is further claimed that the action is barred by the statute of limitations. The note and mortgage were executed in the state of Massachusetts, and therefore under subdivision 1, § 339, Code of Civil Procedure, the action would be barred two years after the cause of action accrued. The action was begun on January 3, 1902. By the terms of the note it did not become due until June 8, 1900, which was less than two years before the action was begun. The mortgage provided that the sum borrowed should be paid in three years from its date, "with interest thereon, at the rate of 5 per centum per annum, payable semiannually." It also contained the following provision: "But upon the default in the performance of any part of the foregoing conditions, the holder or holders hereof may sell the granted premises * * * at public auction; such sale to be on or near the granted premises, or at the real estate exchange and auction board in the city of Boston, without notice or demand, except giving notice of the time and place of sale once in each of three successive weeks in any one newspaper published in said Newton, and may convey the same by proper deed or deeds to the purchaser. * * * And out of the proceeds of such sale or sales the holder or holders hereof shall be entitled to retain all sums then secured by this deed (whether then or thereafter payable), including all costs," etc. Default was made in the payment of the interest due on December 8, 1898, and again on June 8, 1899. Thereupon on June 14, 1899, under the power aforesaid the mortgagee sold the premises for the sum of $2,000. This left a balance of $1,221.68 remaining unpaid on the principal and interest on the note.

The argument is that, under the terms of the power of sale above set forth, it was necessary for the mortgagee to declare the principal and interest on the note and mortgage immediately due and payable, as a condition precedent to, or concurrent with, the exercise of the power of sale; that this election transformed the debt into a matured obligation, on which an action might have been maintained on June 14, 1899; that the statute of limitations began to run at that date; and, hence, that the action was barred two years thereafter. In support of this claim the defendant cites Brickell v. Batchelder, 62 Cal. 624, Maddox v. Wyman, 92 Cal. 674, 28 Pac. 838, and Phelps v. Mayers, 126 Cal. 549, 58 Pac. 1048. In none of these cases was there any question concerning the effect which the exercise of such a power of sale as the one here involved would have in accelerating the time of maturity of any balance on the debt remaining unpaid after the proceeds of the sale were applied thereon. The question in each case was concerning the right to foreclose for the entire debt, where the mortgage authorized a foreclosure suit upon a default in some minor condition, before the maturity of the entire debt. The cases are therefore not strictly in point, even if the instruments were alike. But they are not identical. There is a difference in the terms which is important and material. The case of Brickell v. Batchelder is as strongly in favor of the defendant as any of the cases cited, and a comparison of the mortgage there construed with that here involved will serve to distinguish them all. In that case the mortgage provided as follows: "But in case default shall be made in the payment of the said principal sum or the interest thereon, or any part thereof, * * * then said party of the second part, his heirs, executors, administrators, or assigns, are hereby empowered to proceed to sell the premises above described, with all the appurtenances, *in the manner prescribed by law.* And out of the money proceeding from such sale, the party of the second part shall retain the above amount of thirty-six thousand dollars," with interest and costs and 2 per cent. for attorney's fees, which the instrument declared should become a debt to the mortgagee "upon filing the complaint in foreclosure." (The italics are ours). The other cases are substantially the same in this respect. The provision in the mortgage here involved was that the mortgagee "may sell the granted premises at public auction," said sale to be "on the granted premises" or at the Boston real estate exchange, and "without notice or demand except" a three weeks' notice in a newspaper. The reason for holding that the mortgage in Brickell v. Batchelder, supra, required a declaration making the entire debt immediately due, was that the provision authorizing the sale of the premises "in the manner prescribed by law" could not be construed otherwise than as requiring a sale upon execution issued upon a decree of foreclosure in an action for that purpose. This was said to be obvious from the fact that there was no other manner "prescribed by law" that could be applicable to such a case. And, as this made a foreclosure suit necessary to the exercise of the supposed power, it necessarily, in the opinion of the court, implied that the mortgagee was given power to declare the entire debt fully matured, notwithstanding that, by the terms of the mortgage, the principal was not yet payable. It was assumed, although not stated, that an action of foreclosure could not be maintained, unless the entire debt was declared due. In the present case the terms of the mortgage imposed no such necessary implication and presented no such difficulty. The sale was not to be made by the sheriff as upon an execution sale, but at public auction on the premises, and by the mortgagee upon a notice specially prescribed in the power. No suit for foreclosure was required. The mortgagee could execute the power without judicial authority. It provided that the mortgagee should retain out of the proceeds of sale a sum sufficient to pay the note and interest. This implied that, when the sale was made, a part of the principal and interest on the debt equal to the proceeds which might be applicable thereto should thereupon be payable. But to say that a sum is payable is not the same as to say that it is due. A note made payable "on or before" a fixed date is payable at any time after it is executed; but it does not become due until the date fixed. In the mortgage under consideration there is not a word to the effect that the debt shall become due upon the sale, nor to the effect that the mortgagee, as a condition to the exercise of the power, must declare that it is due. The express language of the instrument is that it shall not become due until three years after its date. To interpolate a provision that it shall all become due upon a sale under the power, or that by such sale a greater part of the principal shall be immediately payable than the proceeds of the sale will pay would be to put in the contract that to which the parties did not agree, and that which would contradict the express terms to which they did agree. By the contract, the payor of the note was to have the full term of the note within which to pay any deficiency remaining thereon, after the application of the proceeds of the sale. The mortgagee was given no power to deprive the payor of this advantage by any declaration he could make at the time of the sale. The effect of the sale and of the application of the proceeds was a mere payment upon the debt, a payment authorized to be made before its maturity and of no more force in accelerating the maturity of the debt than any other payments authorized to be made upon a debt before it becomes actually due. It disposed of the mortgaged property in execution of the mortgage, and practically extinguished that part of the contract, leaving remaining the covenant to perform and the promise contained in the note which remained in force to the extent of the balance remaining unpaid. These were separate obligations and the suit is upon the note. No action could have been maintained for the balance due thereon until the expiration of three years from its date. It follows that the action was not barred by the statute of limitations.

The judgment and order are affirmed.

We concur: McFARLAND, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

151 Cal. 113

## MALONE v. SIERRA RY. CO. OF CALIFORNIA. (Sac. 1,470.)

(Supreme Court of California. May 2, 1907. Rehearing Denied May 31, 1907.)

1. Appeal — Review — Prejudice — Jury —Challenge for Bias.

The Supreme Court will not review the refusal of the trial court to allow a challenge for bias, unless injury is shown, and where it does not appear that defendant was forced to exercise a peremptory challenge on a juror, or that he had exhausted his peremptory challenges, no injury is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4126.]

2. Damages — Assessment — Physical Examination of Plaintiff.

Where, in an action for personal injuries, plaintiff consented to submit to an examination by any physicians appointed by the court, and offered, while on the witness stand, an inspection of his injured arm to defendant's medical experts, and it appeared that two of such experts had previously examined and inspected plaintiff's injuries, and the third was given an opportunity to inspect them, being appointed by the court for such purpose, it was not error to refuse defendant's application that a personal examination be made of the body of plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 531.]

3. Appeal—Harmless Error—Instructions.

Where, in an action for personal injuries, the reasonableness of the expenses which plaintiff had incurred for medical treatment, etc., was not disputed, an instruction that plaintiff was entitled to recover such sum as would compensate him for the expense he had incurred for medical treatment during the time he was disabled, while erroneous as not limiting the expenses to the necessary and reasonable value of the medical services, was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4219.]

4. Damages—Personal Injuries—Nominal Damages.

Where, in an action against a carrier for injuries to a passenger through negligence, there was no evidence as to what wages plaintiff earned or as to his earning capacity, but the nature of plaintiff's employment and the occupations at which he had worked were in evidence, plaintiff was entitled to recover more than merely nominal damages.

5. Same—Mental Anguish.

In an action for personal injuries, through negligence, mental suffering or anguish is an element of damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 255.]

6. Same—Instructions.

Under Civ. Code, § 3283, providing that damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future, instructions, in an action for personal injuries, authorizing the jury to estimate prospective damages upon what they believed might be the plaintiff's future suffering, were erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 552.]

7. Trial — Instructions — Error Cured by Subsequent Instruction.

The error in the instructions was not cured by a subsequent instruction that plaintiff was entitled to recover not only such damages as he might have suffered, but also such damages as by the evidence it was reasonably certain he would suffer in the future.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 715.]

Department 2. Appeal from Superior Court, Tuolumne County; L. W. Fulkerth, Judge.

Action by Edward D. Malone against the Sierra Railway Company of California. Judgment for plaintiff, and defendant appeals. Reversed.

S. D. Wood, J. C. Campbell, and F. W. Street, for appellant. F. D. Nicol, F. P. Otis, and Ashley & Neumiller, for respondent.

HENSHAW, J. Plaintiff was a passenger upon one of defendant's trains, and was injured by a collision between his train and another, also belonging to defendant. He brought his action to recover damages for injuries inflicted, and the jury returned a verdict in his favor. From the judgment which followed defendant moved for a new trial, which the court refused. Defendant appeals from the judgment and from the order refusing it a new trial.

1. It is urged that the court erred in not allowing the challenge for bias interposed by defendant to one of the panel; but it has long been the rule of this court that it will not review the action of the trial court in this regard, unless prejudice or injury is shown. People v. McGungill, 41 Cal. 429; People v. Gatewood, 20 Cal. 149; People v. Gaunt, 23 Cal. 157; People v. Weil, 40 Cal. 268. By the record before us it is not made to appear that defendant was forced to exercise a peremptory challenge upon the juror, or that defendant had exhausted his peremptory challenges. In no way, therefore, is it made to appear that it suffered any detriment by the ruling of the court.

2. It is contended that the court erred in refusing defendant's application that a personal examination be made of the body of the plaintiff. This court has recently had occasion to consider this matter in Johnson v. Southern Pacific Company, 89 Pac. 348. The facts in this case, however, disclose that plaintiff consented to submit to an examination by any physicians appointed by the court; that he had, while on the witness stand, offered an inspection of his injured arm to the defendant's experts, Drs. Anderson, Congdon, and Gould. Drs. Anderson and Congdon had previously examined and inspected the plaintiff's injuries, and Dr. Gould was given an opportunity to examine and inspect them, and was appointed by the

court to make such examination. We see no force, therefore, in defendant's objection.

3. In instructing the jury upon the measure of damages, the court declared as one of the elements of damage "such sum as will compensate him for the expense, if any, he has paid or incurred in the employment of a physician and the purchase of drugs during the time he was disabled by the injuries, not exceeding the amounts alleged in the complaint." It is objected to this instruction that the correct measure of damage in this regard is not the amount which he may have paid or become liable for, but the necessary and reasonable value of such services as may have been rendered him; such reasonable sum, in other words, as has been necessarily expended or incurred in treating the injury. Such unquestionably is the true rule; yet we do not believe that the jury could have been led into error prejudicial to the defendant by the instruction which was given. The reasonableness of the expenses which plaintiff had incurred was not disputed.

4. The court further charged the jury that the plaintiff could recover for the value of his time during the period that he was disabled by the injury. It is said that there was no evidence as to what wages the plaintiff earned, or as to his earning capacity, and that it was therefore error for the court so to charge. But the nature of plaintiff's employment, the occupations at which he had worked, were in evidence, and, even without any positive testimony as to the wages which he had previously earned, there was sufficient to have warranted the jury, in case they found a permanent impairment of earning capacity, to have awarded more than merely nominal damages. Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72.

5. The court instructed the jury that an element of damage was "the pain and anxiety that he has suffered or may suffer by reason of his injuries." And, again, it instructed them that in estimating damages "you may take into consideration * * * the physical and mental suffering he may have sustained or may undergo in the future by reason of the injuries." It is argued that mental suffering is not an element of damage. In support of this proposition is cited Newman v. Smith, 77 Cal. 22, 18 Pac. 791, which was an action in fraud concerning real property, and the plaintiff sought a recovery for the worry, annoyance, and anxiety which the fraud had caused him. This court held that these were not elements of damage in such a case. Munroe v. Dredging Co., 84 Cal. 516, 24 Pac. 303, 18 Am. St. Rep. 248, was an effort in an action by the personal representatives of the deceased to recover damages for the grief and mental suffering of the deceased's next of kin, and it was held that in such a case this was not a permissible element of damage. In Morgan v. S. P. Co., 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143, an action by a mother to recover damages for the death of her child, the same effort was made to recover for the sorrow and mental anguish of the parent, and it was held that in that case it was not an element of damage. But, upon the contrary, where the suffering or mental anguish is endured by the victim, it has been recognized as an element of damage since the case of Malone v. Hawley, 46 Cal. 409. See Sloane v. So. Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

6. In instruction 18, the court informed the jury that an element of damage was "such reasonable sum as the jury shall award him on account of the pain and anxiety that he has suffered or may suffer by reason of his injuries." In instruction 19, the jury was informed that "in estimating the damages to be awarded you may take into consideration * * * how far his injuries are permanent in their character and results, as well as the physical and mental suffering he may have sustained or may undergo in the future by reason of the injuries." These instructions were erroneous in permitting the jury to estimate prospective damages upon what they believed might be the plaintiff's future suffering. The rule as laid down in section 3283 of the Civil Code declares that: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof or certain to result in the future." An instruction that the jury may award such prospective damages, if any, "as they believe plaintiff has sustained or will sustain," has been held erroneous. Pa. Co. v. Files, 65 Ohio St. 403, 62 N. E. 1047. An instruction that the plaintiff could recover for bodily pain and suffering, which "he may have to endure in the future," is condemned. Raymond v. Keseberg, 91 Wis. 191, 64 N. W. 861. An instruction that a recovery might be had for the pain and suffering which "plaintiff was likely to endure in the future" is also condemned. Kucera v. Merrill Lum. Co., 91 Wis. 637, 65 N. W. 374. An instruction that, "in estimating the damages, you will allow plaintiff for any physical suffering and pain and mental anguish, if any, she has suffered and shown in evidence, or which she may in the future suffer, if any, in consequence of the alleged injury," is erroneous, as permitting the jury to enter the realm of speculation regarding such future suffering. Hall v. Cedar Rapids, etc., Ry. Co., 87 N. W. 739, 115 Iowa, 18. To the same effect is Chicago Ry. Co. v. De Clow, 124 Fed. 142, 61 C. C. A. 34; Chicago, etc., R. R. Co. v. McDowell, 92 N. W. 121, 66 Neb. 170; Ross v. Kansas City, 48 Mo. App. 440; Ohio, etc., Ry. Co. v. Cosby, 107 Ind. 32, 7 N. E. 373. It is true that in a succeeding instruction the court declared that plaintiff was entitled to recover, not only such damages as he may have suffered, but also "such damages as by the evidence it is reasonably certain he will suffer in the future." Herein is a declaration of the true

rule, but none the less the instructions upon the matter are conflicting, and it cannot be said by which the jury was guided.

For which reason the judgment and order must be reversed, and the cause remanded.

We concur: McFARLAND, J.; LORIGAN, J.

151 Cal. 649

## PEOPLE ex rel. McCONNELL v. CITY OF WILMINGTON et al. (L. A. 2,000.)

(Supreme Court of California. Aug. 13, 1907. Rehearing Denied Sept. 12, 1907.)

MUNICIPAL CORPORATIONS—INCORPORATION—ORGANIZATION—CHARTER—REPEAL.

Act Feb. 20, 1872 (St. 1871–72, p. 108, c. 113), as amended by Act March 21, 1872 (St. 1871–72, p. 446, c. 337), incorporating the town of Wilmington, never having been followed by an organization of the town as a municipal corporation, the Legislature was not deprived, by Const. art. 11, § 6, providing that municipal corporations organized prior to the adoption of the Constitution of 1879 might continue their existence and save their form of government, etc., from repealing such incorporation act as amended and passing a new act for the incorporation of a city comprising the territory included within the boundaries of the contemplated town.

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Quo warranto by the people, on relation of Lee A. McConnell, against the city of Wilmington and others. From a judgment sustaining a demurrer to the complaint, relator appeals. Affirmed.

U. S. Webb. Atty. Gen., and Hunsaker & Britt, for appellant. Bicknell, Gibson & Trask (Dunn & Crutcher, O. P. Widaman, and Edward E. Bacon, of counsel), for respondents.

HENSHAW, J This is a proceeding in quo warranto in which a judgment is sought declaring and adjudging that the defendant, the "city of Wilmington," and the other defendants, claiming to be officers of such city, are usurping and exercising without authority of law the franchises and powers of a city of the sixth class, and enjoining them from asserting or attempting to exercise such franchises. A general demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment was rendered for defendants. From this judgment plaintiff appeals.

It appears from the complaint that on the 6th day of November, 1905, certain persons presented to the board of supervisors of the county of Los Angeles a petition praying that a portion of said county, within the boundaries defined in the petition, be incorporated as a municipal corporation of the sixth class, with the name of the city of Wilmington, under an act of the Legislature entitled "An act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883. The petition complied with the act as to the number of bona fide residents within the boundaries of the proposed city, and also with respect to the number and character of the signers thereof. The board of supervisors granted the prayer of the petitioners and called for an election to be held on December 22, 1905, at which election a majority voted "for incorporation" and the personal defendants were elected trustees of said proposed city, whereupon the board declared that the said city of Wilmington was duly organized and it is exercising corporate functions as such city.

The appellant does not object to the regularity of the proceedings leading to the alleged incorporation of said city, and does not attack the validity of the incorporation, except on this one ground, namely, that most of the territory embraced in the petition was inclosed in a previously organized municipal corporation called the town of Wilmington, and that the territory not embraced in such previously organized corporation does not contain 500 residents, which number of residents is required by the act. It is therefore contended by appellant that the proceedings under which respondents are claiming to be a city are void, because there cannot be at the same time within the said territory two distinct municipal corporations exercising conflicting powers, and because the municipal corporation act expressly applies only to territory "not incorporated as a municipal corporation." In support of this proposition the complaint avers that on February 20, 1872, (St. 1871–72, p. 108, c. 113), the Legislature passed an act incorporating the town of Wilmington, and that the entire territory embraced in the boundaries of the said town as thus incorporated is included within the boundary of the alleged "city of Wilmington," and also that on March 21, 1872 (St. 1871–72, p. 446, c. 337), the Legislature passed another act to amend the first act above mentioned.

Respondent's main answer to this proposition is that in 1887 the Legislature passed two acts—the one repealing the act to incorporate the town of Wilmington, and the other repealing the act amending the act incorporating the said town—and, as a fact, such repealing acts were passed and approved. But appellant contends that these repealing acts were unconstitutional and void, and therefore had no effect upon the continued existence of the said town of Wilmington. Its main reliance in this regard is placed on section 6, art. 11, of the Constitution. The second sentence of this section gives to municipal corporations organized before the adoption of the Constitution of 1879 the right of continuing their existence and of saving their form of government, and this right, it is contended, is wholly inconsistent with any asserted power of the Legislature to destroy them. In support of this contention, reference is made to Desmond v. Dunn, 55 Cal. 243; Staude v. Election Comm., 61 Cal. 313;

Ex parte Armstrong, 84 Cal. 655, 24 Pac. 598; People v. Com. Council, 85 Cal. 369, 24 Pac. 727; Ex parte Helm, 143 Cal. 553, 77 Pac. 453. Without pausing to analyze these decisions, but conceding, for the purposes of this case, that they go as far as appellant contends in holding that the Legislature is denied the power to abrogate and annul special charters antedating the Constitution of 1879, respondents show a marked and important difference between those cases and the one at bar. Those decisions, one and all, were made with reference to organized and operating municipal corporations. In the case at bar it is made clearly to appear that the town of Wilmington, though incorporated, never became organized at all. The allegation of the complaint in this regard is as follows: "That the town of Wilmington is, and ever since the 20th day of February, 1872, has been, a municipal corporation, duly incorporated under and by virtue of that certain act of the Legislature of the state of California entitled 'An act to incorporate the town of Wilmington in the county of Los Angeles, in the state of California,' approved February 20, 1872, and of that other certain act of the Legislature of the state of California, amendatory thereof, entitled, 'An act to amend an act entitled "An act to entitle the town of Wilmington, in the county of Los Angeles, in the state of California," approved February 20, 1872, approved March 21, 1872.'" A reading of the incorporating act of the town of Wilmington shows that for the organization of the town an election was to be held in April to select town trustees, marshal, assessor, and other officers, and that the board of trustees elected were to assemble within 10 days after the notice of their election and organize. This act was approved upon February 20, 1872, and the allegation of the complaint is that ever since that day the town of Wilmington has been a municipal corporation. This allegation distinctly negatives the idea that any organization could have been effected, and amounts to nothing more than the legal conclusion of the pleader that the town became a municipal corporation because the Legislature passed a certain incorporating act. This pleading respondents insist is equivalent to an admission that the inhabitants of the territory affected by the incorporation act never exercised any corporate rights or incurred any corporate duties under the act. This, they assert, was the ground for the ruling of the trial judge in sustaining the demurrer to the complaint for insufficiency and in allowing plaintiff 10 days in which to amend to cover this defect. Plaintiff's failure to amend in this regard, they contend, is a pregnant admission that the town of Wilmington never in fact organized under the act. Respondents quote in their brief from the language of the learned trial judge as follows: "I have considered it necessary to discuss the constitutional question involved only with reference to the fact that the town government of Wilmington was never organized under the incorporation act, and, in view of the fact that there may be some contention over the question as to whether there ever was such organization, the plaintiff will be allowed 10 days in which to amend, should plaintiff desire to allege the fact."

In view, therefore, of the uncontested fact that plaintiff's attention was called to this omission in its pleading, and that the demurrer was sustained to it upon this ground, with leave to plaintiff to amend, and in view of the further fact, as shown by the judgment, that plaintiff failed and refused to avail itself of this permission, the conclusion is irresistible that it was unable to do so. The real question, then, with which we are confronted, is whether the Legislature has the power to repeal an act of incorporation which has stood for years upon its statute books without organization under it. As to this we entertain no doubt that it can do so. The constitutional provisions which are relied upon deal exclusively with cities and towns which are organized municipalities. We know of no constitutional inhibition which prevents the Legislature from clearing away the dead underbrush of such laws as this. A mere incorporating act, never in any way acted upon, presents an entirely different case from one where the act of incorporation has been followed by organization. While in a certain sense territory becomes incorporated by the incorporating act, it is in a sense most limited. There is plain recognition of this distinction in the language of article 11, § 6, of our Constitution. Thus that section, while providing that cities and towns heretofore organized or incorporated may become organized under general laws, in the next sentence declares, not that cities and towns heretofore incorporated shall be subject to and controlled by general laws, but that cities and towns "heretofore or hereafter organized shall be so controlled." Thus the Constitution designedly protects only organized municipalities from legislative interference other than by general laws. The legislative power is plenary excepting as limited by the Constitution, and there is nothing in that instrument to prevent the lawmaking power from wiping off of its statute books an incorporating act under which no organization has ever been effected. Not only may the Legislature do this, but it may often be desirable that it should be done to the very end that a new municipality incorporated and organized under the existing general laws of the state may proceed with its corporate duties without the possibility of embarrassment. For this reason, the demurrer was properly sustained, and the judgment appealed from is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.

151 Cal. 630

## GREENAWALT et al. v. ROGERS. (L. A. 1,842.)

(Supreme Court of California. Aug. 12, 1907. Rehearing Denied Sept. 10, 1907.)

1. CANCELLATION OF INSTRUMENTS—FRAUD—CONSENT.

Civ. Code, § 1689, provides that a contract may be rescinded if the consent of the party rescinding was given by mistake or obtained through duress, fraud, or undue influence, and section 1568 declares that consent is deemed to have been obtained through one of such causes only when it would not have been given had such cause not existed. *Held*, that a written instrument could not be rescinded for fraud when it appeared that consent would have been given and the contract entered into if the fact misrepresented had been truthfully stated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 2.]

2. COMPROMISE AND SETTLEMENT — FRAUD — VACATION.

Plaintiff having recovered judgment against defendant for $2,563.09, defendant represented that he had lost all his money in Alaska, was without funds, and was engaged as a common laborer at not exceeding $1.50 a day, and it was impossible to pay any portion of his debts, but offered a note, with his brother as surety, for $100, in full satisfaction of the judgment. This was accepted, the note paid, and the judgment satisfied. Thereafter plaintiff sued to set aside the satisfaction for fraud, alleging that defendant was in fact rich at the time of settlement. The proof, however, disclosed that defendant's statements as to his impecunious condition were true, except that he did own a lot of the value of $400, which was not disclosed, and that his debts were upwards of $15,000. *Held*, that such misrepresentation was insufficient to justify the vacation of the settlement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 2.]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Henry Greenawalt and another against Ralph Rogers. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed and remanded.

McNutt & Hannon, Will D. Gould, and Jas. H. Blanchard, for appellant. H. L. Dunnigan, for respondents.

SLOSS, J. This is an action brought to obtain a decree canceling and setting aside a satisfaction of judgment claimed to have been entered in reliance upon fraudulent representations by the defendant. The trial court made a decree in favor of the plaintiffs, and the defendant appeals from the judgment and from an order denying his motion for a new trial.

The complaint alleges that in June, 1890, one A. H. Judson recovered a judgment against the defendant, Ralph Rogers, for $1,793.95. In July, 1895, A. H. Judson transferred the judgment to the plaintiff Greenawalt for collection, under an agreement that Greenawalt should receive one-third of all sums collected, and A. H. Judson the remaining two-thirds. Shortly after the assignment Greenawalt brought an action upon the assigned judgment, and in said action recovered judgment against Rogers for $2,563.09. In May, 1902, the defendant, Rogers, represented and stated to A. H. Judson that he had been absent in Alaska; that he had lost all the money that he had made during his stay in Alaska; that he was absolutely without funds, property, or expectations of any description; that he was engaged as a common laborer for his brother at wages not exceeding $1.50 per day; that it was absolutely impossible at that time, and in all probability would in the future be absolutely impossible, for him to pay any portion of his debts or obligations; that he was largely indebted to other persons, and that his absolute necessities of life and the absolute necessities of his family consumed all that he could possibly earn at that time; that if the said Judson would cause satisfaction of the judgment, then outstanding in the name of the plaintiff Greenawalt, to be entered of record, and accept the sum of $100 in full satisfaction of said judgment, he, the said Rogers, would execute and deliver to said Judson his promissory note for the sum of $100 and procure his (Rogers') brother to execute the said note as surety for him. Rogers further represented that the said $100 was the utmost that he would be able to pay upon said judgment, and that, unless Judson and Greenawalt accepted it, they would entirely lose their claim. These representations were communicated by A. H. Judson to Greenawalt, and said Greenawalt and Judson, fully believing said statements and relying upon them, and by reason of such belief and reliance, accepted the proposition and the said promissory note for $100. The promissory note was paid about the 20th day of July, 1902, and on the 23d day of July, 1902, Greenawalt acknowledged upon the margin of the record full and entire satisfaction of the judgment. The plaintiffs allege that all of these statements of the said defendant were false, fraudulent, and made with the purpose and design to deceive Greenawalt and A. H. Judson, and to procure from them satisfaction and release of the said judgment; that, in fact, the said Rogers at the time of making said representations was absolutely solvent; that he had brought with him from Alaska personal property exceeding in value the sum of $60,000, and had in his possession and was the owner of money and other personal property exceeding in value the sum of $60,000, which facts he fraudulently concealed from Greenawalt and A. H. Judson. Plaintiffs allege, further, that at the time of the representations Rogers did not owe debts exceeding the sum of $15,000, and that during all of said time he was worth money and other personal property in the sum of $45,000 over and above all his just debts and obligations. The plaintiffs allege that they, and the said A. H. Judson, did not discover the said fraud practiced upon them until about the 15th day of May, 1904. On or about the 30th day of

June, 1904, it is averred the said A. H. Judson assigned to W. B. Judson all his interest in and to the cause of action herein set out. The prayer of the complaint is for the cancellation of the satisfaction of judgment, and that plaintiffs recover judgment against Rogers in the sum of $2,563.09, together with interest thereon from the 11th day of September, 1896, less the sum of $100. The complaint was filed July 5, 1904. By an amendment to the complaint filed April 17, 1905, the plaintiffs allege that at the time of making the statements above set forth, the defendant was the owner in fee simple and vested with the legal title to real property in the county of Los Angeles of the value of $750, and that at said time he was the owner of other real property in said county standing in the name of other persons who held for his use and benefit, which said real property was of the value of $6,000, all of which facts were by the said Rogers fraudulently concealed from the plaintiffs, who were absolutely ignorant of said facts, and did not discover them except as alleged in their complaint. The answer denied the making by defendant of the representations set forth in the complaint, and denied the ownership by defendant of the real or the personal property alleged in the complaint to have been owned by him. The answer also denies the assignment by A. H. Judson to the plaintiff W. B. Judson.

The findings are in favor of plaintiffs on the issues raised as to the making of the representations. But it is found by the court that at the time of making such representations the defendant did not own, or have in his possession, money or personal property of the value of $60,000, or any part or portion thereof, other than a very small amount, which was necessary for his own support. The court further finds against the allegation of the complaint that at the time of the settlement Rogers was solvent, and against the allegation of the amendment that he was the owner of real property, standing in the name of others, of the value of $6,000. It finds, however, that at the time of making the representations the defendant, Rogers, was the owner of lot 14, block 1, of Garvanza addition No. 1 of the city of Los Angeles, and that this property was of the value of $400, and that Rogers did at the time of the settlement conceal from A. H. Judson and from Greenawalt the fact that he owned this property, and that he did so conceal this fact with the intent and purpose of thereby inducing Greenawalt and Judson to satisfy and compromise said judgment. There is a finding against the allegation that A. H. Judson had assigned his cause of action to the plaintiff W. B. Judson.

From these findings, the court draws the conclusion of law that the plaintiff H. Greenawalt is entitled to a judgment canceling and setting aside the satisfaction of judgment entered of record by him, and that he is entitled to a judgment against the defendant Rogers for the amount claimed in the complaint. A decree was entered accordingly, canceling such satisfaction and giving the plaintiff Greenawalt judgment against Rogers for $4,017.97, together with costs.

It is argued on behalf of the appellant that the complaint is defective in failing to allege that plaintiff promptly upon the discovery of the alleged fraud, and prior to the commencement of the action, offered to restore to the defendant the $100 received from him. Civ. Code, § 1691; Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797. The appellant makes the further points that A. H. Judson was a necessary party, that any rights which the respondent Greenawalt may have had are barred by laches, and that the evidence is insufficient to justify the finding that Rogers was the owner of the lot in Garvanza addition, valued at $400. It will not be necessary to consider the soundness of any of these contentions, since we are satisfied that the findings, read in connection with the averments of the complaint, do not show such misrepresentation or concealment of a material fact as would justify the setting aside of the contract of compromise.

The complaint sets forth a clear case of aggravated fraud. The representation that defendant was without means, when in fact he was the owner of realty of the value of $6,750, and personalty of the value of $45,000 over and above his debts, was a fraud which, if followed by proper action on the part of the defrauded parties, would furnish abundant cause for relieving them against a settlement whereby they accepted $100 in satisfaction of an undisputed claim of several thousand dollars. But respondent fell far short of establishing the case which he had set out to prove. From the findings it appears that the defendant, instead of having $45,000 of personal property applicable to the payment of his debts, had none, and, instead of owning real property worth $6,750, owned but a lot of the value of $400. While there is a gross disproportion between the amount paid in compromise and the resources of the defendant, as alleged in the complaint, this disproportion becomes less, if, in fact, it does not disappear, when the price of the settlement is compared with the actual amount of defendant's means, as found by the court. When it is considered, further, that the effect of the decree is to subject the defendant to a judgment indebtedness of over $4,000, on account of a claim which he had settled several years before by a payment of $100, the facts on which the decree is based should be scrutinized with care to determine whether they justify such a result.

As was said by this court in Colton v. Stanford, 82 Cal. 351, 398, 23 Pac. 16, 28, 16 Am. St. Rep. 137, quoting the language of Judge Temple, who had presided at the trial of that case in the lower court: "The power to cancel a contract is a most extraordinary power. It is one which should be exercised with great caution—nay, I may say with great reluctance—unless in a clear case. A too free use of this power would render all business uncertain, and, as has been said, make the length of a chancellor's foot the measure of individual rights. The greatest liberty of making contracts is essential to the interests of the country. In general, the parties must look out for themselves." See, also, Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899.

Our Code provides that a contract may be rescinded if the consent of the party rescinding was given by mistake, or obtained through duress, menace, fraud or undue influence. Civ. Code, § 1689. Section 1567 provides that "An apparent consent is not real or free when obtained through: (1) Duress; (2) menace; (3) fraud; (4) undue influence; or (5) mistake." Section 1568: "Consent is deemed to have been obtained through one of the causes mentioned in the last section only when it would not have been given had such cause not existed." It is the law everywhere that a misrepresentation must, in order to afford a basis for complaint by the party to whom it was made, have been with reference to a material fact. 20 Cyc. p. 23. Section 1568 above quoted furnishes a rule for determining what misrepresentations or concealments are to be deemed material. As is said by the court in Colton v. Stanford, supra, at page 399 of 82 Cal., and page 28 of 23 Pac. [16 Am. St. Rep. 137]: "The sections of the Civil Code above quoted [sections 1565, 1566, 1567, 1568] are clear and unambiguous in language, and they seem to establish the rule beyond all controversy that the contract cannot be rescinded when it appears that consent would have been given and the contract entered into notwithstanding the duress, menace, fraud, undue influence, or mistake relied upon. A misrepresentation as the basis of rescission must be material; but it can be material only when it is of such a character that, if it had not been made, the contract would not have been entered into. The misrepresentation, it is true, need not be the sole cause of the contract, but it must be of such nature, weight, and force that the court can say 'without it the contract would not have been made.'" Pom. Eq. Jur. § 890; Elliott v. S. P. Co., 145 Cal. 441, 448, 79 Pac. 420, 68 L. R. A. 393; Spinks v. Clark, 147 Cal. 439, 444, 82 Pac. 45. Was there such misrepresentation of a material fact in the case at bar? The defendant represented that he had been absent in Alaska; that he had lost all the money that he had made there; that he was absolutely without funds, property, or expectations of any description; that he was engaged as a common laborer for his brother at wages not exceeding $1.50 per day; that he was largely indebted to other persons; and that the sum of $100 was the utmost that he would be able to pay. None of these statements is found by the court to have been untrue, except the statement that he was without funds or property of any description, and this was untrue only to the extent that he was the owner of a lot of the value of $400. The complaint alleges that Rogers at no time owed debts exceeding the sum of $15,000. This form of allegation amounted to an assertion, by implication at least, that the defendant was indebted to the extent of $15,000. Taken together with the further averment that he owned personal property of the value of $60,000, and was possessed of $45,000 over and above his just debts and obligations, it shows that the complaint was framed upon the theory that Rogers, at the time of making the representations complained of, had debts amounting to $15,000. The respondent himself treats such indebtedness as an established fact, for in his brief he says that "the answer did not deny that the defendant owed the sum of $15,000." The judgment satisfied amounted at the time of the settlement to about $3,500. This was less than one-fourth of the total indebtedness of Rogers. If, therefore, this lot, which is the only property found by the court to have been owned by him, had been applied to the payment of his debts pro rata, whether by voluntary agreement, or through the bankruptcy proceedings, which, as the complaint alleges, the defendant was contemplating, the share which plaintiff and A. H. Judson could have received would have been less than the $100, which they did in fact receive. If Rogers' ownership of this lot had been made known by him, the plaintiff Greenawalt would have been confronted with this situation: He would have been informed that Rogers had debts amounting to $15,000, about $3,500 of which was owing on the judgment in question, that he had absolutely no property with the exception of a lot worth $400, and that the sum of $100 was the utmost that he would be able to pay upon the judgment in question. The essence of the representations upon which Greenawalt and A. H. Judson acted was the statement that $100 was all Rogers was able to pay upon their judgment. It was their belief that this representation was true that induced them to accept this sum. It is not conceivable that their action would have been different if they had been advised of further facts which were in no degree inconsistent with this ultimate and important fact. Under these circumstances, the concealment by Rogers of his ownership of this $400 lot cannot be regarded as material to the settlement.

The court does not in terms find that this concealment was with reference to a material fact, nor that without such concealment the consent of plaintiffs would not have been given. All that is found is that Greenawalt and A. H. Judson fully believed and relied upon each of the statements of the defendant in regard to his financial condition and his inability to pay the judgment, and that by reason of such belief and reliance they accepted the proposition. Most of the statements, however, and all of them which, under the facts alleged and found, can be regarded as material, are found by the court to have been true. It must follow that the findings are not sufficient to support the judgment, since they do not show that the consent of the plaintiff and A. H. Judson was obtained by fraud.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J., ANGELLOTTI, J.

151 Cal. 667

## PEOPLE v. BUCK. (Cr. 1,370.)

(Supreme Court of California. Aug. 14, 1907.)

1. Criminal Law—Appeal—Order Denying Continuance.

Pen. Code, § 1237, provides that a defendant may appeal from a judgment of conviction, from an order denying a motion for a new trial, or from an order made after judgment, affecting his substantial rights, and section 1173, subd. 2, provides that exceptions may be taken by defendant to a decision of the court on a matter of law in refusing to postpone the trial on his motion. *Held*, that an order denying accused a postponement of trial was reviewable on appeal from the judgment, and was not itself appealable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2585.]

2. Same—Record—Bill of Exceptions.

In order that defendant may obtain a review of an order denying a continuance in a criminal case, the motion, evidence and ruling must be incorporated in the bill of exceptions, as required by Pen. Code, § 1174.

3. Same—Continuance—Denial.

Defendant was informed against for murder on February 3d, and was arraigned on the 5th, when counsel was appointed for him, and his time to plead extended until the 7th. A demurrer to the information was filed on that day, which was overruled, when he pleaded "not guilty," and the cause was set for trial on March 12th. Defendant protested at that time, claiming that as his defense was insanity, there was not sufficient time to procure the necessary evidence as to his personal and family history, and applied for a postponement for absence of certain witnesses whom he expected to testify concerning his insanity, and also because of his inability to obtain the depositions of certain alienists. *Held* that, all the witnesses so desired, except a nonresident alienist, having appeared and testified at the trial, the denial of the postponement was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3045, 3046.]

4. Same—Local Prejudice.

Where a jury was obtained to try accused for murder from the panel in attendance, on the day the trial began, the court did not err in refusing to postpone the trial because of inflamed local feeling against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3045.]

5. Homicide—Insanity—Question for Jury.

In a prosecution for homicide, evidence *held* to require submission to the jury of the question of defendant's insanity.

6. Criminal Law—Modification of Instructions—Prejudice.

In a prosecution for homicide, defendant requested an instruction that the testimony of nonexperts was recognized as proper in support of the defense of insanity, and that the jury was not bound by the statement or testimony of such witnesses nor were they justified in disregarding them, but that it was the jury's duty to give such testimony the weight to which it was entitled. *Held*, that the latter portion of the instruction was a mere commonplace, and that defendant was not prejudiced by the court's elimination thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3154.]

7. Same.

The elimination of a clause from an instruction requested by accused that all opinion evidence should be received and carefully considered with great caution was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3154.]

8. Same—Instructions—Weight of Evidence.

An instruction that the abstract opinion of any witness, medical or of any other profession, is of no importance, but that it was a juror's duty to arrive at his conclusion on his own judgment, exercised in a reasonable way after carefully weighing all the evidence, and that no judicial tribunal would be justified in deciding for or against the legal responsibility of one charged with insanity on the opinion of witnesses, however numerous or respectable, was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1732.]

9. Homicide — Defenses — Insanity — Instructions—False Issue.

Where, in a prosecution for homicide, defendant relied on actual insanity as a defense, an instruction that irresistible impulse to do an act known by the perpetrator to be wrong does not relieve him from its legal consequences was not erroneous as presenting a false issue.

10. Criminal Law—Arraignment for Sentence—Time.

Where a verdict convicting accused of murder was returned on March 21st, and defendant was arraigned for sentence on the 24th, the court did not err in refusing to grant a postponement of the sentence, in the absence of a showing in support of defendant's application for further time to procure affidavits as to newly discovered evidence in support of that ground for new trial.

11. Same—New Trial—Motion—Argument—Limitation of Time.

Where accused had been convicted of murder, it was not error for the court to limit his counsel's time to argue a motion for new trial to an hour.

12. Same—Appeal—Briefs—Misconduct of Counsel.

On appeal from a conviction of murder, it was improper for counsel for accused to refer to the trial court's action, which was fully justified, as a "brutal abuse of discretion and an inhuman violation of his [defendant's] constitutional rights."

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Morris Buck was convicted of murder, and he appeals. Affirmed.

A. D. Warner, for appellant. U. S. Webb, Atty. Gen., Henry T. Gage, and W. I. Foley, for the People.

BEATTY, C. J. The defendant, having been sentenced to death upon conviction of murder, appeals from the judgment and from an order denying his motion for a new trial. He has also given notice of an appeal from an order denying his motion for a postponement of the trial; but, since the ruling upon that motion is reviewable on appeal from the judgment, there is no necessity and no provision for a separate appeal. Pen. Code, §§ 1237, 1173, subd. 2. But to obtain a review of an order denying a continuance in a criminal cause it is necessary to incorporate the motion, evidence, and ruling in a bill of exceptions (Pen. Code, § 1174), and one of the questions here presented is whether it appears by this record that any such bill of exceptions was ever settled or allowed.

The information charging the defendant with the crime of murder was filed on February 3d. On the 5th he was arraigned and, being without counsel, a member of the Los Angeles bar, who represents him on this appeal, was appointed by the court to conduct his defense, and time to plead extended to the 7th. On that day he filed a demurrer to the indictment, which, being overruled, he entered his plea of not guilty. The cause was then set for trial on March 12th.

Assuming for the present that the affidavit subsequently filed in support of the motion for a postponement of the trial (a copy of which is printed in the transcript) can be treated as a part of the record, it appears that counsel for defendant protested very earnestly on February 7th against the fixing of so early a date as March 12th for the trial, upon the ground that his conference with defendant on the previous day had satisfied him that the defendant was insane at the date of the homicide, and that his trial on the 12th of March would not allow sufficient time to procure the necessary evidence as to his personal and family history, or to prepare his defense in other particulars. This objection was, however, overruled by the court, and on March 12th, when the cause was called for trial, defendant made his motion for a postponement, based upon the affidavit in question.

Many objections of a purely technical character are urged by counsel for the people to any consideration of this affidavit, and if we were disposed to rule with technical strictness in a matter of this kind we might be justified in holding that it is not a part of the record because not strictly and formally included in the bill of exceptions. But in view of the facts that the defendant was without counsel, that counsel appointed by the court was new to the state and unfamiliar with our practice in criminal cases, and that matters which he was clearly entitled to have had included in the bill of exceptions were probably not so included through mere inadvertence, we are unwilling in a case of such serious import to rest our decision upon grounds so purely technical as that matters which ought to have been shown by the bill of exceptions appear only in the minutes of the court, and that exceptions to the orders denying the continuance and the new trial were not formally entered at the time the rulings were made. Disregarding, therefore, the objections referred to, assuming that exception was taken to the order denying a continuance of the trial, and treating the affidavit submitted in support of the motion as part of the record, we proceed to consider whether there was any error or abuse of discretion in refusing the continuance.

The simple facts of the case are that the defendant applied to a lady by whom he had formerly been employed as a coachman for a loan or gift of money with which to establish himself in business. She did not answer his letter immediately, and he went to her house in the city of Los Angeles armed with a knife, a derringer, and a revolver. Learning that she was not at home, he sat down on the front porch to await her return. When she came she entered the house by a side door, and was informed that the defendant was waiting to see her. She went out to see him, and he renewed his request for money. She excused herself upon the ground that there were so many demands upon her purse, and for some reason—probably because she was alarmed—went in the house and telephoned for her coachman. When she came out again, defendant asked her whom she had rung up, and she told him. Some other conversation ensued, and the defendant, among other things, told her he was desperate. In the end he shot her twice, causing her death within a few moments. He, then, in the presence of several persons who had been attracted to the scene, put his pistol to his own head and inquired, "Gentlemen, shall I do it?" He did not fire, but sat down with his pistol in his lap and waited till an attempt was made to arrest him, when he ran and took refuge in an ice cream parlor, where he was soon after taken in custody. Upon these facts it was very clearly a case of deliberate murder, unless the defendant was insane, and accordingly his sole defense was insanity.

The affidavit of defendant's counsel, which was filed on the 12th day of March, in support of his motion for a postponement of the trial, showed proper diligence upon his part in preparing his defense, and was intended to show that it would have been impossible to secure the attendance of material witnesses on the point of defendant's personal and family history, or the depositions of distinguished alienists, who, in answer to a hypothetical question based upon facts which counsel expected to prove, had stated that the defendant—assuming those facts to be capable of proof—was certainly insane, and must have been insane at the date of the homicide.

One of these alienists was Dr. I. E. Cohn, of the Napa Asylum, and the other was Dr. W. A. Jones, of Minneapolis, Minn. The only witnesses on the point of personal and family history whose attendance had not been secured were William and Earl Buck, brother and nephew of the defendant, for whom subpœnas had been issued, but who had not been found. On the other hand, the affidavit showed that the defendant was prepared with a very considerable amount of evidence of persons who had known the defendant and his family and of public records which showed that about three years prior to the homicide the defendant had been adjudged insane upon the report of a commission appointed in a proceeding instituted under the laws of this state. Counter affidavits were filed on the part of the people, but they are not included in the record or printed in the transcript. Counsel for appellant seems to consider that the absence of these counter affidavits gives him serious grounds of complaint, but we cannot see how he is injured by their omission, since, in their absence, we can only assume that the material averments of his affidavit were uncontradicted, or, as is more probable, account for their absence upon the supposition that they were deemed superfluous in view of the disclosures at the trial.

But for these disclosures it might be a serious question whether the denial of a continuance was not an error. It turned out, however, that both William and Earl Buck attended the trial and testified in favor of the defendant, and Dr. Cohn, of the Napa Asylum—one of the two alienists who had stated in reply to the hypothetical question that in his opinion the defendant was insane—also attended in obedience to a subpœna issued at the instance of the defendant, and upon the usual order of the court for the attendance of witnesses residing out of the county. He was in court on the day the motion for continuance was made, and was present throughout the trial. In the intervals of the trial he visited and examined the defendant in jail, with the result that he was not called as a witness by the defendant, but testified in rebuttal that he was sane at the time of the trial and at the date of the homicide. It is probable that the ruling on the motion for a postponement of the trial was made with a knowledge that Dr. Cohn and William and Earl Buck were or would be present in time to give their testimony, in which case it was clearly right. But, however this may be, it was clearly not injurious in any view in which it could be claimed to have been erroneous. It is true the deposition of Dr. Jones, of Minnesota, was not obtained, and probably could not have been obtained for the trial with any amount of diligence, but it cannot be held an abuse of discretion or a denial of right to refuse to postpone a criminal trial in the courts of California until the depositions of nonresident alienists based upon hypothetical questions can be obtained in support of the plea or defense of insanity.

Nor did the court err in refusing to postpone the trial because of an allegation in the affidavit that local feeling was inflamed against the prisoner, and that eminent special counsel had been retained to assist the prosecution. The absence of any widespread feeling against the prisoner is shown by the fact that a jury was filled from the panel in attendance on the day the trial began, and a continuance would not have deprived the people of the aid of the special counsel, or freed the defendant of their opposition.

On the trial much evidence was introduced tending to prove that defendant was insane. There was evidence that his father's father had been insane; that his father had died a few years before of some disease affecting the brain; that his mother's mother had been an inmate of an insane asylum of which his mother had been a matron; that defendant himself had at one time been adjudged insane, but discharged after a few days' detention; that after his discharge he had taken up a wandering life, tramping from place to place and working desultorily in various menial employments. Opposed to this was the testimony of a number of experts, who, as the result of personal examinations and the evidence in the case, were all of the opinion that the defendant was perfectly conscious of what he was doing at the time of the homicide and fully aware of the nature and of the criminality of his acts. Upon this evidence it was a case for the jury to determine, under the instructions of the court, whether the defendant was insane or not.

It is contended that the court erred, not only in the charge given to the jury, but in refusing and modifying instructions requested by the defendant. The twelfth instruction so requested was to the effect that the testimony of nonexperts was recognized as proper in support of the defense of insanity, stating the reason of the rule. The concluding clause of the instruction was as follows: "You are not to be bound by the statement or testimony of such witnesses, neither are you justified in disregarding them. It is your duty to give them such weight as they are entitled to." The court in giving this instruction omitted the language quoted. No reason occurs to us why so mere a commonplace should not have been allowed to stand, but there seems as little reason why it should have been requested. It must be presumed that a jury always understands that it is their duty to give to any evidence submitted to it the weight to which it seems entitled, and the refusal of the judge to make that comment on any particular item or line of evidence cannot be supposed to prejudice the party offering it. The thirteenth instruction requested by defendant was to the effect that in weighing and considering expert testimony, it is the duty of the jury to exercise their own intelligent judgment, and to allow it such weight only as after careful scrutiny they may deem it deserving of. A final clause in this instruction was as follows: "And all opinion evidence should be received and carefully considered and scrutinized with great caution." In giving the instruction this clause was omitted. It would have been harmless if allowed, but its omission was equally harmless, since the part given covered the same proposition. The fourteenth instruction requested by defendant was refused outright. It was as follows: "The abstract opinion of any witness, medical or of any other profession, is not of any importance. It is a juror's duty to arrive at his conclusion upon his own judgment exercised in a reasonable way, after carefully weighing all of the evidence. No judicial tribunal would be justified in deciding for or against the legal responsibility of one charged with insanity upon the mere opinion of witnesses, however numerous or respectable." The refusal was proper upon the ground that there is no such rule of law. The case cited as authority sustaining the instruction (In re Redfield, 116 Cal. 655, 48 Pac. 794) is not in point.

It is contended that the defendant was prejudiced by that part of the charge of the court, where, in defining the character of insanity which the law regards as a valid defense in cases of homicide, and other crimes of violence, it is pointed out that "irresistible impulse" to do an act known by the perpetrator to be wrong does not relieve him of its legal consequences. It is said that no such defense was made or attempted—that he had relied alone upon "settled insanity"—and therefore that the injection of this "false issue" into the case was confusing, misleading, and prejudicial to the only defense which had been made either in the evidence or the argument. We do not think it an error for a court where the defense of insanity is interposed to a charge of murder to state the law of insanity fully and with all its special limitations and qualifications, and we cannot see how the defendant could have been prejudiced by what was said in regard to "irresistible impulse."

Misconduct of counsel for the prosecution is alleged, but the record does not sustain the allegation that the evidence was misstated by special counsel for the people, and, if it had been, that was a matter for correction at the time by an appeal to the court and to the recollection of the jurors. As to the perfervid language of the district attorney in characterizing the atrocity of the crime, that was a matter of taste which we are not called upon to consider. When he went too far in the opinion of the trial judge, he was admonished and corrected by him.

The verdict of the jury was returned on the 21st of March, and the defendant arraigned for sentence on the 24th. Counsel says he requested further time to procure affidavits as to newly discovered evidence in support of that ground of his motion for a new trial, but it does not appear that he made any showing in support of this application, and we cannot see that the court abused its discretion in refusing to postpone the arraignment and in limiting counsel to one hour for the argument of the motion for a new trial.

We regret to be obliged to add that there are many passages in the brief of counsel for appellant reflecting upon the action of the trial judge, which appear to be without the slightest justification. To say that it was "a brutal abuse of discretion and an inhuman violation of his constitutional rights" to compel the defendant to go to trial in the face of the affidavit for continuance would have been grossly improper language to incorporate in a brief, even if the facts had justified the charge. The offense is aggravated in this case by the absence of any foundation for the charge. Other less flagrant instances of abuse of the privilege of counsel need not be specified. We may hope that there may be no recurrence of similar offenses.

The judgment and order of the superior court are affirmed.

We concur: HENSHAW, J.; ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; SLOSS, J.

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6 Cal. App. 88

## JONES v. EVANS et al. (Civ. 328.)

(Court of Appeal, First District, California. July 10, 1907. Rehearing Denied by Supreme Court Sept. 5, 1907.)

1. BILLS AND NOTES—ACTION—PLEADING—CORPORATE EXISTENCE.

In an action on notes given by defendant to a company and indorsed to plaintiff, a perfect cause of action is shown without proof of the company's corporate capacity.

2. CORPORATIONS — NOTES — INDORSEMENT — AUTHORITY OF OFFICER.

In an action on notes indorsed to plaintiff by the payee corporation by its vice president, the authority of the vice president to make the indorsement was sufficiently shown where plaintiff indorsed the notes at the vice president's request, they were afterwards discounted, and the proceeds received by the corporation or paid out under specific directions in discharging its obligations, and where the corporation had delivered to plaintiff assets and securities under an agreement made on its behalf by the vice president to secure him from liability for indorsing, among others, the notes sued on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1737.]

3. PLEDGES—RIGHTS OF PLEDGEE—COLLATERAL SECURITY FIRST—NECESSITY FOR APPLYING.

Before suing the maker, an indorser of notes was not bound to apply collateral securities delivered to him subject to the claims of a creditor by the payee as security for the indorsement of notes including those sued on; a bill in equity having been filed against plaintiff by the creditor claiming the assets, and it appearing that no part of the money on hand could be applied to any particular note or claim until after the settlement of the litigation, and then only in the event of plaintiff's success.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, § 140.]

4. SAME—AGREEMENT—CONSTITUTION.

Under the express terms of Civ. Code, §§ 2986, 2987, where a corporation, to secure plaintiff from liability on notes he indorsed and procured to be indorsed, transferred to him, and his indorsers, subject to the claims of another, the entire proceeds of certain territory in which it did business, the contract providing that, on failure to meet the notes, the assets would be collected, reduced to cash, and the proceeds applied to the payment of the notes, there was a pledge as collateral security for the notes indorsed and procured to be indorsed by plaintiff.

5. BILLS AND NOTES—ACTION BY INDORSER—DEFENSE—WANT OF CONSIDERATION.

In an action on notes by an indorser, it was no defense that the maker was paid no consideration for the notes, there being no showing plaintiff knew that fact, since, in the absence of evidence to the contrary, the presumption of law under the express terms of Civ. Code, § 3104, is that the notes were indorsed before maturity and for a valuable consideration, and the notes having been indorsed to plaintiff before maturity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 693.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action on notes by S. W. Jones against J. W. Evans and others. From a judgment for plaintiff and an order denying a new trial, defendant Evans appeals. Affirmed.

H. A. Powell, Geo. R. Williams, and W. A. Dow, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

KERRIGAN, J. This is an action on two promissory notes, made by J. W. Evans, payable to the order of the Domestic Sewing Machine Company. That company, before maturity, indorsed these notes, and delivered them to plaintiff. Thereafter, and before maturity, both notes were indorsed by plaintiff and discounted at certain banks. Defendants failed to meet these notes when they fell due. They were duly protested, and the plaintiff was compelled to pay the amounts due thereon. Defendants failed to reimburse plaintiff for such payment, and this action was brought. A trial was had only against the defendant Evans. Process was not served on the other defendant. The cause was tried by the court, sitting without a jury, and judgment was entered in favor of plaintiff. This appeal is from the judgment entered against defendant Evans, and from the order denying his motion for a new trial.

1. It is alleged in the complaint in the usual form that the Domestic Sewing Machine Company was a corporation. Appellant urges that there is no evidence that the company ever organized, or acted as a corporation. As we have seen, this is an action against the defendant Evans, the maker of the notes, and, so far as his liability on these notes is concerned, the corporate existence of the defendant Domestic Sewing Machine Company is absolutely immaterial. In other words, a perfect cause of action in favor of respondent as against the appellant Evans is set forth in the complaint without regard to the allegation concerning the corporate capacity of the defendant Domestic Sewing Machine Company. Crocker-Woolworth Nat. Bank v. Carle, 133 Cal. 409, 65 Pac. 951.

2. The indorsement on each note reads: "Domestic Sewing Machine Company by David Blake, Vice President." Appellant asserts that there is no showing that David Blake had authority to make these indorsements. The evidence discloses that both notes were indorsed by respondent at the request of David Blake; that after being so indorsed they were discounted, and all moneys received by reason of such discounting were transmitted to the Domestic Sewing Machine Company and received by it, or else paid out under specific directions in discharging some of its obligations. Again, as part of his own case, appellant read in evidence a portion of the deposition of respondent, wherein he testified that he had an agreement with the Domestic Sewing Machine Company, in which it agreed to pledge with him certain assets of the company to secure him from liability for indorsing, among others, the notes involved herein. This agreement was signed: "Domestic Sewing Machine Company by David Blake, Vice President." The evidence further shows that, pursuant to this agreement, the Domestic Sewing Machine Company did deliver to respondent some of its assets and securities. Whether it was a copartnership, corporation, or unincorporated association, it accepted and retained the benefits of the indorsement of its name upon the notes by David Blake, vice president, and upon the faith of these indorsements it procured the indorsement of the respondent. According to well-established principles of law, it could not accept the benefits derived from the indorsement of said notes by Blake, and at the same time repudiate his authority to make such indorsement.

3. Appellant contends that the respondent was bound to apply the collateral securities held by him to the payment of the notes before bringing suit thereon. It appears from the testimony that the respondent Jones indorsed and procured to be indorsed promissory notes for the Domestic Sewing Machine Company, to the extent of over $200,000,

other than those described in the complaint. In order to secure the respondent Jones from liability upon these notes, an agreement was entered into between Jones and the Domestic Sewing Machine Company, by virtue of which, subject to the claims of one Sutherland, it assigned and transferred to the respondent and his indorsers the entire proceeds of a certain territory in which it did business. The contract also provided that, in the event of the failure to meet these notes, the assets were to be collected, sold and reduced to cash, and the proceeds applied toward the payment of the notes. It appears from the evidence that respondent had paid a number of other promissory notes, indorsed by him, for the company after the notes had been protested, and that he had collected about $19,000 net under this agreement. The evidence also disclosed that a bill in equity had been filed by one Sutherland against the respondent, claiming said assets, and that no part of the balance of the moneys on hand could be applied to any particular note or claim until after the litigation now pending as to the ownership of the assets had been fully settled, and then only in the event that the respondent prevailed. This agreement constituted a pledge of the property described, as collateral security for the notes indorsed and which were procured to be indorsed by respondent. Civ. Code, §§ 2986, 2987; Sonoma Valley Bank v. Hill, 59 Cal. 109. In this last-mentioned case it is said: "It is well settled that, in the absence of a statute or stipulation to the contrary, the possession of the pledged property does not suspend the right of the pledgee to proceed personally against the pledgor for his debt, without selling the pledge, for the reason that the security is only collateral. It has been repeatedly so held" (citing a number of cases).

In Ehrlick v. Ewald, 66 Cal. 97, 4 Pac. 1062, the Supreme Court uses this language: "The court below found that defendant was indebted to plaintiff for money loaned. To secure the payment thereof, defendant had delivered to plaintiff certain personal property, which property is still held by plaintiff, who had taken no steps to subject the same to sale for the payment of the debt. The action has been brought to recover the amount due with interest. The defendant insists that according to section 726, Code Civ. Proc., the action cannot be maintained; that the plaintiff must first seek to foreclose his lien before he can have an independent action for money. This view was taken by the court below, in refusing judgment for plaintiff on the findings, and in rendering judgment for defendant." And, after quoting from various sections of the Code, the court proceeds: "We find nothing which will prevent a pledgee from having his action to recover the debt, without first exhausting the subject of his pledge. * * * The plaintiff was entitled to his judgment for the amount stated in the findings, with interest." In Commercial & S. Bank v. Hornberger, 140 Cal. 16, 73 Pac. 625, the Supreme Court again stated: "The pledgee may recover the amount of his debt from the debtor by an independent suit without foreclosing the pledge." To the same effect is Farmers' & Merchants' Bank v. Copsey, 134 Cal. 287, 66 Pac. 324.

4. Appellant testified that he was paid no consideration for these notes, but there is no showing that respondent knew this. In the absence of evidence to the contrary, the presumption of law is that the notes were indorsed before maturity and for a valuable consideration. Section 3104, Civ. Code. Again, the uncontradicted evidence of respondent was that the notes had been indorsed to him before maturity. The action of the court in striking out this testimony of the appellant was correct, for it constituted no defense.

5. Appellant's motion for nonsuit was denied, and, in addition to this ruling, he complains about the admission of certain evidence. These matters, so far as they merit attention, have been fully discussed in what we have already said, and they need no further elaboration.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

6 Cal. App. 77

## MUSHET v. FOX. (Civ. 373.)

(Court of Appeal, Second District, California. July 5, 1907. Rehearing Denied by Supreme Court Sept. 3, 1907.)

1. Trial—Findings by Court—Necessity of Finding—Plea of Want of Consideration.

The plea of want of consideration in an action on a note is an affirmative defense, on which the defendant is entitled to a finding if there is any evidence in support thereof.

2. Appeal—Prejudice—Omission of Finding.

The court's omission to make a finding on a plea of want of consideration in an action on a note was immaterial on appeal, where such failure would not affect the substantial rights of the appellant, under Code Civ. Proc. § 475, requiring the court on appeal to disregard any error not affecting substantial rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4234, 4239.]

3. Same—Necessity of Objections at Trial.

In the absence of particular objections, no error can be claimed on appeal to the admission of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1141.]

4. Evidence—Weight and Sufficiency—Evidence Improperly Admitted.

Defendant, having suffered attachment, solicited two other creditors to levy an attachment on his property for the purpose of counteracting the first, and, for this purpose, the creditors transferred their claims to R., assistant secretary of a board of trade, who brought suit, aided by attachment thereon. Defendant thereafter requested plaintiff, who was secretary of the board of trade and who had received an assignment of the claims from his assistant to have the attachments released, but he refused unless defendant executed a note and chattel mortgage to secure them, which was done. *Held*, that evidence of R. that prior to the execution of such note plaintiff caused the original indebtedness owing by defendant to the creditors, "which had been transferred to the witness, to be transferred to plaintiff," in the absence of an objection on proper ground, was sufficient to establish an assignment of the claims to plaintiffs as the consideration for the note.

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by W. C. Mushet against E. R. Fox. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. M. Fall, for appellant. Carroll Allen and W. T. Craig, for respondent.

ALLEN, P. J. Appeal by defendant from a judgment in favor of plaintiff. The action was upon a note secured by chattel mortgage executed by defendant to plaintiff. Copies of both note and mortgage were set out in the complaint. The sole issue tendered by the answer was a plea of want of consideration. The court, upon the trial, found all of the allegations of the complaint to be true, but made no finding as to the affirmative issue raised by the answer.

The record contains a bill of exceptions, settled and allowed by the trial court on October 13, 1906, being the day succeeding the trial, in which bill alone appears the specifications of error relied upon. Judgment, however, was not entered until October 24, 1906. A copy of the bill of exceptions was served upon plaintiff's counsel November 2, 1906, and on that day filed. The certificate of the judge is that the bill of exceptions had been "duly prepared and settled with due time and in the manner required by law." Assuming for the purposes of this decision, but without deciding, that a bill of exceptions specifying as error the insufficiency of the evidence to support a finding may be settled and allowed before such finding is actually made, and treating the bill of exceptions as a part of the record, we are satisfied that the judgment should be affirmed.

That the plea of want of consideration is an affirmative defense is determined in Pastene v. Pardini, 135 Cal. 433, 67 Pac. 681. If there is any evidence offered in support of such affirmative defense, the defendant is entitled to a finding thereon; yet, if it appears from the record that "the failure to make such finding would not affect the substantial rights of the appellant, the judgment ought not to be reversed. Code Civ. Proc. § 475." Winslow v. Gohransen, 88 Cal. 452, 26 Pac. 504. In support of the issue of want of consideration, the appellant's evidence shows that he was indebted to two certain corporations in an aggregate amount of $642.10; that another creditor of appellant had levied an attachment upon his property, and he thereupon, for the purpose of counteracting this attachment, solicited the corporations to issue an attachment upon their claims; that these corporations, in compliance with such request, procured the Wholesalers' Board of Trade, of which plaintiff was secretary, and one Rossiter, who was assistant secretary, to bring suit upon their claims, which suit was brought in the name of Rossiter and an attachment duly levied; that thereafter defendant, by giving bond, had the first attachment released, and requested plaintiff to release the second attachment, which he refused to do unless other security was given for the claim. Thereupon defendant executed the note and chattel mortgage to plaintiff for $747.11, and the attachment was accordingly released. It does not appear what costs or expenses were incurred by plaintiff in the attachment proceedings, or that the amount of the note was in excess of the original claim and such costs. Appellant testifies that, after the attachment was levied and before the release, he gave a check to one of the corporations for the amount of its claim, but this check was not, upon presentation, paid on account of "want of funds"; that thereafter defendant deposited in the bank upon which said check was drawn funds more than sufficient to cover such check, but the same was not thereafter presented nor paid; that, when he gave the check, the corporation executed a receipt to defendant for the amount of its original bill, and after the dishonor of the check refused to surrender the same until the receipt was returned. Defendant's claim of want of consideration is based upon the proposition that no evidence was offered tending to show that the claims of the corporations had been actually assigned to Rossiter before suit, or by Rossiter to plaintiff before the execution of the note and mortgage. The only competent evidence in relation to such assignment is that of Rossiter, who, testifying in relation to the facts existing at the date of the note, says: "In the meanwhile plaintiff caused said original indebtedness owing by defendant to said packing houses and transferred to witness to be transferred to plaintiff." Defendant objected to this evidence, but upon what grounds does not appear. In the absence of any proper objections, no error can be claimed in the admission of such statements, and they show sufficiently the assignment and transference of the claims to plaintiff. The statements or acts of the assignors subsequently made or performed could have no effect against plaintiff as tending to overcome his proof of transfer. Aside from this, the situation of the defendant after giving the note and mortgage was not unlike that of one executing an undertaking for the release of an attachment, in which latter case, in an action upon such undertaking, the court will not inquire into the sufficiency of the complaint, or admit evidence as to matters therein necessary for determination in the original action out of which the attachment issued. Bailey v. Ætna Indemnity Co. (decided by this court June 18, 1907) 91 Pac.

416, and authorities therein cited. The attachment being actually released, such release was the agreed consideration for the note.

We find no error in the record, and the judgment is affirmed.

We concur: SHAW, J.; TAGGART, J.

4 Cal. App. 432

## PEOPLE v. FITTS. (Cr. 72.)

(Court of Appeal, First District, California. Nov. 23, 1906.)

1. ROBBERY—ASSAULT WITH INTENT—INSTRUCTION AS TO SIMPLE ASSAULT.

On a prosecution for assault with intent to commit robbery, there being no evidence of assault except in connection with the attempt to commit robbery, no instruction as to simple assault need be given.

2. CRIMINAL LAW—HARMLESS ERROR—INSTRUCTION.

The giving of an instruction that, if any of the witnesses willfully swore falsely as to any material matter, it is the duty of the jury to distrust their entire testimony, if violative of the inhibition of the Constitution against charging with respect to matters of fact, is harmless; it being as to mere commonplace matters within the general knowledge of the jurors.

3. SAME—ARGUMENT OF COUNSEL—REFERENCE TO DEFENDANT'S NOT TESTIFYING.

Under Pen. Code, § 1323, declaring that neglect of a defendant to be a witness cannot in any manner prejudice him or be used against him on the trial, it is not ground for reversal that the prosecuting attorney merely told the jury that the person they were trying was not W. (indicted with defendant) who took the stand, but F., the defendant, who did not take the stand, as to which fact he was not permitted to comment and should say nothing; the court having then also told the jury that it was the legal right of defendant to remain silent, and that no presumption should be indulged in against him because of his failure to take the stand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1672.]

4. SAME—MATTERS NOT SUSTAINED BY EVIDENCE.

W., indicted, but not tried, with defendant, having testified that, when they arrived at a certain place, the evening after they were claimed to have committed the offense, they met a fellow named Gilluly, the mere statement of the prosecuting attorney that defendant on reaching such place the evening after the assault "met the Gilluly gang—the Gillulys are well known in Santa Rosa"—is harmless, though there was no evidence of their being so known.

Appeal from Superior Court, Marin County; T. J. Lennon, Judge.

Terence Fitts appeals from a conviction. Affirmed.

Ross Campbell, for appellant. U. S. Webb, Atty. Gen., for the People.

HARRISON, P. J. The defendant was indicted for an assault with intent to commit robbery, and upon the trial thereof was convicted and sentenced to a term in the state prison. From this judgment and an order denying his motion for a new trial he has appealed.

It was shown by the testimony of the prosecuting witness that between the hours of 2 and 3 o'clock in the morning of December 6, 1905, he was addressed from the outside of his cabin on the Greenbrae drawbridge, and on opening the door a little way he was seized by the throat and dragged outside by a man named Woods, and that the defendant thereupon went through his pockets; that they went inside the cabin, and the defendant, after throwing its contents into confusion, came outside, and while holding the witness tight in his grasp demanded with a threatening gesture that he give up his sack of gold; that thereupon he was pulled around by Woods and struck upon the temples, by which he was rendered unconscious for about two hours. Woods, who was a witness for the defendant, testified that he and the defendant were together during the whole of the night of December 5th in a box car behind the freighthouse in San Rafael, and that neither of them was at any time that night at Greenbrae, or on the Greenbrae drawbridge.

1. One of the grounds urged in support of the appeal is the refusal by the court to instruct the jury, as requested by the defendant, that the charge in the indictment embraces two offenses; that is, an assault with intent to commit robbery, and an assault which is commonly termed a simple assault. The only evidence before the jury of the assault by the defendant was that of the prosecuting witness, and, if the jury believed his testimony, the defendant made no assault upon him except in connection with his attempt to commit robbery. The testimony of the witness Cleary, upon which the appellant claims the right to this instruction, did not purport to describe the occurrence, but was merely a statement of what the prosecuting witness had told him. If the testimony of Woods should be believed by the jury, there was no evidence of even a simple assault on the part of the defendant. Under the evidence before them the only verdict which the jury could render was either one of guilty as charged in the indictment or of acquittal. The court was therefore justified in refusing the instruction, upon the ground that there was no evidence before the jury to which it could refer. People v. Chavez, 103 Cal. 407, 37 Pac. 389; People v. Lopez, 135 Cal. 23, 66 Pac. 965; People v. Swist, 136 Cal. 520, 69 Pac. 223.

2. The court instructed the jury: "If any of the witnesses examined before you have willfully sworn falsely as to any material matter, it is your duty to distrust their entire testimony." It is contended by appellant that by this instruction the court violated the constitutional inhibition against charging the jury with respect to matters of fact. While it is held that in so far as the statute "requires" such an instruction to be given it is unconstitutional, it is at the same time said that the giving of such instruction will not be held to be reversible error, since

by it the jury are instructed as to mere commonplace matters within their general knowledge. People v. Wardrip, 141 Cal. 229, 74 Pac. 744.

3. The witness Woods was indicted jointly with the defendant, but the defendant was separately tried, and Woods was a witness in his behalf. In his closing argument to the jury the district attorney, while commenting upon the testimony, said to them: "You are trying the defendant Fitts and not Woods, and we have shown that he (Fitts) is the one that ran his hand in Feliz Sands' pocket, and I don't want you gentlemen of the jury to become confused as to which is the person on trial in this action and whose case you can alone consider. The codefendant Woods, the one who took the stand, is not the defendant on trial. The person on trial is the defendant Fitts—the one who did not take the stand. I am not permitted to comment on his failure to take the stand, nor shall I say anything about that." The attorney for the defendant objected to his reference to the fact that the defendant did not take the stand, and the court thereupon instructed the jury that it was the legal right of the defendant to remain silent, and that they were to indulge in no presumption against him because of his failure to take the stand in his own behalf.

It is contended by the defendant that the above remarks of the district attorney are in violation of section 1323 of the Penal Code, and constituted misconduct on his part for which the verdict should be set aside. Section 1323 declares that the neglect or refusal of a defendant to be a witness "cannot in any manner prejudice him or be used against him on the trial or proceeding." We are of the opinion that the above reference of the district attorney to the defendant was for the purpose of directing the attention of the jury to testimony which particularly affected him rather than Woods, and cannot properly be considered as indicating a purpose on his part to "use" against the defendant the fact of his not being a witness. The section does not declare that no reference to such fact shall be made, or that any reference, however innocent or inadvertent, shall be a ground for setting aside the verdict. It is only when the fact is "used against" the defendant that such result should follow. There is an expression in an opinion given by the court for the Third appellate district in People v. Morris (Cal. App.) 84 Pac. 463, to the effect that "it is error to allude in any way to the fact that the defendant had refrained from testifying," which may have been proper if limited in its application to the language of the counsel which was used in that case, wherein the fact was directly "used against" the defendant; but, if intended as the declaration of a rule or a construction of the provision in the section, it is an enlargement of the language of the statute which in our opinion is unauthorized.

Misconduct on the part of the district attorney is also assigned for another remark in his argument to the jury. Woods in his testimony stated that after they had reached Santa Rosa on the 6th of December they "met a fellow named Gilluly"; and, in addressing the jury in reference thereto, the district attorney said, "The defendant, on reaching Santa Rosa the evening after the assault, met the Gulluly gang—the Gullulys are well known in Santa Rosa." The proposition of the appellant that these remarks were prejudicial to him is submitted without any argument. No reference is made therein to the charge upon which the defendant was tried; and, while there was no evidence before the jury that the Gullulys are well known in Santa Rosa, it is evident that their verdict could not have been affected by this statement.

The judgment is affirmed.

We concur: HALL, J.; COOPER, J.

150 Cal. 676

### YOULE v. THOMAS (ROSS et al., Interveners). (L. A. 1,557–1,564.)

### WILKES v. SAME (BRADLEY et al., Interveners). (L. A. 1,565–1,572.)

(Supreme Court of California. March 19, 1907 Rehearing Denied April 18, 1907.)

Appeal—Aggrieved Parties.

As in an action to determine a contest between applicants to purchase public lands interveners are not entitled to litigate, they are not parties aggrieved by the judgments dismissing their complaints in intervention, and so cannot appeal therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 947.]

In Bank. Appeal from Superior Court, Kern County; M. L. Short, Judge.

Two actions, one by W. E. Youle and the other by Albert R. Wilkes, against Mary J. Thomas. In the first action T. P. Ross and seven others, and in the second action J. D. Bradley and seven others, separately intervened. From judgments dismissing the complaints in intervention, interveners appeal. Affirmed.

See 80 Pac. 914, 1133.

James F. Peck, Solinsky & Wehe, and Charles C. Boynton, for appellants. Laird & Packard, Galpin & Bolton, T. M. McNamara, and Charles G. Lamberson, for respondents.

HENSHAW, J. For the facts of these cases reference may be made to Youle v. Thomas, 146 Cal. 537, 80 Pac. 714. W. E. Youle contested the right of defendant Thomas to purchase the north half of the section, for which she had made application and held the certificate of purchase. Albert R. Wilkes in like manner contested her right to purchase the south half. These appellants are the interveners, who, as noted in Youle v. Thomas, by leave of court filed complaints in intervention; each claiming as an applicant for the purchase of a 40-acre tract under the acts for the purchase of mineral lands. When the case came on for trial, the court on motion dismissed these 16 complaints in intervention, and the interveners appeal. Youle v. Thomas, above cited, dealt with the right of the intervener Clarke to be heard in the contest between Youle and Thomas. The same proposition that was presented in that case touching the intervener Clarke is here presented in but slightly changed form as regards these appellants. The reasoning adopted and the conclusion reached in that case are strictly applicable to the present cases. No elaboration of the views expressed in Youle v. Thomas is called for.

As under no circumstances would these interveners have been entitled to litigate in the contest between Youle and Thomas, or in Wilkes v. Thomas, it follows that they were not aggrieved by the orders and judgments dismissing their complaints in intervention, which orders and judgments are therefore affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; SLOSS, J.; LORIGAN, J.

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150 Cal. 680

### COHEN v. LA CANADA LAND & WATER CO. et al. (L. A. 1,861.)

(Supreme Court of California. Aug. 16, 1907.)

1. Appeal—Review—Findings on Conflicting Evidence.

A finding on conflicting evidence that waters diverted by defendant would not have fed springs, the waters of which plaintiff had appropriated, will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal an Error, §§ 3983–3989.]

2. SAME—REVERSAL—NEW TRIAL—ISSUES.

Where, on appeal by plaintiff in an action by one who had appropriated waters of a spring to restrain diversion of waters claimed by plaintiff to have fed the springs, the only question was as to the correctness of the rule relative to percolating waters applied by the trial court, and it was held that such rule was wrong, and the cause was remanded for new trial, it is a question of fact at issue on the new trial, to be determined by the evidence then introduced, without regard to any finding on the first trial, whether the percolating waters diverted would have fed the springs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4713.]

3. WATERS AND WATER COURSES — PERCOLATIONS—TUNNELS—RIGHTS OF LANDOWNER.

Though defendants, for the purpose of collecting and carrying away percolating waters, constructing a tunnel commencing on plaintiff's land, without her permission, and then extending through defendants' land, plaintiff is not entitled to have adjudged to her the waters which percolated into the tunnel on defendants' land.

4. SAME—DIVERSION—RIGHTS OF ADJOINING OWNERS.

Percolating waters may be developed by a tunnel and conducted away from land, as against owners of adjoining lands, where the waters would otherwise in their natural flow sink into the ground and be lost.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 113.]

Department 2. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by E. G. Cohen against the La Canada Land & Water Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. J. Scrivner, Alfred H. Cohen, and Lawler, Allen & Van Dyke, for appellant. Munson & Barclay, W. S. Wright, and Anderson & Anderson, for respondents.

LORIGAN, J. This action was brought to restrain the defendants from diverting and carrying away certain waters of which plaintiff claimed to be the owner and for the recovery of damages for such diversion. Judgment went for the defendants, and this appeal is taken therefrom, and also from an order denying the motion of plaintiff for a new trial.

The main question on this appeal is addressed to the sufficiency of the evidence to sustain certain findings of the court. Referring first to the general features of the case as disclosed by the evidence before referring particularly to the findings, it appears that about 1891 one Mrs. Gould became the owner of a tract of land containing 160 acres situated at La Canada, in Los Angeles county. This tract, 60 acres of which was useful for agricultural purposes embraced the lower portion of what is known as "Snover Canyon" and extended some distance up it. At the time of her purchase there was lying, contiguous to and northerly of this tract of 160 acres, a 40-acre tract of unappropriated government land of the United States extending across the canyon, and on this tract were several small springs. This 40-acre tract was worthless for agricultural purposes. In 1891 and 1892, while said 40-acre tract was still unappropriated public land, Mrs. Gould appropriated the waters of said springs, conducted them by pipes to her house and lands, and used them for irrigation and domestic purposes. Subsequently, and in 1899, the present plaintiff became the owner of said 160-acre tract, together with its appurtenances. In the years 1898 and 1899 the predecessors of defendants went upon said 40-acre tract, and with the assent of those who in the meantime had acquired title thereto from the United States government dug several tunnels thereon, and conducted the waters obtained thereby to lands belonging to them some two miles distant, for the purpose of irrigating their lands and selling the surplus waters to their neighbors. The plaintiff thereupon brought this action, the amended complaint having been filed in 1904, claiming that the defendants had, by constructing such tunnels, intercepted and diverted the waters of the springs, the right to which she and her predecessors had prior thereto acquired and owned by appropriation and use. Presenting this as a general situation, we now come to a more particular consideration of the findings made by the court bearing on the controversy between the parties relative to the waters of such springs.

The court found that the springs referred to in the complaint were situated, two of them in or near the thread of the canyon, and two on the steep mountain side thereof, which springs for convenience sake may be designated as springs Nos. 1, 2, 3, and 4. And it may also here be mentioned that the tunnels involved are designated upon the plat filed in evidence as tunnels 2, 3, 4, 6, and 7. The area of the watershed of Snover canyon is about three-fourths of a mile square; the area above the tunnels, the construction of which are involved here, amounting to about 200 acres. Relative to the springs, it was found that as they existed in 1896 the waters therefrom, if not diverted, would flow in a small stream upon the lands of the plaintiff for a short distance, but that since 1897 there had not been sufficient water issuing from said springs during the irrigating seasons to form a stream, or flow over and upon the lands of plaintiff, and that no stream had flowed thereon, and aside from the waters of said springs no stream would flow, or has flowed, down said canyon, except a temporary flow caused by rainfall; that the predecessor of plaintiff appropriated the waters of said springs in 1891 and 1892, and in the early part of the irrigating season of 1893 conducted said waters to the extent of 1¾ inches to a reservoir constructed by her, but from said date, owing to the effects of fire and of drouth and other natural causes, the flow from said springs steadily diminished, so that at the time the defendants and their predecessors began the work of constructing tunnels in said canyon in 1898, one of said springs had entirely ceased to flow, others had greatly diminished, and the total amount supplied by said springs had been reduced to less than one-half inch of water, miner's measurement, constant flow' that the tunnels constructed by respondents were constructed by and with the consent of the owner of the said 40-acre tract upon which said springs were found; that by means of said tunnels certain waters were developed near and at the end or face of said tunnels; that all of the waters so found and developed were and are percolating waters, which issue from the seams and fissures of the granite dyke or wall in which the same were found, and none of said tunnels intercepted any known stream of water running in any defined channel; that said tunnels were run in the vicinity of and at points below the plane of said springs, and one of said tunnels is at one point near its mouth directly under one of said springs, on the side of the canyon, but said tunnel is 75 feet long, and is in granite strata, and the waters therein are found within 8 feet of the face thereof; that neither of the other tunnels is under a spring; that the said tunnels are run nearly at right angles with and away from the thread of the canyon, and the water which issues from said tunnels was found in granite dykes, which cross said canyons, the strata and main seams of which stand almost perpendicular; that said springs were not and are not, nor is either of them, fed by any known stream running in a defined channel; that no part of said waters which were developed or found in said tunnels would, if said tunnels were not there, issue from said springs, or either thereof, or feed or support the same in any way, and no part of said waters found or developed in said tunnels would, if said tunnels were not there, find its way into the Snover canyon, so as to feed or support in any way any stream, either surface or subflow, in said canyon, but said waters of said tunnels would, except for said tunnels, disappear into the crevices of the mountains and be lost; that said springs have not, nor has either of them, been destroyed by the defendants, or any of them; that the amount of water found or developed in said tunnels upon said 40-acre tract was about 1.50 of an inch of water measured under a 4-inch pressure, and the said flow of said tunnels has not increased during the irrigating seasons since the construction thereof; that the lands upon which the defendants have used the water of said tunnels are not riparian, and do not abut or adjoin the lands upon which said springs and tunnels are situated, or the lands of plaintiff, or the lands upon which the waters from said springs would naturally flow.

We have set forth these findings of the court as applicable to all the springs referred to in the complaint and the various tunnels run by defendants which are claimed to have diverted the water therefrom. This appeal, however, involves only springs Nos. 3 and 4 and tunnels 2, 6, and 7. Tunnel 6, it is claimed by appellant, diverts the waters of spring No. 4, and tunnel No. 7 the waters of spring No. 3; and, the court having found that these tunnels did not divert the waters of either of said springs, the main question arising now is concerning these particular springs and tunnels, and the sufficiency of the evidence to sustain the findings relative to them. Nothing with reference to other tunnels constructed by defendants is involved on this appeal, as far as the diversion of waters of other springs is concerned, although a question as to the rights of appellant to the waters developed by the construction of tunnel No. 2 is presented. That, however, does not involve the waters of any spring, and there is no dispute as to the sufficiency of the evidence to sustain the finding relative to it. It presents purely a question of law, arising from the finding as made by the court concerning it and the evidence on which it was based. It appears that this tunnel No. 2 was commenced on the land of appellant, ran in a northerly direction about 80 feet through her lands and then upon the land of respondents, and near the face of the tunnel upon the land of respondents water was developed which was conducted in a pipe line through the tunnel to another pipe line on the land of respondents. The court found as to said waters that said tunnel did not intercept or cut off any of the waters of any of said springs, and none of the waters which were found or developed in said tunnel would, if said tunnel were not there, issue from said springs, or either thereof, or tend to feed or support said springs, and no part of said water would find its way into Snover canyon, so as to feed or support any stream, but such water so found or developed would, except for said tunnel, be lost and disappear into the crevices of the strata in which they were found. As conclusions of law the court decided from these findings that as far as tunnels 6 and 7 were concerned the defendants were entitled to all the waters developed by their construction, and as to tunnel 2 that the respondents were entitled to all waters issuing from adjoining rocks in that portion of the tunnel constructed on the lands of respondents and plaintiff to all water issuing into said 80 feet of said tunnel from her land.

Many other findings were made by the court as to other springs and other tunnels and on the subject of damages; the court finding as to the latter that any damages sustained by plaintiff or her predecessor were caused through failure on their part to either obtain an adequate water supply from the springs, or through their own negligence in applying such water as they had to the irrigation of their premises, and not to any action on the part of defendants. On the subject of damages the findings and conclusion of the court are not seriously questioned, and we are satisfied could not be under the evidence. So, as we have said, no questions arise in the case save as to springs 3 and 4 and tunnels 2, 6, and 7. Now, as to the claim of appellant that the evidence was insufficient to warrant the findings of the court relative to the construction of tunnels 6 and 7. The findings as to the waters obtained by the construction of these tunnels were, in effect, that such tunnels did not intercept any stream of water running in any defined channel, nor any water which would feed any stream, either surface or subflow, in said canyon; that the waters which were obtained by the construction of said tunnels were new or developed waters found in formations in the mountain differing from those existing in the vicinity of the springs; that such waters were developed at or near the face of the tunnels, and were waters percolating through seams and fissures in granite dykes intercepted by the tunnels at long distances back in the mountain side from the springs; that such waters would not, even were the tunnels never dug, support or feed said springs, or issue therefrom, but would follow the crevices of the strata through which they were percolating and be lost.

The appellant's contention is that the evidence does not support such findings, either as to the source or trend of these percolating waters; that the formation through which said tunnels were driven is of a broken and seamy granite character, saturated with water which, percolating through the broken rock, supported and fed these springs; that the driving of these tunnels in the mountain in the vicinity of these springs did not develop any water existing in other formations or whose trend would not reach the springs, but the direct effect was to penetrate the saturated body of earth through which the waters feeding the springs flowed, or which supported the flow of water thereto, and to draw such waters into the tunnels, with the result that the springs dried up. But the principal controversy at the trial was as to whether these waters were percolating waters, the natural flow of which, but for the interference of the respondents' tunnels, would have fed these springs, or were they waters percolating through fissures in the mountain and developed by the construction of these tunnels from sources entirely disconnected with, and separate and distinct from, the sources from which the springs in controversy were supplied? Very much of the evidence in the case was addressed to this question, and was largely made up of the testimony of expert witnesses—civil and hydraulic engineers—called on both sides. The views of the witnesses called to this point were widely divergent on the subject. Some were confident that the waters which supplied the springs, and were taken by the tunnels, were found in the same formation or material, which consisted of a saturated mass of earth extending into the mountains; that from and through this mass the waters in their natural flow percolated and fed the springs, and that the effect of driving the tunnels was to drain into them the waters from this saturated mass, and from no other source; that the waters which fed the springs and flowed in the tunnels belonged to this same body of saturated earth and had the same water plane, and the draft on it by the tunnels had the direct effect of drying up the springs. Others were equally confident that the waters obtained by driving the tunnels were not waters obtained by the penetration of any saturated plane through which the springs were supported, or any saturated plane at all, but were obtained by running the tunnels into the mountain until they struck granite walls, through the seams or fissures of which water percolating was intercepted and taken into the tunnels, and which water, but for its interception by the tunnels, would have gone in a natural course into the depths of the earth and would never have flowed towards the springs, but, on the contrary, would have continued in a different direction and away from them.

In this condition of the evidence it is apparent that whatever conclusion the trial court reached must be resolved out of a conflict of the evidence. While this conflict is obvious from an inspection of the record, we have the opinion of the judge of the trial court presented in the transcript, in which he notes the conflict, refers to it, and gives his conclusion drawn from it and subsequently embodied in the findings: In that opinion the court said: "Aside from matters disposed of at the trial by rulings on the admissibility of evidence, the questions of fact to be decided by the court now are whether the defendants, by the said tunnels, divert water to which the plaintiff has a better right by virtue of said appropriations or by virtue of her riparian privileges. The defendants, by the construction of tunnels in 1898, did not at that time deprive Mrs. Gould or the plaintiff of any of the said appropriated water. The water yielded from the tunnels has not increased since that time. Plaintiff is now enjoying the use of as much water as she or Gould did at the time of the construction of the tunnels. The amount of this appropriated water is less than previously, but the decrease is not due to acts of the defendants or their predecessors, or any of them. The other question, whether the water abstracted by the defendants would, if not interfered with, flow as an underground stream or by percolation, and thus reach the plaintiff's land, is not so easy of determination. The canyon is fan-shaped, as is usually found in mountains of southern California. The sides of the canyon are very precipitous and covered to a considerable extent with vegetation. The bottom of the canyon is filled up to some extent with detritus, and is moist, and at the lower end is covered by a dense growth of vegetation common under similar conditions in southern California. The earth's formation here is cyanite (resembling granite), folded by volcanic action into layers of more or less regularity and continuity. These layers rest at an angle of 80 degrees or more (sometimes nearly perpendicular), and dip towards the south. Between the layers the main seams or fissures trend east and west and downward to an unknown, but presumably great, depth. These layers, as they near the surface, are somewhat decomposed and also broken, so as to form many irregular fissures in every direction. The rock lying at a greater depth is also more or less broken, but the fractures are quite well defined. Several experts testified in the case for each side, giving an opinion as to the course of the water known to be within the watershed of the canyon. Those on behalf of the plaintiff contend that all of the water taken by the defendants, if not interferred with, must find its way out of the canyon through the plaintiff's land; that such is the usual course of water in the canyons of southern California; and that this is not an exceptional case. The experts testifying for the defendants take a radically different view, and insist that such water would pass out of the canyon through the main seams or fissures behind the rocks, without coming in contact with plaintiff's land; that the water taken by the defendants by means of tunnels is water passing through the fissures behind the layers of rock, and, except the same was thus intercepted would pass out of the canyon and find its way to the surface at some distance from plaintiff's land without passing through it, or would follow the vertical seams to a great depth, contributing to form the great body of subterranean water observable in all mining operations; that the water known to be within Snover canyon watershed is greater than could exist from the rainfall alone; and that the excess must come from other watersheds, accounting for this by the peculiar formation at this point. From the evidence I am unable to conclude that the plaintiff has met the requirements by proving by a preponderance of evidence that she is deprived by the defendants of any of the appropriated water or any to which she may assert rights as riparian waters; but, on the contrary, I am constrained to find that the water which the defendants are taking is 'developed' water abstracted from their own land, and which, if not so taken, would be of no benefit to the plaintiff either directly by flowing onto her lands or by forming a support for other water which would so flow, and, from the evidence, find that, except for the fact that it was intercepted in the manner employed by the defendants, it would be entirely lost."

This conflicting condition of the evidence with reference to the main point in controversy between the parties to which the trial judge called attention in his opinion—the source from which the waters taken by the tunnels was diverted—is amply borne out by the record and is sufficiently pointed out there so as to obviate any discussion by us upon the subject, which could only amount to detailing the evidence which raises it without accomplishing any other result than to make it apparent that such conflict exists. The opinion sufficiently refers to the evidence out of which it arose, and, as the record shows that there was in fact a conflict in it, the familiar rule applies that a finding by the trial court based on conflicting evidence is not subject to review by this court. In this connection it may be said that this case was was here before (142 Cal. 437, 76 Pac. 47). While it appears from an examination of the decision on that appeal that the trial court found "that part of said waters which were developed in said tunnels would, except for said tunnels, have found its way by some unknown subterranean stream to said springs and been discharged therefrom," still on the appeal the only question was as to the correctness of the rule relative to percolating waters applied by the trial court to that and other findings. It was held that the rule applied was wrong and the cause remanded for a new trial. It is not important to a consideration of the present appeal that upon a previous trial the court made a different finding from the one made on the last trial as to the source of the waters developed by said tunnels. It is probable that upon the first trial counsel for defendants, believing the law as they then contended for, and as the court applied it, to be that percolating waters were part of the soil and could be removed by the owner of the land at pleasure, and without consideration as to the rights of plaintiff as an appropriator of the water of the springs, did not devote as much evidence to prove that the source from which the tunnels were supplied was different from that which fed the springs. Under the rule of law as contended for by the defendants upon the first trial, if it were the correct rule as they then believed it to be, it was immaterial from what source the waters came as long as they were percolating waters. Or it may be, as asserted by respondents in their brief and not questioned in the closing brief of appellant, that much additional evidence, both of expert engineers and others familiar with conditions in Snover canyon when the tunnels were constructed, was introduced by the defendants on the second trial. In any event, it was a question of fact again at issue on the second trial as to the source of said waters, and the sufficiency of the finding upon it is to be determined from a consideration of the evidence then introduced, which, as we have said, was sufficient to sustain it.

Now, as to tunnel No. 2, it is contended by appellant that, because this tunnel commenced on her land, the waters brought through it by respondents belonged to her. It is not claimed that the construction of this tunnel affected the water supply of any spring claimed by appellant. Her position is that as the tunnel commenced on her land and is cut through it for a distance of 80 feet till it runs into the land of respondents, and respondents conduct through it for that distance water developed upon their own land, that appellant is entitled to said waters, notwithstanding they are not found anywhere within the 80 feet of tunnel through her land, but wholly on that of respondents. Counsel for appellant content themselves with the assertion that appellant is entitled to said water, but refer to no principle of law upon which their claim is based, and, of course, cite no authority which supports any. Whatever appellant's claim may be against respondents for trespass upon her land in the construction of said tunnel and their right to maintain a pipe line through it, certainly the fact of such trespass and the use of the 80 feet of tunnel as a conduit did not give appellant the right to the waters developed on respondents' own land. The right of respondents to this water follows from their development of it on their own premises and control and conduct of it through their pipes. It is immaterial to any question of ownership of the waters that respondents are trespassing upon the lands of appellant in conveying them from the point of development on their land through her land to their pipes at another point. Respondents may be guilty of trespass to the extent claimed by appellant, but the penalty for such trespass is not to deprive respondents of their ownership of waters taken from their own property. In its decision the trial court gave appellant all the waters which might percolate into the tunnel along the 80 feet of its construction on her property, and, so far as ownership of waters developed by the construction of this tunnel was concerned, this was all to which she was entiled. She was not entitled to have it adjudged that waters developed on respondents' land belonged to her from the mere fact that it was piped through her land without her permission. This disposes of all matters relative to the construction of said tunnels, or their effect upon the springs.

We come now to the last point made by appellant. It will be noticed the court found that the land upon which the respondents have used the waters from said tunnels are not riparian to and do not abut or adjoin the lands upon which said tunnels are situated, and it is insisted by appellant that though the waters developed by said tunnels were not part of the waters supplying said springs, or waters which would have reached Snover canyon by percolation or otherwise, nevertheless the respondents were only entitled to use such waters upon the lands where they were developed; that the waters could be applied and used by respondents upon their 40-acre tract, where they were developed, and could not be taken for use to other lands. In support of her position the broad proposition is contended for that percolating waters can never be taken away from the land where they exist, although adjoining proprietors are not injured or damaged thereby; and it is asserted this rule finds support in the decisions of this court in Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849, So. Cal. I. Co., v. Wilshire, 144 Cal. 68, 77 Pac. 767, Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113, and Gutierrez v. Wege, 145 Cal. 730, 79 Pac. 449. But these cases do not lay down the doctrine as broadly as appellant contends for. They lay down the rule that waters of a stream, or percolating waters, cannot be taken away from the lands on which they flow, or from lands upon which they are found, for use elsewhere, where the result of such taking would be to injuriously affect adjoining property owners. The principle which enters into this rule is the protection to be given the superior natural rights of adjoining property owners to the flow and use of such waters. Where, however, there can be no injury worked to such adjoining owners by the taking and use elsewhere of such waters, no limitations should be placed upon the right of one developing them as to their use. In the case at bar the waters which were secured by the construction of these tunnels of respondents were not waters which, but for their interception, would have reached any stream in Snover canyon, or which would have reached or supported any of the springs in question in the case. They were not waters which would follow the natural watershed of the canyon and have trended down in the canyon by way of the springs or otherwise. They were waters trending through the fissures of the granite dykes away from the direction of the natural watershed of Snover canyon, and would never have reached it, nor reached the springs in question, but, if uninterrupted in their flow, would have continued down through the strata in which they were percolating, and in their natural flow would, as the experts testified and the court found, have passed down into the crevices of the mountains and been lost. Under these circumstances, as the waters developed by the tunnels were not waters which would have trended towards or supported or affected any stream flowing by the land of appellant, nor any springs in or to the waters which she had any claim or interest, she was not injured as an adjoining proprietor or as an appropriator, and hence could not complain, or insist upon the application of the rule announced in the cases cited to prevent the respondents from taking such developed waters to any lands to which they might see fit to conduct them. For authority sustaining this proposition we cite Hanson v. McCue, 42 Cal. 306, 10 Am. Rep. 299, Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201, and Montecito, etc., Co. v. Santa Barbara, 144 Cal. 585, 77 Pac. 1113.

There are other points made by counsel for appellant and referred to in their brief. They are, however, simply referred to, and are not discussed. We have examined them, and do not think them tenable, or that they merit particular reference or discussion.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(151 Cal. 693)

KOYER v. BENEDICT et al. (L. A. 1,812.)

(Supreme Court of California. Aug. 19, 1907.)

MORTGAGES — FORECLOSURE — EVIDENCE TO WARRANT.

Evidence in an action to foreclose a mortgage *held* sufficient to authorize a finding that it was a valid lien for the amount found.

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by A. S. Koyer against C. E. Benedict and others. Judgment for plaintiff. Defendant Gertrude Stull appeals. Affirmed.

See 87 Pac. 231.

Gertrude Stull, in pro. per. Harris & Harris, for respondent.

LORIGAN, J. This action was brought to foreclose a mortgage made by the defendant Benedict in favor of plaintiff on March 14, 1900, upon a lot in the city of Los Angeles to secure payment of $3,250. The complaint contained the usual allegations in an action for foreclosure. The defendant Gertrude Stull, who appears to have drafted her own pleadings and tried the case in her own behalf in the trial court, alone answered, denying specifically all the allegations of the complaint save that she claimed an interest in the premises, and setting up as an affirmative defense the following facts: That immediately prior to the making of the mortgage in question plaintiff and the defendant Holway were her agents, having under their control, with the Title Insurance & Trust Company of Los Angeles, $1,150 of her money to be invested by them in the purchase for her of a lot somewhere in the city of Los Angeles, for which lot $1,100 was to be paid and the balance of $50 to be retained (and the defendant alleges it was retained) by plaintiff; that thereafter plaintiff agreed with defendant to purchase for her the lot described in the mortgage for $1,550, her $1,100 with an additional $450 to be loaned her by plaintiff to be paid for that purpose; that she thereupon notified the Title Insurance & Trust Company to accept the written instructions of said plaintiff and Holway for the purpose of the transfer of said property to her; that thereafter, acting adversely to the interests of defendant and for his own interest, plaintiff carried forward $200 of her $1,100 deposited with said Title Insurance & Trust Company, placed therewith $1,350 of his own money, and instructed the trust company to pay over the sum to the owner of the property, one Claybrooke, when a deed was executed by him in favor of defendant; that in depositing said sum of $1,350, instead of $450, plaintiff aided and was accessory to the withdrawal and misapplication of $900 of the $1,100 intrusted to her agents as the purchase price of said lot; that plaintiff and Holway procured a deed to be executed by Claybrooke to the defendant Benedict; that Benedict then executed the mortgage in question and subsequently conveyed the lot to the defendant; that Benedict paid no consideration for the deed to himself, and acted solely for the benefit of plaintiff and Holway; that Benedict held the property in trust for her, and executed the mortgage without authority from her; and that said mortgage was void. The issues presented were tried, and the court found that the mortgage was executed by Benedict, that he was the owner of the premises at the time of its execution, that the defendant Gertrude Stull subsequently acquired title to the lot from him with knowledge of the mortgage, and found against defendant upon all the allegations set up in her affirmative defense. Judgment was entered for the sum of $3,631.92 and costs in favor of plaintiff; and from an order denying her motion for a new trial, defendant appeals.

Her attack is directed against the findings in favor of plaintiff, the claim being that none of them were justified by the evidence. The record on appeal is not the most satisfactory. The evidence on the trial was apparently presented in a rather desultory way, arising, doubtless, from the fact that defendant was her own attorney and not familiar with legal procedure. Exactly on what theory she presented her case in the lower court, or in what particular respect the findings of the court are challenged here, it is difficult to readily perceive. The position of plaintiff on the trial regarding the mortgage in question was that the lot described in it was purchased for $1,550 by Holway, who desired a deed from Claybrooke to be made to Benedict; that Holway put up $250, plaintiff advancing the remainder of the purchase price —$1,300—it being further agreed between them that plaintiff should advance, as required, an additional $1,950 to pay for the construction of a building to be erected on the lot; that the mortgage was given to secure the amount of the purchase money advanced by plaintiff and to secure the advances to be made for the building. We will discuss this matter later, and mention it now as premising a reference to the claim of defendant relative to the lot described in the mortgage. In her answer presenting her affirmative defense she alleged that the plaintiff paid, as part of the purchase price of the lot mortgaged, the sum of $1,350 of his own funds, but asserted that, by reason of further allegations in the answer, the entire transaction culminating in the giving of the mortgage was a fraud upon her, perpetrated by the plaintiff and the other defendants, Holway and Benedict, and that the mortgage was, therefore, void. Upon the trial, and here, as we understand her position, it is claimed that $1,150 of her money went into the purchase price of the lot, together with $400 she borrowed from plaintiff; that the deed from Claybrooke should have been made directly to her, as per agreement; that the deed to Benedict was without any consideration, was unauthorized, and that the mortgage, for all purposes for which it was given, was equally unauthorized by her, and fraudulent and invalid; or, at least, the entire scheme of plaintiff, Holway, and Benedict was a conspiracy to obtain her money, after the mortgage was executed and given priority, and to put it into the lot, either towards the purchase price, or to be expended in the construction of the building, and at the same time including it in the mortgage.

We have examined the record carefully and perceive no reason why the findings should be disturbed. The evidence upon all the main issues in the case was, as usual, conflicting. It was for the trial court to determine from the conflict what facts it deemed satisfactorily proven, and an examination of the record shows that sufficient evidence was presented to justify the findings upon which the judgment was based, and to warrant the trial court in further concluding that the affirmative defense alleged was not sustained by it. There was evidence, which was accepted by the court as true, to the effect that plaintiff was in no respect the agent of defendant in the purchase of this property; that he was engaged in selling real estate, and had been requested by defendant to look out for the purchase of a lot for her in Los Angeles; that Holway, one of the defendants, was her agent, and had her money under his control; that Holway had given plaintiff $50 of the money of defendant long prior to the purchase of this lot, not as a commission, but as a deposit to be used by him in the event of securing a lot which defendant might wish to buy; that he (plaintiff) had listed with him by Claybrooke the lot described in the mortgage which he was authorized to sell for $1,550, and asked defendant if she would purchase it, but she declined to do so. He then tried to dispose of it to several parties without success, until Benedict and Holway agreed to purchase it on the following terms: Holway to pay $250, the plaintiff to advance $1,300 to complete the purchase, and plaintiff to take a mortgage upon the lot for $3,250 at 11 per cent. per annum interest. This mortgage was to secure $1,300 of the purchase price advanced by plaintiff, and to further secure an advance of $1,950 to be paid to Holway and Benedict for the purpose of building a small two-story house on the premises according to plans acceptable to plaintiff; the money to be paid out on the construction of the house as it progressed. Holway and Benedict were also to pay plaintiff $100 commission. These terms for the purchase of the lot by Holway and Benedict were accepted by plaintiff, who paid $1,300 and Holway $250 of the purchase price, and, under an arrangement between Holway and Benedict themselves as to who should take the conveyance, it was agreed that Benedict should do so. Accordingly the deed was made from Claybrooke directly to Benedict, and the mortgage in question for $3,250, as agreed for, was immediately made by the latter in favor of plaintiff. The evidence warranted the court in finding that up to this time defendant Stull had no interest in the transaction, nor was in any manner connected with it, or, if so, it was by some arrangement with Holway of which plaintiff knew nothing. It does appear that Holway was at the time the agent of defendant and had the control of her money on deposit with the Title Insurance & Trust Company, and it is no doubt the fact that the sum put up by him towards the purchase price was a portion of it; but the evidence warranted the court in concluding that plaintiff did not know this fact, and did not know that defendant had any interest in the property until he ascertained, subsequent to the execution of the mortgage that Benedict had deeded the lot to her. It is true that an escrow order to the Title Insurance & Trust Company was signed by Koyer and Holway, directing payment of the money (it is to be presumed to Claybrooke; the order does not recite) to be made by the company when it could issue a certificate of title which would show "that the title of said property is vested in Gertrude Stull free from all incumbrances * * * except a mortgage executed by Charles E. Benedict and wife in favor of A. S. Koyer. * * *" The plaintiff testified that instructions as to the contents of this order were given in the office of the company by Holway, that plaintiff signed it after it was prepared, without reading it closely, and did not notice any reference in it to the defendant nor knew at that time that she was concerned in the matter. The court accepted this explanation as reasonable, and it had a right to do so. It is true, also, that, when plaintiff and Holway got together to arrange for the payment of the purchase price of the lot, Holway, though he had agreed to pay plaintiff $250, was only ready to pay $200. Plaintiff insisted that he should put up the additional $50, and Holway said—so plaintiff testified—"There is $50 more in your hands I let you have," to which plaintiff replied, "That belongs to

Mrs. Stull," and continuing, he testified: "After some more conversation, I turned that money into the Title Insurance & Trust Company." This is the $50 which has heretofore been referred to as paid to plaintiff by Holway as a deposit to be used in the contemplated purchase of some lot for defendant. While these circumstances might raise a suspicion that plaintiff had some knowledge that defendant was connected with the transactions with reference to the purchase of this lot, still it could hardly be sufficient to warrant the court in disregarding the positive statement of plaintiff and Holway that at this time plaintiff knew nothing of her connection with it. This $50 was not included in the mortgage nor involved in the suit to foreclose it.

Added to all this evidence is this further fact that several agreements were drawn up between Benedict, Holway and the defendant relative to this lot. Some of them while they were unsatisfactory to defendant in some particulars and rejected by her for that reason, all practically contained the same recitals, and all of them contained reference to this mortgage as a recognized subsisting lien on the property. The agreement which was finally executed recited that Benedict had conveyed this lot to defendant; that his purpose in doing so was to secure defendant the payment of $1,150 and interest thereon at the rate of 10 per cent. per annum, payable monthly, said sum to be payable only on the sale of the land so conveyed to her; that Benedict as owner, and Holway as builder, agreed to erect a two-story frame house of a certain description; that upon the sale of the premises defendant would be entitled to one-half of the net profits of the transaction, based on the sum the property might be sold for "over and above the existing mortgage of $3,250 made by Charles E. Benedict to A. S. Koyer, and over and above the $1,150 advanced by Gertrude Stull, and interest on such sums." This agreement states that she took the conveyance to the lot subject to and with the knowledge of the existence of this mortgage from Benedict to the plaintiff, and no doubt, from the discussion had between herself and Holway and Benedict as to the various agreements which were prepared between them and in which this mortgage was referred to, the defendant was fully aware of the circumstances under which it was given. The agreement as executed was acted upon, and it appears that the defendant received payments of interest on the $1,150 mentioned in it, according to its terms. This $1,150, aside from the $250 of it which undoubtedly was used by Holway as his advance of the purchase price of the lot, would appear from the evidence to have gone with the amount plaintiff was to advance, and did advance, towards payment for the construction of the house, which cost at least $3,000. We might pursue this matter further, but think these facts which the evidence presents, and which the trial court obviously accepted as true, justify the findings as made by it in every particular.

It is claimed, however, that, conceding that the mortgage was a valid lien upon the property, still the evidence is insufficient to support the finding of the court as to the amount due under it. In this regard it is insisted that, as the mortgage was given, not only to secure the purchase price advanced by plaintiff, but also to secure the additional advance to be used for the specific purpose of erecting a house upon the lot, and as the plaintiff, after the execution of the mortgage and before any sums were advanced for that purpose, had notice that the agreement in that respect was for the benefit of defendant, he was only entitled to enforce his mortgage to the extent that he had actually made payments for that purpose alone. And it is claimed the evidence does not show that he advanced all the moneys for that purpose which the court found to be due under the terms of the mortgage. But the evidence is uncontradicted that the full amount of money specified in the note and mortgage was paid out by plaintiff for the benefit of defendant, that $1,300 of it went into the purchase price, and the rest into the construction of the house on the lot. Defendant does not contend that there was in fact no evidence to show this. Her point is that the evidence upon the subject was too general to be accepted as satisfactory. It is true the statement was a general one. Plaintiff testified that he had paid out the full amount mentioned in the mortgage, less the $1,300, all for the construction of the house. He did not go into details—did not particularize as to amounts paid, to whom paid, or the character of the work or materials for which payment was made. But, in connection with his general statement, he further testified that he had all the checks with him showing such payments, and they were in fact handed to defendant for examination. She looked over some of them and cross-examined him as to them, and then practically the inquiry on the subject ended. If defendant questioned the general statement of plaintiff in regard to such payments, she could have pursued the matter in detail and had his vouchers at hand from which to determine how far his general statement was supported by them. Not having done so, she is not in a position to claim that sufficient proof of payment was not made by his general statement.

These are the only points made on this appeal of sufficient merit to require consideration.

The order denying the motion of defendant for a new trial was properly made, and is affirmed.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.

151 Cal. 732

## CALIFORNIA FARM & FRUIT CO., Limited, et al. v. SCHIAPPA-PIETRA et al.

(L. A. 1,687.)

(Supreme Court of California. Aug. 19, 1907.)

1. VENDOR AND PURCHASER—ACTION TO RESCIND CONTRACT—OFFER TO RESTORE PROPERTY.

An offer to restore the property received before suit by the purchasers to rescind for fraud a contract of sale of lands is unnecessary; plaintiffs, in case their claim is well founded, being entitled, on delivery to defendant of the lands, to receive, not only the money and obligations they gave therefor, but also the amounts they had properly expended in the management of the property according to their contract with defendant, who had received all the income of the property, and the facts being complicated and a judicial accounting necessary, and defendant being unable to restore some of the obligations received by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 209.]

2. SAME—NOTICE OF RESCISSION.

Even if notice of rescission is a condition, precedent to an action to rescind a contract of sale, a prior action in the federal court, dismissed on defendant's plea to the jurisdiction, is sufficient notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 216, 217.]

3. SAME—DELAY IN COMMENCING ACTION.

A delay of three months after knowledge of the facts before bringing an action to rescind, for fraud, a contract of purchase, does not constitute undue delay; plaintiffs in that time having commenced a suit for the same purpose in the federal court, which was dismissed on defendant's plea to the jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 213.]

4. PLEADING—COMPLAINT AND SUPPLEMENTAL COMPLAINT.

Though a complaint and supplemental complaint are incorporated in one document, styled an "amended and supplemental complaint," the supplemental complaint being distinguished only by being contained in separately, but consecutively, numbered paragraphs, they are to be considered as separate pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 636-640.]

5. SAME—ELIMINATION OF PARTIES—DEMURRER.

Where persons were properly made defendants as the facts existed when an action was commenced, the complaint is not demurrable as not stating a cause of action against them, or on the ground of their improper joinder, on the appearance in a supplemental complaint of other matters occurring after commencement of the action.

6. PARTIES — MISJOINDER — MODE OF OBJECTION.

Where the presence of certain defendants becomes unnecessary because of facts occurring after commencement of the action, the proper practice to eliminate them is by motion to dismiss the action as to them.

7. SAME—MISJOINDER OF DEFENDANTS—PERSONS WHO MAY OBJECT.

The presence in an action of a defendant entitled to have the action dismissed as to him is not ground of objection by other defendants, protected from additional costs because thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 149.]

8. CANCELLATION OF INSTRUMENTS—PARTIES.

Where plaintiffs bought land and gave a deed of trust to secure the unpaid purchase money, the trustees are proper parties to an action to rescind the contract of purchase for fraud, with complicity in which they are charged, though they have divested themselves of title to and possession of the property by sale under the power in the deed of trust.

9. PARTIES—MISJOINDER OF PLAINTIFFS.

It is not a fatal misjoinder to make plaintiff, in an action to rescind a contract of purchase of land, with the corporation which bought the land, one who owns stock of the corporation and bonds thereof, which are a lien on the property, and who might have been made a defendant; it being a part of the relief asked that the stock and bonds of the corporation be produced and canceled, or transferred to the vendor.

10. PLEADING—STRIKING OUT ALLEGATIONS OF COMPLAINT.

Matters material to the accounting to which plaintiff, under the facts alleged in the complaint, is entitled, and proper, though not necessary, subjects of averment to lay the foundation for that part of the relief, should not be stricken from the complaint.

11. COSTS—TAKING OF DEPOSITIONS.

Under Code Civ. Proc. §§ 2021, 2031, authorizing either party to have a deposition taken any time after service of the summons, it is not ground of objection to the taxing of costs for a deposition that defendant had it taken before answer, and while a demurrer that the complaint did not state a cause of action was pending.

In Bank. Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

Action by the California Farm & Fruit Company, Limited, and another, against Leopoldo Schiappa-Pietra and others. From an adverse judgment, plaintiffs appeal. Reversed and remanded for further proceedings.

John S. Chapman and J. H. Shankland, for appellants. Lynn Helm, Barnes & Selby, and Edward M. Selby, for respondents.

PER CURIAM. In this action demurrers interposed by defendants to plaintiffs' amended complaint were sustained, with leave to plaintiffs to amend. Plaintiffs failed to amend, and judgment was thereupon given for defendants. Plaintiffs appeal from such judgment.

The amended complaint, as we read it, states substantially the following facts: Defendant Schiappa-Pietra (hereafter referred to as Pietra) was the owner of a tract of land in Ventura county, consisting of 6,962.31 acres, part of the Rancho Santa Clara del Norte, and 5,375 shares of the capital stock of the Santa Clara Water & Irrigating Company. On March 20, 1902, through the medium of defendant Temple, he sold all of said property to plaintiff corporation; the terms agreed on being as follows: The total purchase price was $1,113,880, of which $125,000 was to be paid in cash, $925,000 was to be evidenced by promissory notes payable at various times between that date and January 1, 1912, and $63,880 was to be evidenced by a promissory note, which was to be replaced, and which was in fact replaced, on July 5, 1902, by 64 interest-bearing bonds of the corporation, 63 for $1,000 each and 1 for $880, issued to Pietra. The transaction was had as of the date of January 2, 1902. Pietra executed to Temple a conveyance of the property, and an assignment of all the leases and rents reserved thereon; such leases covering all but about 800 acres of the land. Temple executed and delivered to Pietra the promissory notes. As security for the payment of the indebtedness he executed to defendants Power and Foster deeds of trust, covering all of said property and conferring power on them to collect all rents and apply them to the indebtedness. He caused the shares of stock of the water company to be transferred on the books of the company to said trustees as security. He further agreed to cultivate the portion not covered by leases, and executed to Pietra a crop mortgage covering the crops to be raised. He then transferred all the property, subject to the incumbrances thus created, to the corporation. It was stipulated in the trust deeds that a sale of the property by the trustees under the terms of the deed should be a full satisfaction of the indebtedness other than that evidenced by the bonds; no personal liability thereon surviving. The corporation was thereupon placed in possession of the property, and, so far as appears, continued in such possession until March 2, 1904, a few weeks subsequent to the commencement of this action, when Pietra, under a deed executed in pursuance of a sale made by the trustees, entered into possession of all thereof. During the whole period of the possession by the corporation, all of the proceeds, income, revenue, and every other receipt of money or property accruing from the possession and farming operations of the land, amounting to $109,928.73, were delivered to and received by Pietra. The transaction thus had was induced, so far as plaintiffs were concerned, by the solicitations and representations of Temple. He had gone from California to Manchester, England, where plaintiff Scott resided, holding a purported option for the purchase of the property at a specified sum, and in the guise of one seeking financial help in a matter in which he himself desired to participate as an investor had there sought to interest Scott. He made certain representations in regard to the value of the property and its income capacity, and the adaptation of portions thereof for town site purposes, which need not be recited here, as it clearly appears from the complaint that Scott, through agents of his own, examined the property and the merits of the proposed enterprise, and, further, that he was satisfied, as a result of those investigations, that the property was not worth exceeding $900,000. Temple did, however, represent himself as a man of means, desirous of joining in this purchase, and able to respond to any call made upon him for funds in the matter. He persuaded Scott to join him, and they caused the plaintiff corporation to be organized under the laws of the kingdom of Great Britain for the purpose of carrying out their plans and purposes, in the event that the purchase should be made. It was agreed that they would at all times subscribe for an equal number of shares in the corporation. It was further agreed, as an inducement to the purchase, that Temple would personally pay, from his share of the profits or otherwise, the excess over $1,000,000 paid to Pietra, with interest thereon. Temple agreed to subscribe and pay for 15,000 shares of £1 each, and it was further agreed between Scott and Temple that they would provide such further sums as might be necessary fom time to time.

It was the understanding of plaintiffs, induced by the representations of defendants, that Temple paid to Pietra $75,000 of the $125,000 cash payment for the property, Scott advancing the remaining $50,000, and stock of the corporation for that amount was subsequently issued him upon that theory. As a matter of fact, Temple was at all times acting as agent of Pietra for the sale of this property. The purported option was given him by Pietra solely for the purpose of enabling him to appear in the capacity in which he represented himself. He had not the financial ability to pay any of the amounts that he agreed to pay, or to keep his part of the agreement with Scott and the corporation. His $75,000 portion of the $125,000 cash payment was not required by Pietra to be paid at all, and such payment was never intended to be required; the representations in regard thereto being made solely for the purpose of inducing the payment by Scott of the $50,000 portion and the entering by him and the corporation into the transaction. Scott personally advanced the $50,000 so paid, and subsequently received from the corporation stock thereof for that amount. The promissory note for $63,880, to be replaced and which was replaced by the bonds of the corporation, was executed not as a part of the purchase price, but solely for the purpose of requiring the plaintiffs to pay this amount to Temple for his services rendered to Pietra in the matter of such sale; it being the intent of Pietra and Temple that said bonds should subsequently be transferred to Temple. The actual purchase price to be received by Pietra was thus only $975,000. Temple never paid to the corporation any portion of the money he had agreed to pay. Upon the claim made by him that he had paid for the corporation the $75,000 at the time of the transaction, and various other sums, aggregating $19,213, 19,213 shares were issued him by the corporation, 5,000 of which he subsequently sold to Scott. Temple subsequently became indebted to defendant Newhall, and transferred to him as security his remaining 14,213 shares, and also 20 of the $1,000 bonds issued by the corporation to Pietra, and which had been transferred to Temple. Pietra still holds 33 of said $1,000 bonds, Scott 5, and Temple 1. As to the whereabouts of the remaining 5 bonds, plaintiffs have no knowledge. Scott holds all the stock of said corporation, except the 14,213 shares now held by Newhall as security for Temple's indebtedness, and some 150 shares which are subject to his control. Plaintiffs never discovered that any of Temple's representations, all of which are alleged to have been the result of a conspiracy between Pietra and the other defendants, except Newhall, were false, until in November, 1903. On December 26, 1903, they commenced an action against the defendants here in the United States Circuit Court in and for the Southern District of California for a rescission of the transaction and an accounting, and in their bill asked "that said trustees be directed to reconvey the said property to the said Schiappa-Pietra, and did offer to surrender up the same, and everything obtained by, through, or under the said transaction, and offered to surrender up to be canceled all the stock * * * upon such terms and conditions as to the said court might seem just." This suit was so brought under the belief that all the defendants were citizens of the state of California; but, it subsequently appearing upon a plea made by the defendants therein that Pietra was a subject of the kingdom of Italy, the court dismissed the suit upon the ground of want of jurisdiction.

In February, 1904, this action was commenced by plaintiffs in the superior court of Ventura county, against Pietra, Temple, George C. Power, and Eugene P. Foster, trustees under said deed of trust, and W. S. Newhall. In the supplemental and amended complaint filed April 15, 1904, is contained the allegation of the sale by the trustees under the trust deed on March 2, 1904, and the delivery of the property thereunder to Pietra. Except for the allegation as to the offer made in the bill filed in the United States Circuit Court, this is the only allegation as to any restoration of the property or offer to restore or notice of rescission. The action is primarily for a rescission of the transaction on account of the fraudulent representations, and the restoration of the parties, so far as possible, to the position they occupied at the time of entering into the same. To this end the setting aside of the deed of the property, the cancellation of the notes and bonds given upon the purchase, and an accounting to determine the amounts due plaintiffs are asked. As to the defendant Newhall, it was alleged that he took the stock and bonds from Temple with notice of the frauds, and it is asked that, if it be found that he took in good faith, the amount due thereon be decreed a lien on the property of Pietra, conveyed by the trust deed. Subject to this claim of Newhall, it is also sought to have the stock of the corporation issued to Temple canceled. The demurrers interposed were based on various grounds, among which was the general ground that the complaint did not state facts sufficient to constitute a cause of action. Under this, the principal question discussed is as to whether the complaint failed to state a cause of action for failure to allege a rescission, and restoration or offer to restore what plaintiffs had received under the contract, before bringing this suit.

Section 1691 of the Civil Code states the general rule applicable to one desiring to rescind. He must rescind promptly upon discovering the facts which entitle him to rescind, and he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so. It will be assumed, in accord with the views expressed by this court in several cases, that one invoking the aid of equity to obtain a decree of rescission must comply with this rule as a condition precedent to action, except in exceptional cases, where, by reason of the circumstances, restoration or offer to restore is not essential, and that, in this regard, there is no distinction between an action on the equitable side of the court to obtain a decree of rescission and an action maintained on the theory that a rescission has been fully accomplished by the acts of the party. Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797; Westerfeld v. N. Y. Life Ins. Co., 129 Cal. 68, 84, 58 Pac. 92, 61 Pac. 667; Toby v. Oregon Pac. R. R. Co., 98 Cal. 490, 499, 33 Pac. 550. These rules are based on the equitable doctrine that he who seeks equity must do equity, and are applicable in every case where compliance therewith can be had without injury to the rights of the rescinding party, and is essential to the protection of the other party. There are, however, exceptions to the rule as to restoration, also founded on equitable considerations. In Kelley v. Owens, supra, this court recognized the existence of such exceptions in the following language: "There are exceptional cases where restoration or an offer to restore before suit brought is not necessary—as, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties, or where the plaintiff has merely received the individual promissory note of the defendant, or where the contract is absolutely void, or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore, or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties—and it will be found that such instances, or others similar to them in principle, are those to which the authorities cited by appellants generally relate." Some of the cases thus instanced are excepted by the terms of the statute, as in the case where the thing received by the plaintiff is of no value whatever to either party, but others are not. It is settled by our decisions that one attempting to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain. See Matteson v. Wagoner, 147 Cal. 739, 743, 82 Pac. 436, and cases there cited. This is upon the theory that the defendant could not possibly have been injuriously affected by the failure to restore, and the plaintiff might be; for he might not be able to again collect the amount from the defendant, if it should be so restored to the defendant. One of the exceptions recognized in Kelley v. Owens, supra, is where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties. See, also, Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486; Wills v. Porter, 132 Cal. 516, 521, 64 Pac. 896. Another exception recognized by this court is that of the case where the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself.

In such a case, as the plaintiff cannot determine in advance of the suit the amount by him to be repaid, an offer to refund such sum as shall be decreed is a sufficient offer to do equity. Sutter St. R. R. Co. v. Baum, 66 Cal. 44, 4 Pac. 916. The authorities fully sustain the proposition that an offer to restore before action is not essential where the rights of the other party can be fully protected by the decree, and such restoration cannot be made without injuriously affecting the rights of the party seeking rescission, or the relative rights of the parties in the event of a rescission cannot be determined without an accounting. The statute itself dispenses with the necessity of such an offer, where the other party is himself unable to restore what he has received. In such event an offer on the part of the rescinding party would be a vain thing, and the respective rights of the parties can be fully guarded by the decree.

We think it is manifest that this case falls within the exceptions to the rule as to restoration or offer to restore. If their claims in regard to the contract were well founded, plaintiffs were entitled, upon delivery to Pietra of the property transferred to them, to receive, not only the money and obligations they had given therefor, namely, the $50,000 and the 64 bonds of the corporation, but also such amounts as they had properly expended in the management of the property in accordance with their contract with Pietra, who had himself received all the proceeds. They were entitled to be reimbursed for all amounts they had properly expended under their contract with Pietra, and thus put in the position they occupied at the time of entering into the same. An accounting was undoubtedly essential to the determination of the amount to which they were so entitled, for no one could undertake to determine that amount in the absence of such an accounting. A restoration of the property received by them, viz., the possession of the property and the title thereto, subject to the trust deeds and other incumbrances, upon the restoration of the property received by Pietra from them, namely, the $50,000 and the 64 bonds, would not have reimbursed them as to any portion of the amount so expended. We think, too, that they were entitled to look to this property for such reimbursement, and for protection against such outstanding bonds as could not be recovered, and, consequently, entitled to retain possession of it for that purpose until the amount due them could be determined and their rights protected in a proceeding in which the rights of Pietra also could be fully guarded. In addition to this, we think it sufficiently appears from the allegations of the complaint that Pietra himself was, at the time of the commencement of this action, unable to restore certain of the property received by him from the plaintiffs, namely, certain of the bonds of the corporation which had been transferred to other parties. As is said by plaintiffs' counsel, the facts of this transaction are exceedingly complicated, and it is very clear that the terms upon which a rescission should be had, and the property received restored, can only be determined upon a judicial investigation, in which the rights of all the parties can be fully guarded. We are therefore of the opinion that the circumstances shown by the complaint fully justify the failure of plaintiffs to offer to restore possession of the property before the commencement of the action, and bring the case within those classes of cases in which no such offer is necessary as a condition precedent to action.

Under the facts of this case, it is clear that there was no undue delay on the part of plaintiffs in moving for rescission. Their delay of some three months in commencing this action was fully excused by the allegation showing the commencement of a similar suit in the United States Circuit Court under the misapprehension that Pietra was a citizen of California, and the dismissal of the same by the court upon the plea made by him that he was a subject of the kingdom of Italy. If we concede that notice of rescission was a condition precedent to action, we are of the opinion that such action in the Circuit Court was a sufficient notice to satisfy all requirements as to this action.

As we read the brief of counsel for the defendants, it is not contended that the complaint fails to state a cause of action against any defendant, other than as to the matters hereinbefore discussed, except as to defendants Power and Foster as trustees under the trust deed. It is claimed that, as the supplemental and amended complaint shows that, after the commencement of the action, they sold the property to Pietra under the terms of the trust deed, and, so far as appears, in full accord therewith, and delivered possession thereof to him, and no longer make any claim thereunder, such complaint fails to state a cause of action against them. Herein counsel fail to note the distinction between a complaint and a supplemental complaint. Although in this instance they are both incorporated into one document, styled an "amended and supplemental complaint," and the supplemental complaint is distinguished only by being contained in separately, but consecutively, numbered paragraphs, they are, nevertheless, to be considered as separate pleadings. The complaint, whether original or amended, can properly speak only of things which occurred either before or concurrently with the commencement of the action. The office of a supplemental complaint is to bring to the notice of the court and the opposite party things which occurred after the commencement of the action, and which do or may affect the rights asserted and the relief asked in the action as originally instituted. If, upon the conditions existing when the action was begun, Power and Foster were proper parties to the action, they do not become improper parties, in the sense that they were improperly joined, by reason of the fact that after the action was begun they parted with their interest in the subject-matter and thereby terminated their liability. The propriety or necessity of joining them was a matter which the plaintiffs were obliged to determine when the action was begun. Having been properly joined as parties, as matters then stood, they are proper parties to the action thereafter, until something occurs which dispenses with their further presence, in which case the proper course is to dismiss the action as to them, and not to sustain a demurrer to the complaint because of the supposed improper joinder. In such a case the sufficiency of a complaint, with respect to the question of the proper joinder of all the parties originally included, is to be determined by reference to the facts existing and disclosed by the complaint at the beginning of the action. At the time this action was begun Power and Foster still held the title to the property involved in the action, and they were properly joined. While the sustaining of a demurrer on this ground is often a convenient way of excluding a party from further participation in the case, practically equivalent to a dismissal, and therefore to be deemed harmless error, it is not the technically correct method of dealing with the proposition that such party is no longer interested in the outcome of the action, nor liable to judgment therein. Such joinder is not a matter of which the other parties can complain, unless it causes additional cost to them. 15 Ency. Pl. & Pr. p. 698. We can perceive no harm that can result from their retention as parties, especially in view of the power of the court to adjust the costs so that, if their presence proves to be unnecessary, the costs of bringing them in and keeping them in shall fall on the plaintiffs.

We think, however, they are proper parties to the action, although they have divested themselves of title to and possession of the property. They are charged with complicity in the frauds perpetrated and in the conspiracy by which it was carried out. It is possible that, upon the accounting, the presence of the trustees in court, or the continued jurisdiction of the court over them, may be necessary to fully accomplish the relief necessary to protect the plaintiffs, or to enforce their rights. Their expenditures as trustees will necessarily come under review, and certain claims made by them as trustees or otherwise must needs be settled and provided for, if found just, and they are proper parties to any investigation of those subjects.

The joinder of Scott as a plaintiff was not, under the rules prevailing in courts of equity, a fatal misjoinder. It is true that the corporation plaintiff is the only party shown to be entitled to affirmative relief, and that it is the party in whom the cause of action is vested; but it appears that the plaintiff Scott holds bonds of the plaintiff corporation of the face value of $5,000, which were a lien upon the property, and $50,000 of its stock, and that in order to effect a complete rescission it may become necessary or desirable to have this stock and all these bonds produced and canceled, or transferred to the defendant Pietra, and this is a part of the relief asked. Scott offers to deliver them up for that purpose, or for any disposition of them which the court may deem proper. He would be a proper party defendant, in order to answer as to any title he may have to them, or to oppose or advocate any proposed disposition of them; and, if some disposition of them is essential to complete relief, he would be a necessary party. He, of course, took them with knowledge of the facts, except the alleged fraud of the defendants. If he desires now to make common cause with the plaintiff corporation, which is for many purposes his agent, and in which he holds the majority of stock, and makes profert of the stock and bonds for the purposes of the suit, it is immaterial to the other defendants whether he is plaintiff or defendant. A court of equity can mold its decree to suit the exigencies of the case, and may determine the ultimate rights of the parties on either side as between themselves or the opposing party and render a decree accordingly. 15 Ency. of Pl. & Pr. 672, 673. Inasmuch as the effect of joining him as plaintiff was to avoid the cost of service of process upon him, if he was a necessary or proper party, it was to that extent beneficial to the defendants, if the plaintiffs should prevail and recover their costs.

It is unnecessary to consider further the question of the misjoinder of parties. The distinct relief asked as to some of the defendants is incidental to the main case, and necessary to effect a complete settlement of the matters involved in the transaction sought to be rescinded. All of the defendants were properly joined. There is really but one cause of action stated, and hence there is no misjoinder of causes of action.

A motion to strike out certain parts of the complaint was sustained. It is alleged in the complaint that certain sums were paid by the plaintiff on account of the transaction, including interest to the defendant Pietra, expenses of operating the ranch, and expenses of agents transacting the business, and that certain claims are outstanding against the said plaintiff for similar expenses and other expenses incurred in the enterprise, some of which are in dispute, and that all these moneys were paid out and these liabilities incurred in good faith, while the plaintiffs believed the false representations complained of to be true, and before discovery of the falsity thereof. These matters are all material to the accounting, to which the plaintiff corporation, under the facts alleged, is entitled, and were proper, though not absolutely necessary, subjects of averment to lay the foundation for that part of the relief. The court erred in striking out these allegations. It also erred in striking out the allegations of paragraph 42½ of the complaint, containing a statement of some of the facts constituting diligence on the part of the plaintiff in promptly prosecuting the action.

The plaintiff moved to strike out of the cost bill of the defendants an item of $193.10 for costs incurred in the taking of the deposition of a witness, H. G. Mirfin. The objection to this item was that the deposition was taken before any answer was filed, and while an issue of law upon a demurrer to the complaint, on the ground that the facts stated did not constitute a cause of action, was undetermined. There is no provision or rule of law to the effect that a deposition may not be taken before an issue of fact has been raised. The Code provides that a deposition of a witness may be taken in an action at any time after the service of the summons or the appearance of the defendant (Code Civ. Proc. § 2021), and that either party has the right to obtain evidence in this manner in the cases specified (Code Civ. Proc. § 2031).

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

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(151 Cal. 711)

## McKANNAY v. HORTON, Auditor. (S. F. 4,856.)

(Supreme Court of California. Aug. 19, 1907.)

1. Mandamus—Questions Determinable.

There being no other speedy and adequate remedy, the right to salary as secretary of the mayor of a city may be determined by mandamus, though the question of who is the mayor is incidentally involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 38.]

2. Municipal Corporations—Officers—Vacancy in Office—Conviction of Felony.

Under the provisions of the charter of San Francisco that an office becomes vacant when the occupant is convicted of a felony, there is a vacancy in the office of mayor when a verdict of guilty has been entered on trial of the mayor for a felony, and the board of supervisors has, on the judgment thereon being certified to them, declared the office vacant, though an appeal from the judgment is perfected and a certificate of probable cause granted.

3. Same—Removal of Mayor's Secretary.

The secretary of the mayor of San Francisco, who holds his position only during the mayor's pleasure, is removed when, after his appointment, a vacancy in the mayor's office occurs, and the mayor elected to the vacancy appoints another secretary.

In Bank. Petition of Harry G. McKannay for mandamus to Samuel W. Horton, auditor of the city and county of San Francisco. Peremptory writ ordered.

Wm. B. Kollmyer, for petitioner. Maurice L. Asher (Wm. H. H. Hart, of counsel), for respondent.

BEATTY, C. J. This is a petition for a writ of mandate to compel the allowance of a claim for salary of the secretary of the mayor of San Francisco. There are two persons claiming to be mayor de jure of the city, and each is assuming to act in that capacity. Each has appointed a secretary, both of whom have presented claims for salary for the month of July, 1907. The auditor cannot approve more than one claim, and, being uncertain which is valid, refuses to approve either. Practically he takes the position of a stakeholder, willing to allow and certify the lawful claim as soon as it shall be determined which is lawful. Recognizing the difficulty of his position, the court, in ordering the issuance of the alternative writ, directed service to be made of a copy of the writ, together with a copy of the petition, upon John J. Boyle, the rival claimant to the office of secretary, and upon Eugene E. Schmitz, who was the de jure and acting mayor at the time of his appointment. Acting upon this suggestion, said Boyle has made himself a party to the proceeding by filing an answer to the petition, setting forth the facts upon which he founds his claim to be rightfully in the exercise of the duties of the disputed office. The cause has been submitted for decision upon demurrers to the answers of respondent and Boyle, and upon facts stipulated by the parties where not admitted by the pleadings.

The case is as follows: At the general election in November, 1905, Eugene E. Schmitz was elected mayor of San Francisco for the next regular term of two years, and in pursuance of said election he duly qualified and entered upon the duties of the office on the 8th day of January, 1906. Thereafter he continued to discharge the duties of the office without question until July 9, 1907. (The fact that he was absent from the state on two occasions during this period, and that the president of the board of supervisors acted at such times as mayor pro tem., is not material in this case.) On the 13th of June, 1907, in the superior court of San Francisco, said Eugene E. Schmitz was found guilty of a felony—the crime of extortion—by the verdict of a jury, and on July 8th he was sentenced by the judgment of the court to a term of imprisonment for five years in the state's prison at San Quentin. On the following day the judge of the superior court, presiding in the department in which the trial and conviction of said Schmitz took place, in obedience to the requirements of section 997 of the Political Code, caused to be delivered to the board of supervisors a formal notice of said trial, conviction, and judgment, together with a duly authenticated copy of the judgment as entered. On the same day, July 9, 1907, the said board of supervisors regularly adopted a preamble reciting the election of Schmitz, his assumption of the office of mayor, his subsequent conviction of the crime of extortion, the judgment of conviction, and the fact that he was then actually confined in jail. They thereupon resolved that a vacancy existed in the office of mayor and that they would proceed forthwith to elect a mayor to fill the vacancy for the unexpired term. Immediately after passing this resolution they did actually elect Charles Boxton as mayor for such unexpired term, who immediately qualified, and on the 11th day of July took possession of the rooms in the city hall which had been set apart by a resolution of the board of supervisors for the use of the mayor, and designated as the office of the mayor of San Francisco, together with the records and papers therein. On the 9th day of July he had appointed the petitioner to the office of secretary, who on the same day duly complied with all the legal conditions and requirements relating to the qualification of such appointees and entered upon the discharge of the duties of the office. On the 16th of July Boxton resigned the office of mayor, and on the same day Edward R. Taylor was elected by the board of supervisors to fill the vacancy for the balance of the unexpired term. He immediately qualified, and took possession of the office and records in the city hall, and has since continued to act as mayor, retaining the petitioner in his service as official secretary. In the meantime Mr. Schmitz has never conceded that his conviction of a felony, or the judgment and sentence of imprisonment, as above stated, have occasioned any vacancy in the office of mayor, but, on the contrary, notwithstanding his confinement in the county jail in the custody of the sheriff, has been insisting on his continued right to the office, and actually discharging the duties of the office so far as under the circumstances he has been able to do so. Some of the city officials have continued to recognize his authority as the rightful mayor. Others, including the respondent, whose duty it is to act, and whose authority to act depends, in some instances, upon written orders of the mayor, have refused to act, unless upon concurrent orders from Schmitz and from Boxton or Taylor, and accordingly Schmitz has been certifying demands upon the city treasury. But Mr. Taylor, since he succeeded Mr. Boxton, has refused to act in conjunction with Mr. Schmitz in any official matter, and he alone is recognized by the board of supervisors as the rightful incumbent of the office of mayor. On the day of his sentence—July 8, 1907—Schmitz took and perfected an appeal to the District Court of Appeal for the First District—the proper court—and at the same time applied for and obtained from the judge of the superior court a certificate of probable cause for his appeal, which is still pending and undecided. Thereafter he continued and still continues to retain control of, and by his secretary, Boyle, remains in possession of, the office at Post and Franklin streets, which, subsequent to the earthquake and fire, and down to the 11th of July, 1907, was the only office of the mayor of San Francisco. He also has in his possession the mayor's official seal.

The question we have to decide is: Who is entitled to the salary of secretary to the mayor for the last 21 days of July? But one salary can be paid, and that is claimed at the same time by McKannay, the appointee of Boxton, and by Boyle, the appointee of Schmitz. Each of the claimants has performed the duties of the office so far as he has been allowed to do so—Boyle in the service of Schmitz, and McKannay in the service of Boxton and Taylor. It is conceded to be the duty of the respondent to allow the claim and direct its payment out of the city treasury, when duly certified by the mayor that it is correct. Taylor has certified that McKannay's claim for services from July 10th to July 31st is correct, and Schmitz has certified that Boyle's claim for a full month's salary is correct. The question, therefore, reduces itself to this: Who is mayor of San Francisco?

With reference to this question Mr. Boyle makes the preliminary objection that in this proceeding by mandamus we cannot try the title either of the secretary or mayor. We are not cited to any authority for the proposition that the title to an office cannot be tried—that is, inquired into—when it is incidentally involved in a proceeding which a third party has a right to institute. The doctrine which Mr. Boyle means to invoke is more correctly stated in these terms: Title to an office cannot be determined in mandamus, where there is another specific remedy prescribed, or where there is another plain, speedy, and adequate remedy at law. This doctrine is very fully and learnedly discussed in People ex rel. Smith v. Olds, 3 Cal. 167, 58 Am. Dec. 398, where the subject, the rule, its reasons, and its limitations are elaborately considered, and where it is shown to be merely a rule of procedure, even in cases where it is sought to establish title to an office by a judgment which will operate as an estoppel in favor of a claimant and against an actual incumbent. Here, although we are obliged to decide, for the purposes of this and like cases, who is de facto mayor of San Francisco, we cannot determine, by a judgment which will operate as an estoppel between Dr. Taylor and Mr. Schmitz, who is the de jure mayor, however little doubt there may be as to the proper decision of that question. And as to the title of the secretary we are not required to determine that. When we have once decided who is de facto mayor, we shall have no difficulty in determining whose order the respondent must obey in the matter of allowing such claims against the treasury as must be allowed on presentation of the mayor's certificate that they are correct. This whole question as to the right to decide incidentally upon the title to an office in a proceeding by mandamus was fully and carefully considered in Morton v. Broderick, 118 Cal. 481, 482, 50 Pac. 644, and the result of the decision there is the same as in the case of People v. Olds, viz.: That the rule in such cases as the present is, as above stated, merely a rule of procedure—the rule, that is to say of our statute; that the writ of mandamus will issue only in cases where there is not another plain, speedy, and adequate, or specially prescribed statutory, remedy. Code Civ. Proc. § 1086. The rule is not jurisdictional, and its application to a particular case involves only the exercise of sound legal discretion. In Morton v. Broderick, supra, it was held, as it must be held here upon even weightier considerations, that the gravity and urgency of the situation afforded ample ground for holding that there was no other remedy adequate or available to relieve the situation except mandamus, which was accordingly allowed, notwithstanding the effect must be practically to end the dispute as to which of two rival bodies was rightfully the board of supervisors of the city. The situation here is certainly as grave as it was then. The government of the city must come to a standstill if claims of public creditors cannot be paid, and many important matters essential to the public welfare must be left uncared for, unless some person is recognized as properly entitled to exercise the varied and important functions pertaining to the office of mayor.

This preliminary objection being disposed of, we return to the question: Who is mayor of San Francisco? Dr. Taylor and Mr. Schmitz are each claiming to be at the same time the de jure and de facto mayor. It will appear from the facts above stated that each has some claim to be the de facto mayor. Dr. Taylor is in possession of the offices provided for the mayor by the board of supervisors—the governing body of the city and county—and is recognized by that board as the rightful mayor. Mr. Schmitz is in control through his secretary of the premises occupied by the mayor at the date of his conviction; but he is himself a prisoner in the county jail, where it is the duty of the sheriff to keep him closely confined. Nevertheless his right to act is maintained by some at least of the other city and county officers and by many private persons who resort to him for the purpose of transacting official business. He also is in possession of the official seal used by him up to the time of his conviction, while Dr. Taylor has been provided with a new seal. If these facts alone were considered, it might be difficult to decide which of the two is de facto mayor. But in such cases the law affords a rule of decision which in this case is not difficult of application. There cannot be two de facto incumbents of one office at the same time, and where two are acting simultaneously, each under claim of right, that one alone will be recognized who appears to have the better legal title. Morton v Broderick, 118 Cal. 485, 486, 50 Pac. 644. For the purpose, therefore, of determining who is mayor de facto of San Francisco, we must inquire who appears to be mayor de jure.

By the charter of the consolidated city and county it is provided that "an office becomes vacant when the incumbent thereof dies, resigns, is adjudged insane, convicted of a felony or of an offense involving a violation of his official duties," etc. Article 16, § 10. And by section 996 of the Political Code it is provided that "an office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. * * * (8) His conviction of a felony or of any offense involving a violation of his official duties." It will be seen that with respect to the case in hand the provisions of the charter and the state law are identical. Either, in the absence of the other, would give the same effect to any one of the enumerated contingencies, including conviction of a felony, that ensues in the case of the death of the incumbent; that is to say, the office ipso facto becomes vacant. People v. Shorb, 100 Cal. 540, 35 Pac. 163, 38 Am. St. Rep. 310; People v. Brite, 55 Cal. 79. On the 13th of June, 1907, the verdict of guilty in People v. Schmitz was returned and recorded; but we are not required to decide in this case that the entry of a verdict of guilty constitutes a "conviction" in the sense of the statute, for here a vacancy was not declared by the board of supervisors, and Boxton was not elected, until the 9th of July, after the entry of judgment on the 8th had been duly certified to the board. At that date certainly, if not before, Mr. Schmitz was convicted. The event had occurred which by the terms of the statute and of the charter vacated the office.

It is contended, however, that the perfecting of an appeal from the judgment and the granting of a certificate of probable cause by the trial judge, prior to the election of Boxton and prior to the declaration of a vacancy in the office, suspended the operation of the judgment for every purpose until the appeal, which is still pending, shall be finally determined. We are clearly of the opinion that the statute will not bear that construction. An office becomes vacant when the incumbent is convicted of a felony, and also it becomes vacant when he is convicted of any offense—whether felony or misdemeanor—if it involves a violation of his official duties. There are felonies which involve no violation of official duty; there are felonies, such as extortion by a public officer, which do involve a violation of official duty; and there are simple violations of official duty, which are misdemeanors solely for that reason. Whether a felony does or does not involve a violation of official duty, the indictment will charge the facts constituting the felony, and a verdict of guilty will import a sentence of imprisonment in the state's prison, to be executed at once unless a stay of proceedings pending an appeal is obtained through the medium of a certificate of probable cause; and even in that case the defendant is committed to close custody in the county jail to await the result of his appeal, unless the court, in the exercise of a discretion rarely exercised and only in exceptional cases, admits him to bail. The result is that a public officer convicted of a felony is placed by the verdict in a position and under a physical restraint which prevents him from performing the duties of his office. But if the misconduct alleged against a public officer is a misdemeanor only, and only such because it is a violation of official duty, the proceeding against him is under the provisions of chapter 2 of part 2 of the Penal Code (sections 758 to 772). A verdict of guilty upon an accusation based upon the provisions of that chapter does not involve imprisonment of the defendant or any other penalty except removal from office. It does not, in other words, disable the officer to discharge the duties of the office pending the appeal, and accordingly it is specially provided that in such cases he is not even suspended from office until 30 days after the entry of judgment, and not then if in the meantime he shall have taken an appeal and obtained a certificate of probable cause. Pen. Code, § 770. This special provision for an entire suspension of the operation of the judgment in an exceptional case shows what the rule is in all other cases, and the ground of the exception affords conclusive evidence of the meaning and motive of the rule. It means that, since a prisoner in close custody cannot administer a public office, he cannot be allowed to stand in the way of the appointment of one who can perform its duties. No man has a property right in an office paramount to the public interest. He has a property right in the salary and emoluments of an office while he is capable of discharging and actually discharges its duties; but when, by his fault or misfortune, he is no longer able to render the service, the public interests demand that he shall give way to some one who can. An official who is declared insane is simply unfortunate; but he ceases to be an official. An innocent man who is unjustly convicted of a felony is doubly unfortunate; but the fact that he may by means of an appeal ultimately succeed in establishing his innocence does not entitle him in the meantime to hold on to a public office which he is no more capable of serving than if he were insane. The law allows an appeal from a conviction of felony because, so far from being against the public interest, it is promotive of the public interest that a person accused of crime should have every reasonable opportunity of vindicating his innocence. But, if the person so convicted is the incumbent of a public office, these considerations do not weigh in favor of retaining him in that position pending an appeal. The pendency of the appeal does not affect the presumption of guilt, which arises immediately upon the rendition of the verdict; and it would be strange indeed if a state which gives such weight to that presumption as to deprive the defendant of the right to bail, and to require in all but rare and exceptional cases that he be detained in close custody in the common jail, should at the same time provide by law for his continuance in an office the duties of which he cannot discharge. There is no such law. The only effect of an appeal and certificate of probable cause is to stay the execution of the judgment. Removal from office is not part of the judgment of conviction in cases of felony, though a consequence which flows from it, and the statute in express terms defines and thereby limits the effect of the appeal and certificate of probable cause. "If the certificate provided for in the preceding section is filed, the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal." Pen. Code, § 1244.

We are cited to a number of cases decided in other jurisdictions which are supposed to conflict with these views. We do not think there is any conflict or discordance, except such as follows necessarily from different statutory provisions. On the other hand, there are numerous decisions by courts of the highest authority which fully sustain our conclusions. We do not consider it necessary to review these cases. We have only to construe our own statutes and the charter of San Francisco, the terms and policy of which are plain and identical, and there is no decision of this court which is in the least degree at variance with what is here held. The case of People v. Treadwell, 66 Cal. 400, 5 Pac. 686, comes as near as any other to supporting the contention of respondent; but it is distinguishable on several grounds. Treadwell, an attorney at law, was convicted of a misdemeanor in a justice's court and immediately appealed to the superior court. There was no law making his conviction operate ipso facto to deprive him of his license. It was only the foundation for a new proceeding in the Supreme Court to revoke his license, involving the issuance of a citation to show cause why he should not be removed and a hearing upon the rule day. The justice of the peace, notwithstanding the appeal, forwarded to the Supreme Court a certified copy of his docket, and a citation was issued to Treadwell to show cause why he should not be removed. In response to the citation he alleged the pendency of his appeal. The court held, and properly held, that the proceeding under section 288 of the Code of Civil Procedure could not be instituted until the judgment became final. This is the rule generally in civil cases, and the rule was held applicable to a proceeding to revoke a license to practice law, which is essentially a property right. An attorney at law is not a public officer. He does not, as such, discharge any public function. His license, like the license of a physician, a druggist, a dentist, or an architect, merely enables him to engage in his vocation, for the service of private employers and for his private emolument. The public is not concerned in depriving him of the right to practice his profession in the service of those who choose to employ him until it has been finally determined that he is unfit for the profession. The decision in Treadwell's Case was clearly right; but a loose and inaccurate expression occurs in the opinion, which, if it were a correct statement of the law, might afford some support to respondent's contention. It is said—arguendo—that an appeal to the Supreme Court operates a suspension of the judgment of the lower court for all purposes. This, as every lawyer knows, is not true. If, in a civil cause, the appellant does not file a sufficient undertaking to stay proceedings upon the judgment, execution will issue, notwithstanding the pendency of the appeal, and may be levied upon the property of the judgment debtor, and the property may be sold, and an indefeasible title vested in the purchaser at the execution sale, notwithstanding the result of the appeal may be a complete and final reversal of the judgment of the trial court; and, as in civil cases, so in criminal cases, a judgment not final may be proved for every purpose for which it is effectual. It may be proved for the purpose of showing a vacancy in office, just as in a civil case it may be proved to justify the levy of an execution, or to establish the title of the purchaser at the execution sale; and this, even after it has been reversed on appeal.

The last objection urged by the respondent may be answered very briefly. He says the petitioner is not secretary to the mayor, because it is conceded that Boyle was duly appointed to the place, and it does not appear that he has ever been removed. It would be a sufficient answer to this objection to say that the petitioner's claim is certified by the de facto mayor; but it may be added that in the case of the mayor's secretary, who holds the position only during the mayor's pleasure, he is removed whenever a new secretary is appointed and assumes the duties of the office.

It is ordered that the peremptory writ of mandate issue as prayed.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

ANGELLOTTI, J. While I have concurred in the foregoing, I deem it proper to add that I am satisfied that the effect of the charter provision declaring that an office "becomes vacant when the incumbent thereof dies, resigns, is adjudged insane, convicted of a felony," etc., was to create a vacancy in the office of mayor upon the rendition and entry of the verdict of conviction against the then incumbent. One is "convicted" of a crime when a verdict of guilty has been so given and entered against him, or when a plea of guilty has been given and entered. This is the well-settled meaning of the term as ordinarily used in our constitutional and statutory provisions, and I can see no warrant for concluding that it was used in any other sense in the charter provision under discussion. Under this view, it is entirely immaterial whether or not judgment has been given upon the conviction, or whether or not the execution of any judgment so given has been stayed by an appeal. The vacancy in the office is in no way dependent upon any judgment given on the conviction, but was fully and finally created by the happening of the event specified, viz., the rendition and entry of the verdict of conviction.

There can, of course, be no question as to the power of the people of the city and county of San Francisco to make such provision in their charter as to purely municipal offices. As is shown in the opinion of the Chief Justice, the provision for the ouster of the incumbent in the contingency named is in no degree by way of punishment for any offense alleged to have been committed by him, but is solely for the purpose of securing an efficient, orderly, and decent discharge of the duties of the office, which, doubtless, it was deemed could not be had during the incumbency of one under a verdict of conviction of felony.

We concur: SLOSS, J.; SHAW, J.

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## DONLON BROS. v. SOUTHERN PAC. CO.
## DELANEY v. SAME.

(L. A. 1,724.)

(Supreme Court of California. Aug. 22, 1907.)

1. Carriers—Carriage of Goods—Contract of Shipment.

A shipper requested a carrier to accept a shipment of horses of the value of $20 each, and stated that he desired to procure a certain contract of shipment, which referred to the request with the valuations therein and limited the liability of the carrier for loss to an amount not in excess of such declared value. *Held*, that the request of the shipper must be deemed a part of the contract of carriage.

2. Same—Limiting Liability—Validity.

Under Civ. Code, § 2175, providing that a carrier cannot be exonerated by any agreement from liability for gross negligence, a contract which attempts to relieve a carrier from liability for gross negligence, or which attempts to fix a liability for half the actual value of the property carried, or any other proportion less than the actual value, is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 654, 663, 664.]

3. Same—Statutes.

The common-law rule that a carrier cannot make a contract which exempts it from liability for any kind of negligence is abrogated by Civ. Code, § 2174, providing that the obligations of a common carrier may be limited by special contract, and the prohibition against a carrier limiting its liability applies, by section 2175, only to limitation for gross negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 654.]

4. Same—Limiting Liability — Contracts — Validity.

A contract of carriage of horses, which stipulates that the carrier shall not be liable for any damage not caused by its gross negligence, and that the amount of recovery shall be adjusted on the basis of value not exceeding the declared value, based on a consideration of a rate of transportation lower than the rate otherwise would have been, is not in conflict with Civ. Code, § 2175, providing that a carrier cannot be exonerated from liability for gross negligence, and the contract, if freely made, limits the recovery for damages resulting from gross negligence.

5. Same.

The court, in determining whether a contract of carriage, which stipulates that the carrier shall not be liable for damage not caused by its gross negligence, and that the amount of recovery shall be adjusted on the basis of value not exceeding the value stated in the contract, is reasonable, will not consider the question whether the agreed value reasonably approximates the real value, and the contract establishing the value will be construed to embrace the real value.

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

Actions by Donlon Bros. and by Henry Delaney against the Southern Pacific Company. From judgments for plaintiffs in each action, defendant appeals. Reversed, and new trial ordered.

Canfield & Starbuck, for appellant. Thomas O. Toland and Merle J. Rogers, for respondents.

LORIGAN, J. These two cases were tried together and are presented here on the same record. The complaints alleged that defendant, as a common carrier, contracted to transport from Salinas to Sacramento, in this state, certain race horses belonging to plaintiffs; that through its gross negligence in the management of its train while en route one horse was killed and another injured, to plaintiffs' damages in the sum of $1,500 and $1,200, respectively. The answer of defendant denied that it had been guilty of gross or any negligence in the transportation of said horses, and for a further and separate defense set out a special contract entered into by the plaintiffs with defendant relative to the carriage of said property, and under which it averred that, if liable at all, it was not liable beyond the sum of $20 in each case, the agreed valuation of each horse as fixed in such contract of shipment. Upon the trial, aside from other evidence in the case, the execution of a special contract relative to the carriage of these horses as averred by defendant was proven; in fact, its execution was not questioned. In that regard it appeared that plaintiff Delaney, in his own behalf and as agent for the other plaintiffs, the Donlon Bros., applied to defendant at Salinas on August 24, 1902, for the transportation from that point to Sacramento of five horses, including those involved in this action. The result of the negotiations between them was that Delaney chartered for $42 charges a whole car to transport the horses, and a certain document in relation thereto was executed by himself and the agent of the defendant. This document was divided into several parts, and was in form such as was generally provided by the defendant for execution where a special rate for transportation on an agreed valuation was obtained. The first part consisted of a request by the shipper to the carrier to accept a specified shipment, which, in the present instance, Delaney stated in his own handwriting, inserted in blanks left for that purpose, consisted of five horses consigned to himself at Sacramento from Salinas, and of the value of $20 apiece. The request contained a further statement by him that he desired to procure the form of contract set out below the request and constituting the second part of the sheet, the provisions of which he declared had been read by him, were freely understood, and accepted in consideration of the lower shipping rate thereby to be obtained. This request was filled out by him and, containing the statements indicated, was signed by Delaney. The next part of the document, which immediately followed the request as signed, consisted of a contract, which referred to the request and the valuation of the horses stated therein and was signed by the defendant and Delaney. This contract provided that Delaney should load, feed, and water the stock, etc., and that the defendant should transport it between the points named for $42 freight charges, and then further provided: "And second party [plaintiffs] hereby specially agrees that in no event is first party [defendant] * * * to be liable for any loss or damage to said live stock not proven to have been caused by the gross negligence of first party in the performance of or failure to perform some duty which under the terms of this contract is due from first party to second party as to said live stock. And it is expressly agreed by second party that the amount to be by him claimed for each animal as described herein for loss or damage shall be adjusted on the basis of value at the time and place of shipment, not exceeding the declared value as hereinbefore set forth, and on which declared value the rate or rates of transportation hereinbefore named by first party are based, and in no event is there to be any recovery from first party * * * for any loss of or damage to said live stock from whatsoever cause arising in excess of the declared value hereinbefore set forth." This contract was followed by the third part of the document, which consisted of a statement that the published rates of transportation under these special contracts applied only to ordinary live stock, and set forth two schedules, the first of which enumerated the ordinary kind of live stock to which such rates applied, and fixed what was deemed the ordinary valuations of such animals, and declared that such rates only applied in the case of ordinary animals, and as to horses applied only to race horses sent by passenger train whose actual and declared value did not exceed $100, and to other horses whose actual and declared value did not exceed $20. It was further stated that values of animals in excess of those specified in this schedule should be deemed extraordinary, and subject to increased charges as compared with charges for such ordinary live stock, and the second schedule, as set forth, showed what these charges should be—that for every 100 per cent. increase in valuation of such live stock over the ordinary valuation there would be under these special contracts an increase of 10 per cent. in the freight charges. These statements and schedules were a portion of the matters referred to in the request signed by Delaney, and which he stated therein he had read and agreed to. The last portion of the document is immaterial to the question presented here, and hence is not stated. These papers having been executed and delivered, the defendant undertook the carriage of the horses to their destination, and on the journey an accident happened to the train, occasioning the loss of the two horses mentioned in the complaint under circumstances which—the plaintiffs claim, and the jury found—constituted gross negligence on the part of defendant. Aside from the evidence relative to the making of the special contract, the cause was fully tried upon the other issues involved and a general verdict returned by the jury in favor of the Donlon Bros. for $350, found by them to be the value of the horse killed, and in favor of Delaney for $200 damages for the horse injured. Judgments having been entered on the verdicts, defendant appeals therefrom; its appeals being accompanied by a bill of exceptions in which the errors relied on for a reversal are presented.

The principal question arising on this appeal relates to the effect which is to be given to the special contract proven to have been entered into between plaintiffs and the defendant, conceding, as we think it must be, that there was sufficient evidence in the case warranting the jury in finding that the defendant was guilty of gross negligence occasioning the loss and injury complained of. At the close of the evidence the defendant requested the court to instruct the jury that, if they should find for the plaintiffs, their verdict should not exceed $20 damages in favor of each. This instruction the court refused to give, but instructed them that, if they found the defendant was guilty of gross negligence in the carriage of the horses, they should find in favor of plaintiffs for their value, not exceeding the amount stated in the complaint. The defendant excepted to the action of the court with relation to these instructions, and under these rulings is presented the question as to what extent the liability of the defendant was affected by the execution of the special contract. The view taken by the trial court was, and it is the position taken by counsel for respondent here, that while, under the provisions of the Civil Code, a common carrier may limit its liability for ordinary negligence (section 2174), it is prohibited by section 2175 thereof from doing so as to its gross negligence, this latter section providing that "a common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud or willful wrong of himself or his servants"; and in the light of that section it is claimed by respondents that the special contract relied on was an attempt to limit the liability of defendant for damages for gross negligence to the agreed value of the horses as stated in it, and was therefore void, and for that reason plaintiffs were entitled to recover for the actual value of the horses, if gross negligence of defendant occasioned their loss, independent of the terms of the special contract providing that such liability of defendant should not exceed that agreed amount. On the other hand, the position of appellant as to such contract, or, rather, as to the several instruments executed by plaintiffs and defendant—the request for the shipment signed by plaintiffs alone and the bilateral special contract executed by plaintiffs and itself—is, first, that aside from the special contract, and eliminating its consideration from the case entirely, the plaintiffs were estopped by their statement of value in the request for shipment from subsequently claiming that the horses injured were of any greater value than as stated therein; and, second, that as to the special contract itself it did not attempt to limit the liability of defendant for gross negligence, but, on the contrary, the defendant thereby assumed full liability for any loss occasioned to the extent of the full value of the property shipped, and which value was fixed by the terms of the agreement. While we are satisfied that both positions of appellant are correct, we perceive no reason why they should be considered separately. The special contract refers to the request, with the valuations stated therein, and limits the liability of defendant for loss to an amount not in excess of such declared value, and hence is to be deemed a part of the contract. The authorities, also, to which we shall presently refer, discuss both the effect of such statements of value by the shipper as representations constituting an estoppel and as agreed valuations purely matter of contract affecting the responsibility of the carrier for negligence. These cases involved the consideration of special contracts such as the one involved here, and, although the execution of such contracts was not preceded by a request for shipment in which the valuation of the property was declared by the shipper (the valuations there being only mentioned in the contract executed by the parties), still such valuations, as creating an estoppel and also as a matter of contract, were considered and discussed.

Now, to examine the contract under the terms of section 2175 of the Civil Code, to see if it comes within its prohibition. That section prohibits the carrier from entering into any contract in anticipation of gross negligence exonerating itself from liability therefor. Undoubtedly a contract which attempted to relieve the carrier from liability for gross negligence, or attempted to fix a liability for only half the actual value of the property carried, or any other proportion less than such actual value, would be obnoxious to the prohibition of the section and void. But the contract in question here does not attempt to relieve the carrier from liability for the actual value of the property shipped, nor does it provide for any partial exemption from liability, nor does it provide for exemption from responsibility at all. On the contrary, the carrier assumes full responsibility for loss or injury to the property occasioned through its gross negligence to the full extent of the actual value of the property as declared by the shipper and which valuation by the contract between them was agreed to be its actual valuation for all purposes. As to these purposes it is not correct to assume that the special contract was made solely in anticipation of liability, or that liability was the principal subject-matter of the contract. It was not entered into with a view of providing solely for exemption, nor was that by any means its contemplated purpose. While it is true that the actual value of property may in fact be in excess of an agreed valuation in a contract, and as to that excess it may be said that the carrier is exonerated from liability, this does not render the contract, otherwise fairly entered into, fixing the agreed valuation, invalid. If to that extent exemption may be said to result in some instances under an agreed valuation, it only follows indirectly, because it is not the main or chief object of the contract to attain it. The primary purpose of this contract was, as the rates of transportation charged by the carrier were measured by the valuation of the property shipped, to fix an agreed valuation of the horses in question as a basis upon which freight rates should be charged and paid, on condition that in case of loss the responsibility of appellant should be measured by such agreed valuation. The contract is one in which the valuation of the property was agreed to for the purpose of fixing transportation charges and as measuring the responsibility of appellant. It was not a contract limiting liability. It was a contract dealing primarily with value—the value of the horses shipped. That was agreed to, and, of course, the agreed valuation must be deemed to be the actual valuation of the property, its actual valuation for all purposes of the contract; and, as appellant assumed responsibility for loss to the full extent of such valuation, there is no room for claiming that the contract was an attempt to exonerate it from the liability which the statute imposed. On the contrary, it assumed under it full liability for the actual value as that actual value was agreed on. Under this view of the contract we cannot see how it violates the section of the Code relied on. That section, while it prohibits contracts relieving the carrier from liability for the value of property intrusted to it for carriage and lost through its gross negligence, was not intended to limit the right of contract between shipper and carrier as to what that value may be. It prohibited only the making of a contract limiting liability. The limitation of liability necessarily imports a responsibility less than full responsibility. Full responsibility under the statute for the loss of the property carried could not exceed its actual value, and while, under the statute, a carrier cannot by contract exonerate itself from liability for such value, there is nothing in the statute which prohibits the parties by contract from determining freely in advance what the actual value of such property is as the measure of the responsibility of the carrier when it attaches.

Now, as to the authorities: At common law a common carrier might make any other contract relative to the carriage of property intrusted to it, save one exempting it from liability for any kind of negligence. This rule was founded upon considerations of public policy; it being deemed derogatory thereto to allow a common carrier to contract against its own negligence, because to permit this had a tendency to promote negligence.

In fact, as far as ordinary negligence is concerned, the rule at common law has been abrogated by our Code (section 2174) to the extent that the shipper and carrier may now contract for the purpose of limiting the liability of the latter therefor. The prohibition of the common law against a carrier limiting his liability from any kind of negligence is declared in this state by section 2175 only to apply to the limitation for gross negligence. But, in so declaring, our statute has added nothing to the restrictive force of the common-law rule. Declaring the same rule as it existed at common law, and nothing more, the section should not be construed as restricting the right of contract to any narrower compass than the common law restricted it. In fact, section 2175, as it is but a declaration of that rule, as far as it applies to contracts limiting liability for gross negligence, should not be interpreted as restricting the right of contract as to an agreed valuation of property for the purpose of fixing responsibility any further than it was restricted under the common-law rule. At common law such agreed valuation was not considered a limitation of liability for either ordinary or gross negligence. In jurisdictions in this country where the common-law rule obtains, it is the prevailing doctrine that there is a wide distinction between a contract by a carrier providing for exemption from liability for its negligence and a contract, fairly entered into, whereby, in consideration of a reduced rate of compensation for the transportation, the shipper and carrier agree upon a fixed valuation therefor under which the responsibility of the carrier in case of loss shall be measured. In his work on Carriers, Hutchinson, at section 250, notes the distinction, where, after discussing cases involving the question of contracts providing for total exemption of carriers in cases of negligence, he says: "To be distinguished from these cases, however—though the distinction is not always observed—are those cases, obviously different, in which, for the purpose of determining the shipper's liability for freight and the carrier's responsibility for damages, the value of the property is agreed upon."

The leading case marking this distinction is that of Hart v. Pennsylvania R. R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717. The distinction is further pointed out and approved in many of the state courts; most of them, like the Supreme Court of the United States, holding that agreements such as are involved here do not constitute contracts limiting liability on the part of the carrier, and all holding that in any view the shipper is estopped from questioning the value as represented by him and agreed on. In the Hart Case, where the provision of the contract under consideration was that "the carrier assumes liability on the stock [horses] to the extent of the following valuation," the court said relative to it "that where the contract of the kind signed by the shipper is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation. * * * There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement fairly made as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss, and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intended he should assume. * * * The limitation as to the value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contract, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss. * * * The distinct ground of our decision in the case at bar is that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives and of protecting himself against extravagant and fanciful valuations."

In the case of Graves v. L. S. & M. S. R. R. Co., 137 Mass. 33, 50 Am. Rep. 282, where the valuation was contained in a bill of lading in which it was stipulated that the goods were "shipped at an agreed valuation of $20 per barrel," it is said: "If we adopt the general rule that a carrier cannot * * * exempt himself from responsibility, * * * we are of opinion that it does not cover the case before us, which must be governed by other considerations. The defendant has not attempted to exempt itself from liability for the negligence of its servants. It has made no contract for that purpose, but admits its responsibility. * * * The care to be exercised in transporting property and the reasonable compensation for its carriage depend largely on its nature and value. * * * It is just and reasonable that a carrier should base his rate of compensation to some extent upon the value of the goods carried. This measures, and is an important element in fixing, his compensation. If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be barred by his representations and agreement. Otherwise, he imposes upon the carrier the obligations of a contract different from that into which he has entered. * * * We are of opinion that the plaintiffs are estopped to show that 'the property shipped' was of greater value than was represented. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect efforts of such a contract is to limit the extent of the responsibility of the carrier for the negligence of its servants, this was not the purpose of the contract. We cannot see that any consideration of a sound public policy requires that such contracts should be held invalid, or that a person who in such contract fixes a value upon his goods, which he intrusts to the carrier, should not be bound by his valuation."

In two cases in this court, while the particular section of our Code as to contracts limiting liability for gross negligence was not directly involved, still, discussing the effect of an agreed valuation in a contract between a shipper and carrier, the court expressed itself in approval of the rule laid down in the Hart Case. Said this court: "There is a wide distinction between a contract for exemption from liability in case of negligence, which is usually held in derogation of public policy, tending to encourage negligence, and a contract fairly made whereby, in consideration of a lower freightage, the parties agree upon a fixed or determinate value to be placed upon the article to be shipped, in case of its loss." Pierce v. S. P. Co., 120 Cal. 156, 166, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350. Also: "It would be unreasonable for a shipper to expect his packages to be carried for a compensation based upon an agreed valuation much less than the actual value, and then, in case of loss, recover the full value. * * * Where * * * the shipper agrees to a certain value, he should not be heard, in case of loss, to claim a greater value. Such a contract is fair and reasonable, and is not contrary to public policy. It is not a contract that relieves the carrier from responsibility for his own misbehavior. He is liable in case of loss for the value of the packages as agreed to by the shipper, and upon which value he pays a reduced compensation for the carriage. Limitation as to value does not excuse negligence." Michalitschke v. W. F. & Co., 118 Cal. 683, 688, 50 Pac. 847.

We content ourselves with thus quoting at length from these authorities. They discuss the matter fully, and declare principles which should govern in construing contracts of this nature. To the same effect are St. Louis, etc., Ry. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; Zimmer v. N. Y. C. & H. R. R. R. Co., 137 N. Y. 460, 33 N. E. 642; Jennings v. Smith, 106 Fed. 139, 45 C. C. A. 249; Bermel v. N. Y., N. H. & H. R. R. R. Co., 172 N. Y. 639, 65 N. E. 1113; Hill v. N. P. Ry. Co., 74 Pac. 1054, 33 Wash. 697; O'-Malley v. Great Northern Ry., 86 Minn. 380, 90 N. W. 974; Railway v. Sowell, 90 Tenn. 17, 15 S. W. 837; Normile v. O. R. & N. Co., 41 Or. 177, 69 Pac. 928. It is true that there are some authorities holding to a contrary doctrine, as there are those which sustain contracts exempting carriers from all liability for negligence; but the weight of American authority is in support of the doctrine announced in the Hart and other cases cited. While the authorities referred to discuss the effect of such contracts arising in cases where only ordinary negligence was involved, that can make no difference in the application of the principle to cases involving gross negligence. It is obvious that in principle it can make no difference what the character of the negligence may be. As it is pertinently said in Calderon v. Atlas S. S. Co., 69 Fed. 574, 578, 16 C. C. A. 332: "Such a valuation would necessarily, in the absence of fraud, conclude both the shipper and the carrier upon any inquiry as to the amount of damages arising from a loss, and the contract would therefore extend to any kind of a liability." It will be observed in the authorities quoted that they speak of a contract which is reasonable and freely made between the parties. In the case at bar there can be no question of the reasonableness of the contract. It was based upon a consideration of a rate of transportation much lower than it would have been had the valuation been higher, or if the carrier assumed all the risk which the shipper now seeks to charge it with. The impracticability of establishing one rate for the transportation of stock of different values is universally recognized. Rates for transportation are based upon the value of the property, and it is only natural that the amount of care which is to be exercised by the carrier in the protection of the property will be largely determined by its value. In the case at bar, following the general rule, defendant established freight rates under these special contracts of shipment which were proportional to the value of the property shipped —an increase of 10 per cent. in the freight charges for a rise of 100 per cent. in the value of horses to be transported, which cannot be said to be an unreasonable charge.

As to the contract being freely and fairly made: Delaney had shipped these horses over the road of the defendant before, and on just such a contract, containing the same valuations as appear in the one in question here. Before this latter contract was entered into, he had discussed with the agent of the defendant the shipment and the rate of shipment of these horses. He was not required to ship them under the contract. If he did not consider the rates thereunder reasonable, he was not required to take them. He could have shipped them under an ordinary bill of lading, though at a higher rate of freight, and in case of loss could have recovered whatever they were worth. Even under the contract he was not required to place the valuation on them that he did. He fixed the valuation on them himself. The defendant had nothing to do with it. And he knew, when he signed the contract, that it provided that the liability of defendant was limited by its terms to the value of $20 for each horse, as he had valued them. As we have said, these special contracts provided for freight rates proportionate to the value of the horses shipped. Delaney could have put their valuation at any higher rate than $20 which he deemed they were worth. There was nothing to prevent him from doing so. It was solely a matter of choice with him, and in fixing the valuation he did he could have been prompted only by a desire to obtain a low freight rate based on this low valuation. Nor, in determining whether such a contract is fair or reasonable, can there be taken into consideration the fact whether the agreed value of the property reasonably approximated its real value. That question was presented in some of the cases cited. In Hill v. N. P. Ry. Co., supra, in reply to a contention of counsel for appellant urging that it should, the court said: "An examination of the cases cited we do not think sustains this contention, and, even where there has been an attempt to make this distinction, it has been in principle a failure. The contract establishing the released valuation must be construed to embrace the real valuation." In the Hart Case, supra, which was a suit relative to the value as here of race horses, the court dismisses that contention as without merit, saying: "Although the horses, being race horses, may, aside from the bill of lading, have been of greater value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed. * * *" In Steers v. L. N. Y. & P. S. S. Co., 57 N. Y. 1, 15 Am. Rep. 453, the agreed valuation of the trunk in question was $50, whereas it was shown that the value of its contents exceeded $1,000. In Zimmer v. N. Y. C. & H. R. R. R. Co., supra, the agreed valuation was $100, though the value thereof found by the jury was over $3,000. And in all the other cases cited sustaining such special contracts, necessarily the actual valuation must have exceeded the agreed valuation, and the question whether it did or not must have been held to be immaterial.

We do not think that this matter requires any further discussion. Under the authorities the special contract entered into between plaintiffs and defendant cannot be held invalid as one exempting the defendant from liability for gross negligence. It does not do so, nor pretend to do so, but, on the contrary, must be sustained as a reasonable contract freely entered into by the shipper and under which the defendant assumed full responsibility for the actual value of the property as such value was fixed by the parties, and defendant cannot be made responsible for loss in an amount exceeding that agreed valuation.

The court erred in refusing to instruct the jury that they could not return a verdict exceeding the agreed valuation in each case —$20—and for that reason the judgment is reversed, and a new trial ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.

SHAW, J. (dissenting). In the absence of a special contract on the subject, when goods under shipment are destroyed by the gross negligence of the carrier, the extent of the liability of the carrier in damages is the actual value of the goods. If a carrier makes an agreement in advance that its liability for such destruction by its own gross negligence shall not be the actual value of the goods, $1,000 for instance, but a smaller amount, which the carrier and the shipper agree shall be considered, for the purposes of the shipment, the value of the goods, $100 for instance, I am unable to perceive why such a contract does not exonerate the carrier from liability for its gross negligence to the extent of $900. And, if a contract has that effect, I cannot see why the fact that the effect desired is not directly contracted for in express terms, makes it any the less a violation of section 2175 of the Civil Code, which prohibits the making of such contracts. The exemption from liability to the extent of the difference between the actual value and the stated value is expressly contracted for in the agreement in question here, however. If we hold that this contract is not forbidden by the provision of the Code, then that provision is practically annulled. Theoretically no person is compelled to avail himself of the services of common carriers, for he may walk, or hire his own conveyance; but practically the thing is compulsory, and the terms must be those fixed by the carrier. If the provision were made solely, or chiefly, for the benefit of the shipper or passenger, the theory that he might waive his right, or that he might be estopped to assert it by his conduct or by his contract freely made, would be perfectly sound and reasonable. But the law is not made for the benefit of the shipper or passenger alone. It is founded on public policy, having for its object the safety of human beings from death or injury and the prevention of the destruction of property. Where a course of conduct is required by law in furtherance of such public policy, it is not within the province of the individual immediately interested to dispense with an obedience to its provisions by any agreement, or to obviate its effects by his conduct making it inequitable, as between himself and the other party, to enforce it. The law in such cases makes use of his interest as a means of enforcing the provisions adopted for the purpose of securing the safety of the traveling public and preventing the negligent destruction of property. He is to that extent a public agent, and as such he should not be permitted to divest himself of the right and power to act.

In those jurisdictions where this policy exists solely by virtue of the common law, which is the creature of the judicial power, I concede that the same power is competent to qualify it, or limit its application, although the modification may render the policy practically fruitless. But in this state the policy is the creature of the legislative power. It has been established by legislative act, which in such matters is superior to the judiciary, and I do not believe that it should be within the power of the courts to declare that the parties immediately concerned may, by their previous conduct or by agreements made in advance, defeat the purpose of the law.

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151 Cal. 746

## IVERSON v. METROPOLITAN LIFE INS. CO. (L. A. 1,902.)

(Supreme Court of California. Aug. 20, 1907.)

1. Insurance—Applications for Life Policies—Warranties—Waiver.

Where the insurer, with knowledge that any representations of the insured are untrue, consummates the contract of insurance by issuing a policy, it waives the right to subsequently assert the falsity of the representations and avoid liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 966–997.]

2. Same.

Where a soliciting agent of an insurer has neither actual nor ostensible authority to waive the falsity of statements in an application for a life policy, his knowledge of the falsity of statements therein, not communicated to the insurer, is not knowledge of the insurer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 969.]

3. Same—Authority of Soliciting Agent.

An application for a life policy stipulated that the answers of the applicant were true, and that they were the basis of the contract of insurance, and, if untrue, that the policy should be void; that only officers at the home office of the insurer had authority to determine whether a policy should issue; and that no statements made to the soliciting agent should be binding on the insurer, unless reduced to writing and presented to the officers of the insurer at the home office. *Held*, that the soliciting agent had no authority to waive misrepresentations in the application.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28. Insurance. § 969.]

4. Same — Warranties — Misrepresentations—Waiver.

The applicant for insurance stated that he had never had paralysis, while as a matter of fact he had had partial paralysis, which fact was known to the soliciting agent, who did not communicate the knowledge to the insurer. *Held*, that the insurer, by issuing a policy on the application, did not waive its right to rely on the falsity of the statement to defeat liability.

In Bank. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Annie P. Iverson against the Metropolitan Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Porter, Sutton & Cruickshank, for appellant. Seward A. Simons, for respondent.

LORIGAN, J. This action was brought by plaintiff as beneficiary to recover upon two policies of life insurance issued by defendant in favor of James E. Iverson, her husband. The case was tried by the court and from a judgment in favor of defendant, plaintiff appeals; the appeal being presented on the judgment roll.

The applications for both policies of insurance, which were made and signed by the assured, contained the following: "(2) I have never had any of the following complaints or diseases: Apoplexy, asthma, bronchitis, * * * hemorrhage, insanity, * * * paralysis, pneumonia, rheumatism. * * * (12) I agree that this application has been made, prepared, and written by myself, or my own proper agent, and that inasmuch as only the officers at the home office of the company in the city of New York have authority to determine whether or not a policy shall issue upon any application, and as they act on the written statements, answers, warranties, and agreements herein made, no statements, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any person, shall be binding on the company or in any manner affect its rights, unless such statements, promises, or information be reduced to writing and presented to the officers of the company at the home office. And I further declare, warrant, and agree that the representations and answers made above are strictly correct and wholly true, that they shall form the basis and become part of the contract of insurance, if one be issued, and that any untrue answer will render the policy null and void, and that said contract shall not be binding upon the company unless upon its date and delivery the insured be alive and in sound health." The policies issued were based on these applications and contain the following provision: "This policy is void if any of the statements or warranties in the application for this policy be not true."

The court found that at the date of the policies Iverson was alive and in sound health, and that he and plaintiff had complied with all the terms and conditions of the policy to be performed by them, except as further stated in the findings, and in that regard the court made the following finding: "(3) The defendant issued the said policies of insurance, induced by the warranties and agreements made in the application, a copy of which is attached to the said policies. * * * (7) The statement made by said James E. Iverson in his application that he had 'never had any of the following complaints or diseases, to wit: Apoplexy, asthma, bronchitis, * * * hemorrhage, insanity, * * * paralysis, pneumonia, rheumatism * * *'—was untrue, in this: that he had had a partial paralysis in August, 1900, and was seriously ill at that time from said stroke of partial paralysis, and was attended by Dr. C. A. Briggs." The court further found: "(8) That Harvey L. Clark was the agent who solicited the said James E. Iverson to take an insurance policy with the defendant company, and that he was an agent for the purpose of soliciting insurance only; that he had known James E. Iverson for more than two years, and at the time he solicited said insurance, and at the time of making said application, he knew that James E. Iverson had had said stroke of partial paralysis, and communicated said fact to his immediate superior, who was a soliciting agent of the defendant in charge of the other soliciting agents in Pasadena, but who was under the general agent in Los Angeles, to whom he reported; but the fact that said James E. Iverson had had a partial stroke of paralysis as aforesaid was not communicated to said general agent at Los Angeles, or to any other agent or officers of the defendant company." As a conclusion of law the court held "that the said policies of insurance were null and void by reason of the statement of said James E. Iverson in his application that he had had no paralysis."

There can be no question but that the written answers in the application for insurance, made by the insured in response to the questions asked him relative to whether he had ever had any of the diseases specifically mentioned in the questions, were material to the risk assumed by the respondent; that the contract of insurance was based on them, and on the agreement of the insured that if any answer was untrue the policy to be issued thereon should be void. As the insured stated in response to an inquiry on the subject in his application that he had not had paralysis, and this statement was untrue, the conclusion of the court that the policy was void was proper, unless the contention made by appellant is to be sustained. That contention involves the legal effect to be given to the finding of the trial court that Clark, the soliciting agent of the defendant, who solicited the insured to apply for the policy, knew, when the insured made his application to the company in which he stated that he had not had paralysis, that that applicant had in fact suffered a stroke of paralysis. The position of appellant relative to this finding is that this knowledge of the soliciting agent, Clark, was knowledge of the company, and that the company, having issued the policy with knowledge that the statement of the insured in his application that he had not had paralysis was untrue, must be deemed to have waived the warranty with respect to it, and cannot be heard to insist upon the falsity of the statement to avoid the policy. Undoubtedly, if the company did have such knowledge, the issuance of the policy after possession of it would amount to a waiver. Warranties in an application of insurance are for the benefit of the insurer, in order that it may determine whether it will accept the risk, and if, with knowledge that any representations or statements made therein are untrue, it consummates the contract of insurance, it is deemed to have thereby waived the right to subsequently assert their falsity to avoid liability. But the question always is, did the company have knowledge? and that is the question here. It is not pretended that any knowledge possessed by Clark was in fact communicated to any general agent of the defendant, or that it was communicated to the officers of the company at the home office in New York. The claim is, however, that the relation of Clark to the defendant as soliciting agent was such that, whether the knowledge was imparted to these agents or officers or not, this knowledge was in contemplation of law the knowledge of the company, because Clark had it, and binds it as effectively as if it was communicated. But this effect on the defendant of knowledge possessed by Clark would not follow from the fact simply that Clark was the soliciting agent. It could only follow if, as such soliciting agent of the company, he had either actual or ostensible authority from it to waive the truthfulness of statements, or the warranties accompanying them in the application for the policy. If he had neither actual nor ostensible authority to do so, mere knowledge on his part, uncommunicated to the officers of the company having conceded power to waive conditions or warranties, would not be binding on the company, because knowledge of the agent is only knowledge to the principal in matters which are within the scope of the agent's authority to act. Westerfield v. New York Life Insurance Co., 129 Cal. 68, 79, 58 Pac. 92, 61 Pac. 667. And that Clark, as soliciting agent, had neither actual nor ostensible authority to act so as to waive the truthfulness of any statement in the application for the policy, or to relieve the applicant from any warranties therein, or to bind the company by any knowledge he might possess in relation to such statements or warranties, is clearly shown by the terms of the application itself, which expressly limits the power and authority of soliciting agents in those and in all particulars relative to matters pertaining to such application.

An insurance company can, like any other principal, prescribe limitations upon the power and authority of agents, and persons dealing with such agents with knowledge of the limitations upon their authority are bound by the restrictions imposed. Now, in the application made and signed by the insured it was expressly agreed by him that all his answers therein were true; that they should form the basis of the contract of insurance, and, if any were untrue, the policy should be void. He was informed by it plainly that only the officers at the home office had authority to determine whether a policy should issue on the application, and that they acted on the written statements, answers, warranties, and agreements contained in it in determining that matter. It was further expressly declared in the application and agreed to by the applicant that no statements, promises, or information given to the person soliciting the application for the policy should be binding on the company, or in any manner affect its rights, unless reduced to writing and presented to the officers of the company at the home office. Clearly, by these provisions of the application, express notice was given to the applicant that the officers at the home office reserved the exclusive right to determine whether the company would be bound by any statement or information made or presented by its soliciting agents, and then only when such statements were presented to them in writing, and that soliciting agents had no authority or right at all to bind it by any statements, promises made, or information possessed by them. The company had a right to thus limit the authority of its soliciting agents, and the beneficiary under the policy cannot now assert that the company was bound by the information possessed by its soliciting agent and undisclosed to it, when it was expressly declared in the application that the agent had no authority thereby to bind the company, that the company would not be affected by it unless it was forwarded to the officers at the home office for their consideration and action upon it, and the insured had knowledge of this when he made his application. As by the terms of the application and to the knowledge of the insured the soliciting agent had no authority to bind the company in any way, either by express agreement or the possession of any knowledge or information concerning the falsity of any of the statements or warranties contained in the application, mere possession of knowledge of such falsity was not knowledge acquired within the scope of his authority, and therefore cannot be said to be the knowledge of the company.

Counsel for appellant cites us to cases where the company has been held bound by the conduct of its soliciting and other special agents. But these are cases where either the agents had ostensible authority to act in the matters in question there or had deceived the insured, been guilty of some misrepresentation, or perpetrated some fraud upon him; the insured not being in fault and acting in good faith without notice of any limitation upon the authority of the agent. But the case at bar presents none of these situations. It is not claimed that the agent perpetrated any fraud on the insured, or that he represented he would or had authority to waive the truthfulness of any statements in the application or the accompanying warranty respecting its truth. The position taken here by appellant simply is that, because the agent had information that a statement the assured warranted to be true was false, the mere possession of this knowledge bound the company and relieved the assured from his warranty, notwithstanding it was expressly provided in the application, and the insured knew that the company could not be so bound, and could only be bound by having such information imparted in writing to the home officers, who were authorized to act upon it. This position could only be sustained by holding that it was not competent for the company to limit the authority of its agents and that the insured is not bound by the knowledge of such limitations. Of course, it cannot be so held. In the case at bar there is no question of fraud, deception, or misrepresentation practiced by the agent. The sole question is one of contract. The application contained a limitation on the authority of the agent expressly providing against the company being bound by any information possessed by him not disclosed in the application and declaring the only way it could be bound, namely, by written statements furnished the officers at the home office for their action upon them. The assured knew all this and agreed to it. It was the contract of the parties upon the subject of the agent's authority, and prescribed the only method in which the company could be bound, which it is not pretended was followed; and we know no reason why the assured should not be controlled by the terms of the contract and the limitations on the authority of the agent imposed thereby. New York Life Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; Northern Assurance Co. v. Grand View Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; McCoy v. Metropolitan Life Ins. Co., 133 Mass. 82; Clemens v. Supreme Council, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; Dimick v. Met. Life Ins. Co., 69 N. J. Law, 384, 55 Atl. 291, 62 L. R. A. 774.

In discussing this matter we have referred simply to the finding of the court as to the knowledge possessed by Clark, the soliciting agent, who actually solicited the application for the policy by the assured. We have in mind the fact that the court found that Clark had imparted this information to his immediate superior, also a soliciting agent of defendant in charge of the other soliciting agents in Pasadena. That he imparted this information to him does not affect the question. The knowledge of the superior soliciting agent, under the limitation as to the authority of such agents, bound the defendant no more than did the knowledge possessed by Clark.

It follows, from the view we take of the law applicable here, that the insurance company had not waived the warranty made by the assured in his application for a policy relative to paralysis; that knowledge by the soliciting agent of the falsity of this statement as to that matter did not have that effect, in view of the limitation on his authority contained in the application and known to the assured, and the further provision as to the only method by which the warranty might be waived by the company; that the judgment is supported by the finding that there was a breach of such warranty, and is affirmed.

We concur: McFARLAND, J.; SLOSS, J.; HENSHAW, J.

ANGELLOTTI, J. I concur in the judgment, and generally in what is said in the opinion. I, however, base my concurrence solely upon the presence in the application for the policy of the provision set forth in the opinion, and the knowledge thereof which, by the record before us, must be imputed to the applicant at the time he made the application. Mr. Cooley, in his Briefs upon the Law of Insurance, states that the general rule that the knowledge of an insurance agent is imputable to the company applies also, in most instances, to a soliciting agent with reference to matters made known to him prior to the execution of the policy. Volume 3, p. 2524 et seq. This declaration appears to be supported by many decisions. But where the company has, to the knowledge of the applicant, expressly provided that it shall in no way be bound by any knowledge possessed by the soliciting agent, and that, as to matters covered by the questions asked the applicant, it acts solely upon the written information furnished by the applicant to the home office, in determining whether or not a policy shall issue, which is the effect of the provision in question, I do not see how the company can be held to be bound by the mere knowledge of the soliciting agent of the falsity of an answer knowingly made by the applicant.

I concur: SHAW, J.

151 Cal. 701

## WOOLLACOTT et al. v. MEEKIN. (L. A. 1,808.)

(Supreme Court of California. Aug. 19, 1907. Rehearing Denied Sept. 18, 1907.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—CONTRACTS—VALIDITY.

A contract for a street improvement, providing that all damage arising from the nature of the work to be done should be sustained by the contractor and that the latter should indemnify the city from all suits against it on account of any damages from the actions of the contractor, was void as imposing conditions naturally tending to increase the cost of the work and add to the burden of the property owners.

2. SAME — ACTION TO ANNUL ASSESSMENT — PARTIES—MISJOINDER.

In an action to annul an assessment for street improvements and bonds issued thereunder constituting a lien on land owned by plaintiffs, on the ground that the contract for the improvements was void, no substantial right of defendant was affected by the joinder as plaintiffs of several owners of separate lots of land not claiming under a common source of title.

3. APPEAL AND ERROR—MISJOINDER OF PARTIES—HARMLESS ERROR.

A judgment, after trial on the merits, will not be reversed because the court improperly overruled a demurrer on the ground of misjoinder of parties, where such misjoinder did not affect any substantial right of a party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4098.]

4. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—VOID ASSESSMENTS.

Where proceedings for street work were void ab initio, there was no moral obligation on the part of the owners of land abutting on the street to pay any part of an invalid assessment made for such street work, so that a tender of the amount properly due was not a condition precedent to the right to sue to set aside the assessment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1200.]

Beatty, C. J., and Shaw and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by H. J. Woollacott and others against Cora L. Meekin, substituted for D. A. Meekin. Judgment for plaintiffs, and defendant appeals. Affirmed.

Munson & Barclay, for appellant. O. B. Carter, for respondents.

ANGELLOTTI, J. This is an action by 12 persons, owning separate lots of land in the city of Los Angeles, to obtain a decree declaring void and annulling a certain assessment upon their land for street work done on Mott street, in said city, and the bonds issued thereon, constituting a lien on said land. Judgment was given in favor of plaintiffs, and defendant appeals therefrom.

Upon the question as to the validity of the assessment and bonds it will be necessary to notice but one of the objections of plaintiffs. The street work done consisted of the grading and graveling of a portion of Mott street, and the construction therein of a cement curb, a redwood curb, a cement sidewalk, and a cobble-paved gutter. The various proceedings of the city officials, from and including the resolution of intention to and including the contract for the work, provided that the work should be done in accordance with certain described specifications on file in the office of the city clerk of said city. By reference, these specifications were expressly made a part of the contract, and this inclusion of such specifications as a part of the contract was, of course, authorized by the reference thereto in the anterior proceedings. The specifications so referred to in all the proceedings were separate specifications for the different kinds of work. Each of these specifications contained the following provisions: "*All loss or damage arising from the nature of the work to be done under this agreement*, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from any incumbrances on the lines of the work, or for any act or omission on the part of the contractor, or any person or agent employed by him, not authorized by this agreement, *shall be sustained by the contractor.* * * * The contractor shall indemnify and save harmless the city of Los Angeles from all suits and actions of every name and description brought against it for or on account of any damages received or sustained by any party or parties, or by or from any of the acts of or anything done by said contractor, his servants, or agents in the prosecution of said work." The italics are ours. These two provisions were in no way connected, and were apparently separate and independent stipulations.

The question as to the effect on the assessment and bonds of the italicized portion of the first of these provisions is determined by the decision of this court in Blochman v. Spreckels, 135 Cal. 662, 67 Pac. 1061, and Goldtree v. Spreckels, 135 Cal. 666, 67 Pac. 1091. These were actions to restrain a purchaser at sales made on bonds issued on an assessment for street work in the city of Coronado from applying for a deed, and to quiet the owner's title as against such sales. There was an ordinance of the city providing that the work "shall be done in accordance with the following specifications," which ordinance was held to constitute a part of the contract for the work. That ordinance, after specifying the manner of doing the work and the materials to be used, provided, among other things, as follows: "All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor." It will be observed that the only difference between this and the italicized portion of the provision in the case at bar is in the use of the words "these specifications," instead of "this agreement." This difference in verbiage is clearly immaterial. The provisions are substantially the same, and necessarily mean the same thing, unless the connection in which they are used makes a difference. There was also a provision in the cases cited that the contractor "shall hold the city harmless for any and all suits for damages arising out of the construction of said improvements." This court held that, while a fair construction of the other provisions might warrant a conclusion that they referred only to damages resulting from the negligence of the contractor in prosecuting the work, the provision as to loss or damage arising from the nature of the work had a broader meaning, and included practically any damage for which the city would be liable which might originate "in the nature of the work to be done." It was held, citing Brown v. Jenks, 98 Cal. 10, 32 Pac. 701, and Alameda Macadamizing Co. v. Pringle, 130 Cal. 226, 62 Pac. 394, 52 L. R. A. 264, 80 Am. St. Rep. 124, that such a provision was not only unauthorized by statute, but that it imposed conditions naturally tending to increase the cost of the work and increase the burden of the property owner, and the judgments giving the owners the relief sought on account of the invalidity of the assessment and bonds were affirmed.

So far as the question as to the proper construction of the provision under discussion is concerned, there is no material difference between the case at bar and the cases of Blochman v. Spreckels, supra, and Goldtree v. Spreckels, supra. The added clauses present in the case at bar in no degree tend to affect the force or meaning of what is clearly a separate and independent provision as to the loss or damage arising from the nature of the work to be done. The words "which may be encountered in the prosecution of the same" can be read only as applicable to the clause "or from any unforeseen obstruction or difficulties," immediately preceding. The second provision in the case at bar is obviously a separate and distinct provision, having no reference to the provision relating to damages arising from the nature of the work, and in no degree affecting the meaning thereof. No principle of construction would justify the conclusion that this provision was intended to detract from the effect of the former provision, and relieve from the burden thereby imposed. There is no merit in the contention that the unauthorized provision was not a "specification" as to the materials to be used, and the manner of doing the work, and, therefore, was not included in the reference to the specifications made in the preliminary proceedings. Whether or not the provision is, in strictness, a "specification," it was a part of each of the documents on file referred to, entitled simply "Specifications No. 68, for the Construction of Graveled Streets in the City of Los Angeles," "Specifications No. 54, for the Construction of Cement Curbs in the City of Los Angeles," etc., and was manifestly included in that term, both in the documents entitled "Specifications" and the references thereto, just as it was in the ordinance involved in the Spreckels Cases above cited. See, also, Brown v. Jenks, 98 Cal. 10, 32 Pac. 701. It is apparent that, unless the decisions in Blochman v. Spreckels, supra, and Goldtree v. Spreckels, supra, are to be overruled, the assessment and bonds here involved must be held void. While those cases were decided in department, the decisions were practically by the court in bank, for Blochman v. Spreckels was decided by department 1, and Goldtree v. Spreckels was decided on the same day on the authority of the Blochman Case by department 2. All of the then justices of this court except the Chief Justice then gave their adherence to the views there expressed, and applications for a rehearing in bank denied. These decisions, given February 28, 1902, constitute a rule of property declared by this court, upon the faith of which, we must assume, parties have acted in their dealings in regard to lands. The construction given by these decisions to the provision in question was certainly a permissible one. Under these circumstances, we would not feel warranted in overruling such decisions, even if we felt that a different construction might have been given to that provision. It is to be noted in this connection that the proceedings for the street work here involved were inaugurated by the city of Los Angeles nearly one year after the decisions above referred to.

A demurrer was interposed to the complaint in the court below, and overruled. We have deferred consideration of the points made relative to this ruling, as they can be disposed of more briefly in the light of the knowledge afforded by what we have said as to the merits of the case. It was urged by the demurrer that there is a misjoinder of parties plaintiff and causes of action, in that several owners of separate lots of land not claiming under a common source of title are joined in an action to have the assessment and bonds issued thereunder, constituting liens on the several parcels, declared void. It is unnecessary to consider the argument of learned counsel for plaintiffs in support of this joinder. Assuming, for the purposes of this decision, that there was a misjoinder, it is apparent that no substantial right of the defendant was affected thereby. Defendant's claim as to each and all of the lots was based entirely upon the validity of the legal proceedings, common to all the lots, leading up to the assessment. Those proceedings were, as we have seen, ineffectual for any purpose, and void. No prejudice could possibly result to defendant from having that question determined in a single proceeding mantained by the different owners. On the contrary, in at least one respect, such a course was manifestly to his advantage, namely, in the matter of costs and attorney's fees. It seems to be thoroughly settled that a judgment after trial upon the merits will not be reversed because the court improperly overruled a demurrer on the ground of misjoinder of parties, where it is plain that such misjoinder did not affect any substantial right of a party. See Daly v. Ruddell, 137 Cal. 671, 674, 70 Pac. 784; Hirshfeld v. Weill, 121 Cal. 13, 15, 53 Pac. 402; Asevado v. Orr, 100 Cal. 293, 300, 34 Pac. 777; Reynolds v. Lincoln, 71 Cal. 183, 185, 9 Pac. 176, 12 Pac. 449. This is but an application of the rule declared by section 475, Code Civ. Proc., that the court must disregard errors and improper rulings not affecting the substantial rights of the parties.

It is urged that the complaint is fatally defective, in that there is no allegation that plaintiffs ever offered to pay what the street improvements were reasonably worth to their lots. It is said that they cannot have the equitable relief sought without doing equity. The equitable maxim thus invoked has no application under the facts shown by the complaint. We have here proceedings for street work had, presumably, without the consent of the landowner, which were void ab initio. They could not serve as a sufficient foundation for any assessment, and for this reason the entire assessment was void. It cannot be held upon the facts shown that there was any moral obligation on the part of the owner to pay any part of such an invalid assessment. The mere fact that the street work called for by the invalid proceedings and contract has been done does not create such a moral obligation. The case in this respect is the same as Chase v. Treasurer, etc., 122 Cal. 540, 55 Pac. 414, where it was held, in an action by the owner to restrain a sale on such a bond, that, as the entire assessment was void and there was no tax to be tendered, no tender was essential to the maintenance of the action. The case here does not fall within the doctrine of the cases cited by defendant, nor within that of the later cases (not cited) of Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301, and Couts v. Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168, in the latter of which the application of the maxim relied upon is fully discussed.

There is no merit in the claim that, if the assessment and bonds are void, they cast no cloud upon the title of plaintiffs. The invalidity is not apparent upon an inspection merely of the assessment, warrant, and diagram, and the bonds, which constitute prima facie evidence of the validity of the proceedings, and the owners of the land, in any action founded upon a deed issued in proceedings to enforce the lien of the bonds, would be required to offer evidence to defeat a recovery. The precise point here made was made in Chase v. Treasurer, etc., supra, and decided against the contention of defendant.

There is no other point requiring consideration.

The judgment is affirmed.

We concur: SLOSS, J.; McFARLAND, J.; HENSHAW, J.

I dissent: BEATTY, C. J.

SHAW, J. I dissent. In my opinion the clauses of the so-called specifications, upon which the validity of the assessment in the prevailing opinion is based, were not incorporated in the contract and proceedings leading up to the assessment and formed no part thereof. In the first place, the reference in the proceedings and in the contract are to things designated therein as "specifications," and the extent of the incorporation of the documents thus designated into those proceedings and contract must be confined to that which constitutes the specifications alone. In Baltimore & O. R. Co. v. Stewart, 79 Md. 487, 29 Atl. 964, speaking of a reference of this character in a building contract, the court says: "The term 'specifications,' as thus used in contracts of this kind, ordinarily means a detailed and particular account of the structure to be built, including the manner of its construction and the materials to be used." In the second place, the purposes for which the documents called "specifications" are referred to are limited by the words in which the several references are couched. The proceedings and contract called for five separate classes of work, for each of which separate specifications were referred to. These specifications were evidently general specifications prepared in pursuance of some city ordinance and filed with the clerk, to be made applicable to all subsequent proceedings for the particular classes of work. The work required to be done by the contract and proceedings included the grading and graveling of the street, the construction of a cement curb along part of its course, a redwood curb along another part, a cement sidewalk, and a cobble paved gutter. As an illustration of the method of reference, the ordinance of intention provided, with respect to grading and graveling, that the street should be "graded and graveled in accordance with the plans and profile in the office of the engineer and specifications for the construction of graveled streets in the city of Los Angeles on file in the office of the city clerk of said city, said specifications being numbered 68," and provided, with respect to curbing, that "a cement curb be constructed * * * in accordance with specifications for constructing cement curbs, on file in the office of the city clerk, said specifications being numbered 54." Similar language was used with respect to each of the other classes of work. In the notice for street work, in the ordinance declaring that the work should be done, in the notice inviting proposals for the work, and in the notice of award of the contract, the language above quoted was repeated word for word with respect to each class of work. In the contract the references with respect to each particular class of work are again repeated in the same language as in the resolution of intention and other documents. It further provides that the contractor "promises and agrees * * * that he will do and perform, or cause to be done and performed, in a good and workmanlike manner, under the direction and to the satisfaction of the said street superintendent, all of the following work [here follows the description with references as above mentioned] * * * according to the specifications on file in the office of the city clerk of said city, which are known as 'specifications Nos. 68, 54, 52, 55, and 51,' and made part of this contract."

The specifications provide with great detail the manner in which the work is to be done and the materials of which it is to be composed. Each is prefaced by a heading indicating the purpose for which they were originally adopted by the council. For instance, that relating to the cement curbs is as follows: "Specification No. 54, for the Construction of Cement Curbs in the City of Los Angeles." The others are in the same language, thus demonstrating that the specifications were prepared as specifications of construction alone. There is nothing in the proceedings, or in the contract, expressing any purpose to refer to the specifications for the details respecting the rights, obligations, or liabilities of the contractor or of the city. The two clauses in the documents called "specifications," which are supposed to create liabilities against the contractor, and which are declared to have the effect of making the entire proceedings invalid, have no reference whatever to the construction of the work required to be done, nor to the materials of which that work is to be composed. It is true that the contract, after referring to the specifications, contains the statement that they are made part of the contract. This language, by grammatical construction, is limited in its meaning to the specifications previously referred to, and manifestly relates solely to the specifications of the manner of doing the work and the materials to be used therein. It does not have the effect of incorporating into the contract other parts of the document called "specifications," which have no reference whatever to the work, but only to the rights and liabilities of the parties. In Short v. Van Dyke, 50 Minn. 286, 52 N. W. 643, the court, referring to the extent to which a separate document was made a part of a contract by a reference thereto, states that "if the reference be made for a particular purpose, expressed in the contract, it becomes a part only for that purpose." In Neuval v. Cowell, 36 Cal. 650, where other documents were referred to for matter of description, the court said that the other documents were admissible in evidence as part of the agreement, to aid the contract in regard to the description, and that "for any other purpose they were foreign to the case." This rule is in strict accordance with the rules by which contracts are to be construed. The document referred to, not being signed by the parties, is incorporated in it only for the purpose of supplementing the contract to the extent to which the contract itself is deficient, and its use must be confined and limited to the purpose for which it is adopted. The following cases are of similar effect: Riley v. Brooklyn, 46 N. Y. 444; Hopkins v. Rogers, 11 Tenn. 457.

There is nothing in the cases referred to in the prevailing opinion upon this subject. In all of those cases it was assumed without argument that the matter contained in the specifications, whether referring to the manner of doing the work, or to the materials therefor, or not, were a part of the proceedings or contracts in the particular case. It does not appear that the proposition that the references did not include the specifications for the purposes of incorporating the foreign clauses in the contract or proceeding was brought to the attention of the court. The clauses quoted in the prevailing opinion constitute no part of the contract entered into by the contractor, nor of the proceeding upon which it was based. They did not refer in any respect to the manner of doing the work, the plan by which it was to be constructed, or the quality or character of the materials. It cannot be presumed that they would have any effect whatever upon the various bidders who may have intended to bid upon the work. These clauses are not in fact incorporated, either in the proceedings referred to or in the contract. They could only become a part thereof by reason of the reference, and as the reference was not made for that purpose, but solely to describe the work and materials they were entirely foreign to the case, and could have no effect upon the validity of the assessment.

I concur: LORIGAN, J.

151 Cal. 723

## MOORE v. GOULD et al. (L. A. 1,790.)

(Supreme Court of California. Aug. 19, 1907.)

1. BILLS AND NOTES—CONSIDERATION—PRESUMPTIONS.

A presumption of consideration for a note and mortgage securing it arises from the note and mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1652.]

2. EVIDENCE — PRESUMPTIONS — CONFLICTING EVIDENCE.

In an action to foreclose a mortgage securing a note, the testimony that there was no consideration for the note was not contradicted, but it had in itself inherent elements of improbability. *Held*, that in view of a presumption of consideration arising from the note and mortgage, which under Code Civ. Proc. § 2061, subd. 2, is evidence, there was a conflict in the evidence on the issue of consideration sufficient to support a finding of consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1816, 1819.]

3. MORTGAGES—EXTENSION OF TIME OF PAYMENT.

An instrument reciting that a debtor is desirous of extending the loan, and declaring that a mortgage, together with the note and debt secured thereby, is renewed for a specified period, and signed by the debtor, is a renewal of the note and mortgage, within Civ. Code, § 2922, providing that a mortgage can be renewed only by writing, etc.

4. LIMITATION OF ACTIONS—ACKNOWLEDGMENT OF DEBT—SUFFICIENCY.

An instrument reciting that a debtor is desirous to extend a mortgage, and that it is renewed for a specified time, signed by the debtor, is an acknowledgment of the debt, and operates to start a new period of limitation, within Code Civ. Proc. § 360, providing that no acknowledgment is sufficient evidence of a new contract, unless the same is contained in some writing signed by the party to be charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 601.]

5. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—POWER OF ATTORNEY—CONSTRUCTION.

A power of attorney, authorizing the grantee therein to prosecute every kind of business and for and in the name of the grantor execute and deliver agreements, mortgages, notes, etc., empowers the grantee to execute for the grantor an instrument renewing a mortgage executed by the grantor and the note thereby secured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 364.]

6. SAME.

A payee of a note secured by a mortgage may, after the transfer of the note and mortgage, act as an agent of the maker to renew the note and mortgage, since, under Civ. Code § 3116, the maker is bound to pay the debt, and the payee is liable only to the subsequent holder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 465.]

7. SAME—ACT OF AGENT—LIABILITY OF PRINCIPAL.

A payee of a note secured by a mortgage transferred the note and mortgage. The maker subsequently executed a power of attorney authorizing the payee to renew the mortgage. The payee executed in the name of the maker an instrument renewing the mortgage for a specified period. *Held*, that the renewal of the mortgage was binding on the maker only, under Civ. Code, § 2343, holding an agent liable only when he enters into a contract in the name of his principal without having authority so to do, etc.

8. MORTGAGES — FORECLOSURE — EVIDENCE — PRESUMPTIONS.

Under Code Civ. Proc. § 1962, subd. 2, providing that facts recited in an instrument shall be conclusively presumed to be true as between the parties, a recital in a mortgage is conclusively presumed to be true as between the parties thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 211; vol. 16, Deeds, § 256; vol. 19, Estoppel, §§ 41–45.]

9. MORTGAGES—CONSTRUCTION—TIME OF PAYMENT.

A payee of a note secured by a mortgage transferred the note and mortgage, and thereafter executed to the transferee a mortgage, which set out the note and recited that the payment thereof had been extended, and which stated that the payee promised to pay the note according to the terms and conditions thereof. *Held*, that the mortgage executed by the payee contained a promise by the payee to pay the note as extended, and an action commenced within four years thereafter was not barred, under Code Civ. Proc. § 337, limiting actions on obligations founded on instruments in writing to four years.

10. SET-OFF AND COUNTERCLAIM—CROSS-DEMANDS—AVAILABILITY—SECURED CLAIMS.

In a suit under Code Civ. Proc. § 726, to foreclose a mortgage, a claim for services and for goods solds is not available as a cross-demand under section 440, providing that, when cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, the two demands shall be deemed compensated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, § 70.]

11. SAME—DEMANDS BARRED BY LIMITATIONS.

Under Code Civ. Proc. § 438, subd. 2, providing that in an action on contract any other cause of action arising on contract and existing at the commencement of the action may be set up as a counterclaim, a demand barred by limitations is not available as a counterclaim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, § 41.]

12. SAME.

Under Code Civ. Proc. § 438, subd. 2, providing that in an action on contract any other cause of action arising on contract and existing at the commencement of the action may be set up as a counterclaim, and section 1500, providing that no holder of a claim against an estate shall maintain any action thereon unless the claim is presented to the executor or administrator, a demand against an estate of a decedent not presented to his representative is not available as a counterclaim in an action by the representative.

13. PLEADING — DEMURRABLE PLEADING — STRIKING OUT.

Where a demurrer to pleadings should have been interposed and sustained, there was no prejudicial error in striking out the pleadings, or in refusing to receive evidence in support of their allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4110.]

Beatty, C. J., and Lorigan, J., dissenting in part.

In Bank. Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by Rebecca W. Moore against Will D. Gould and others. From a judgment for plaintiff, defendants appeal. Affirmed.

James H. Blanchard, William E. Cox, and Will D. Gould, for appellants. Miller & Page, for respondent.

SLOSS, J. This is an action on two promissory notes, secured by two mortgages of real estate and by a pledge of stock of a corporation. Plaintiff had judgment of foreclosure, and the defendants, Will D. Gould, Mary L. Gould, Samuel Peterson, and James H. Blanchard, appeal from the judgment and from an order denying their motion for a new trial.

On July 18, 1892, the defendant Peterson executed to the defendant Will D. Gould a note for $700, payable on or before one year after date, and at the same time executed and delivered to said Gould a mortgage of certain real property in the county of Los Angeles to secure the said note. On the 28th day of September, 1892, Will D. Gould assigned and transferred the said note and mortgage to plaintiff, and at the same time indorsed the note to the order of plaintiff. On June 28, 1897, the defendants Will D. Gould and Mary L. Gould, his wife, made, executed, and delivered to the order of P. R. Moore, the husband of plaintiff, a promissory note in the sum of $550, payable on or before July 18, 1899. Together with their note, they executed and delivered to said P. R. Moore and to plaintiff, as mortgagees, a mortgage of certain real property in Los Angeles county, which mortgage stated that it was made as security for the payment of the Peterson note of $700, as well as the $550 note. In said mortgage the mortgagors furthermore promised to pay the $700 note according to the terms and conditions thereof. The mortgagee P. R. Moore died, and the $550 note and the mortgage executed contemporaneously with it passed to the plaintiff by virtue of the decree of distribution in his estate. Other facts will be stated in connection with the various points made by appellants.

1. The answers of the appellants allege that there was no consideration for the second note and mortgage, and that said note and mortgage had been executed upon the agreement with the mortgagee P. R. Moore that the sum of $550 should be applied and credited as a partial payment on the $700 note and mortgage. The court found against these allegations. The defendants Will D. Gould and Mary L. Gould gave testimony that there had been an agreement, as averred in the answers, between them and P. R. Moore. This testimony was not directly denied, as, indeed, it could not be; the other active party to the transaction, P. R. Moore, being dead. But the claim of these defendants had in itself inherent elements of improbability. The theory that the second note and mortgage were given to reduce the amount due upon the first note is not readily reconcilable with the form of the mortgage itself, which declares that it is given to secure both notes, and that the mortgagors undertake to pay both. As to the plea of want of consideration, a presumption of consideration arises from the writing itself. Such presumption is itself evidence. Code Civ. Proc. § 2061, subd. 2. There is thus raised a conflict, which is sufficient to support the finding of the court. People v. Milner, 122 Cal. 171, 54 Pac. 833; Sarraille v. Calmon, 142 Cal. 651, 76 Pac. 497; Adams v. Hopkins, 144 Cal. 19, 36, 77 Pac. 712.

2. The statute of limitations (Code Civ. Proc. § 337) is set up as a defense to both notes. The finding of the court is against this plea. The $550 note was payable July 18, 1899. The complaint was filed February 27, 1903, less than four years after the maturity of the note. As to this note, therefore, it is plain that the bar of the statute had not attached. As to the $700 note, which by its terms fell due July 18, 1893, the complaint alleges, and the court found, that on the 28th day of June, 1897, the defendant Peterson and the defendant Will D. Gould in writing extended the time of maturity and payment until the 28th day of June, 1899, and that on the 25th day of May, 1900, the said defendants similarly extended the time of payment of said note until the 18th day of July, 1902. It appears that on July 18, 1892, the defendant Peterson had executed a power

of attorney to Will D. Gould. On June 28, 1897, Gould, acting as attorney in fact of Peterson, executed an instrument in writing reading as follows: "Know all men by these presents, that Samuel Peterson, being desirous of extending the loan and in consideration of the same being extended, does hereby certify and declare that a certain mortgage, together with the promissory note and debt secured thereby, bearing date the 18th day of July, 1892 (describing the mortgage first set out in the complaint), is hereby renewed and extended for the further term of two (2) years from this date, provided that this agreement shall not affect or impair any other covenant or condition in said promissory note or mortgage contained, but that they shall remain in as full force and effect as if this agreement had not been made. In witness whereof, the said Samuel Peterson, by Will D. Gould, his attorney in fact, has hereunto set his hand and seal this 28th day of June, in the year of our Lord one thousand eight hundred and ninety-seven. Samuel Peterson [Seal], by Will D. Gould, His Attorney in Fact." On May 25, 1900, Gould, as attorney in fact, executed a similar instrument purporting to renew and extend the note and mortgage to the 18th day of July, 1902.

Each of these instruments constituted a renewal of the note and mortgage within section 2922, Civ. Code. German S. & L. Soc. v. Hutchinson, 68 Cal. 52, 8 Pac. 627; London, etc., Bank v. Bandmann, 120 Cal. 220, 224, 52 Pac. 583, 65 Am. St. Rep. 179; Seaton v. Fiske, 128 Cal. 549, 61 Pac. 666. Furthermore, each of them contained an acknowledgment of the debt, and thus operated to start a new period of limitation. Code Civ. Proc. § 360; Concannon v. Smith, 134 Cal. 14, 66 Pac. 40; Dearborn v. Grand Lodge, 138 Cal. 658, 72 Pac. 154. In either aspect these writings were sufficient to take the case out of the operation of the statute of limitations so far as the defendant Peterson is concerned, if Gould was authorized to execute them as Peterson's agent and in his behalf. Whether or not he was so authorized depends upon a consideration of the terms of the power of attorney. This instrument was in the form in common use in this state and usually described as that of a "general power of attorney." It authorized Gould, in the name of Peterson, and for his use and benefit, to perform any of a great variety of acts set forth in the instrument. These acts include almost every conceivable mode of dealing with real and personal, tangible and intangible, property, and their enumeration is followed by these words: "And to make, do, and transact all and every kind of business of what nature and kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver, and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgment, and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises." This power authorized the execution by Gould of the two instruments in question. The purpose and effect of a power of attorney of this kind is to vest in the attorney full authority to transact any and all kinds of business for the principal. Every phrase in it, defining the authority of the attorney, is in broad and unrestricted terms, and such terms are to be given an interpretation in harmony with the scope and purpose of the instrument, read as a whole. It is true that, where a power is given for a limited or specific purpose, general words following the declaration of the particular purpose are to be limited to such acts as may be necessary to accomplish such particular purpose. Washburn v. Alden, 5 Cal. 463; Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235; 1 Am. & Eng. Ency. of Law (2d Ed.) 1000. But this rule has no application to such an instrument as the one now under consideration. Nowhere in this power of attorney is there any language limiting the scope of the business which may be performed by the attorney, and the generality of the terms employed clearly includes authority to execute the instruments of renewal. Ward v. Kentucky Bank, 7 T. B. Mon. 93, cited by appellants, is not in point. The power of attorney there considered was closely limited in its terms. Furthermore, the act of the agent was not similar to that of Gould in this case.

It is urged that Gould, by reason of his position as payee of the $700 note, could not act as Peterson's agent to renew the note. This position would have much force if Gould at the time of executing the instruments of renewal or "extension" (as they are termed in the record) had still been the holder of the note and mortgage. Wolford v. Cook, 71 Minn. 77, 73 N. W 706, 70 Am. St. Rep. 315. His disability in such case would have rested on the rule that one who acts in a fiduciary capacity cannot be permitted to deal with himself in his individual capacity. Davis v. Rock Creek Co., 55 Cal. 359, 36 Am. Rep. 40; Sterling v. Smith, 97 Cal. 343, 32 Pac. 320. The interest of his principal would have been adverse to his own. Here, however, Gould had already transferred the note and mortgage. Acting for Peterson, he was dealing, not with himself, but with the plaintiff. Even if the renewal might have resulted in his release as indorser or guarantor, such release could have operated only to the disadvantage of plaintiff, not to that of Peterson. Peterson's liability as maker was primary; that of Gould merely secondary. Peterson was at all times bound to pay the note, and was not entitled to recourse against Gould, who was liable only to subsequent holders. Civ. Code, § 3116. The action was therefore commenced in time as against the defendant Peterson; and this without regard to the allegation and finding of his absence from the state (Code Civ. Proc. § 351) for periods sufficient to prevent the statute of limitation from running in his favor.

Whether the action on the $700 liability was barred as to the defendants Will D. and Mary L. Gould depends on different considerations. The two instruments executed by Gould as attorney in fact for Peterson could have no effect as against any person other than Peterson. In executing them Gould was assuming to act, not in his individual capacity, but only as agent for Peterson. Since the acts were lawful, and within the scope of his authority, the principal only, and not the agent, was bound by them. Civ. Code, § 2343. The evidence, therefore, did not support the finding that Gould extended the maturity of the $700 note. But the mortgage of June 28, 1897, in which the Goulds undertook to pay both notes, contains the following provisions. It declares that the mortgagors mortgage certain real property as security for the payment of the two notes, which are set out in full. Following the copy of the $700 note signed by Peterson, the mortgage reads as follows: "Said last note of $700 is secured by mortgage, * * * and time of payment of said note has been extended to July 18, 1899. And the mortgagors promise to pay said notes according to the terms and conditions thereof. * * *" Here is a direct promise to pay the note, following a recital that the time of payment has been extended to July 18, 1899. This recital is, as between the parties to the mortgage, conclusively presumed to be true. Code Civ. Proc. § 1962, subd. 2. In promising to pay the note "according to its terms and conditions," the mortgagors must be taken to have referred to the terms and conditions, not merely as they appeared on the face of the note itself, but with such modifications as had been recited. To hold otherwise would require us to construe their promise as an agreement to perform an impossibility; i. e., to pay money at a date already past. If the promise to pay was not intended to be a promise to pay at the date to which payment had, as recited, been extended, it is difficult to see why the recital of extension should have been inserted at all. Construing the language as importing a promise to pay the $700 note on July 18, 1899, the action, commenced on February 17, 1903, was not barred by section 337 of the Code of Civil Procedure. Under this view, the finding of an extension by Gould becomes immaterial.

3. The answer of the Goulds and Blanchard set up eight separate "cross-demands and counterclaims." At the trial the plaintiff moved to strike them out, and the court granted the motion as to all but one. This ruling is assigned as error. Two of the counterclaims stricken out set up payments on account of the indebtedness sued on. Whether or not such matter was properly denominated a "counterclaim," the plea of payment was undoubtedly one that the defendants had a right to make. But the order striking out was not prejudicial to the appellants, since the answer had, in another place, affirmatively alleged payment in full. The remaining counterclaims alleged indebtedness from P. R. Moore to the defendant Will D. Gould for services rendered by the latter as an attorney at law in various matters not connected with this litigation, and for hay and other personal property delivered by said Gould to P. R. Moore. It appeared upon the face of said counterclaims that each of the causes of action therein set forth would, if made the basis of an independent action, have been barred by the statute of limitations. The grounds of the motion to strike out were that said claims were so barred, and that they had not been presented for allowance to the personal representative of P. R. Moore, deceased, in the course of the proceedings for the settlement of his estate. Either ground afforded sufficient reason for the granting of the motion, unless these counterclaims are to be treated as partial payments of the mortgage debt, compensating it pro tanto, under the provisions of section 440 of the Code of Civil Procedure. That section provides that, "when cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

Is this a case of cross-demands which may be mutually compensated, under this section? We think not. The plaintiff was suing on an indebtedness secured by mortgage, an indebtedness which could be recovered only by means of the action of foreclosure prescribed by section 726 of the Code of Civil Procedure. In such action the mortgaged premises must first be applied to the satisfaction of the debt, and there is no personal liability on the part of the mortgagor unless the security shall prove insufficient to satisfy the debt. The land is made primarily liable for the payment of the obligation, and the mortgagor can be called on to pay only where the proceeds of a sale of the land are insufficient. Bartlett v. Cottle, 63 Cal. 366; Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Crisman v. Lanterman, 87 Pac. 89, 149 Cal. 647. For this reason it has been held that in an action upon a simple contract debt (a bank deposit) the defendant cannot set off against such debt a liability of the plaintiff secured by mortgage. McKean v. German-American Sav. Bank, 118 Cal. 334, 50 Pac. 656. The two claims, said the court, could not be deemed compensated under section 440, because "the action of respondent for the deposit, and the right of action of appellant to foreclose its mortgage, are not cross-demands as contemplated by that section." In that case the action was brought by the holder of the unsecured indebtedness, and the defendant sought to set up a debt secured by mortgage. Here the plaintiff sues on the mortgage, while the defendant relies on a simple debt as a cross-demand. But this difference does not make the principle of the McKean Case any less applicable here. If the demands, at their inception, were of such a nature that they were compensated, such compensation affected both parties alike. The rights of the parties under section 440 are necessarily mutual. One claim could not be compensated, without the other being compensated to the same extent. If the existence of the mortgage debt in favor of plaintiff was not available to reduce the amount of Gould's claims, his claims had no greater effect in discharging the mortgage debt.

The alleged cross-demands not being such as could be pleaded as an extinguishment of plaintiff's claim under section 440, they can be supported, if at all, only as counterclaims under subdivision 2 of section 438. As such they failed to state a ground of counterclaim, because (1) they were barred by the statute of limitations (Lyon v. Petty, 65 Cal. 325, 4 Pac. 103); and (2) they had not been presented to the executor or administrator of P. R. Moore's estate (Code Civ. Proc. § 1500). While it might have been better practice to demur to these pleadings, there was, therefore, no prejudicial error in the order striking them out, or in the refusal of the court to receive evidence in their support.

The foregoing discussion deals with all the points presented and argued by appellants in their brief.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; HENSHAW, J.; McFARLAND, J.; ANGELLOTTI, J.

I dissent from the judgment, and from that part of the opinion of the court which holds that cross-demand of a mortgagor against the mortgagee are not within the protection of section 440, Code of Civil Procedure: BEATTY, C. J.

I concur: LORIGAN, J.

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## KINSEL v. BALLOU. (L. A. 1,962.)

(Supreme Court of California. Aug. 20, 1907.)

1. Pleading — Failure to Deny Allegations—Effect.

Defendant may not attack the finding of the giving of a notice; the complaint having alleged the giving of such notice, and the answer not having denied it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1228.]

2. Evidence—Parol Evidence—Varying Indorsement of Note.

In the absence of fraud or mistake, it cannot be shown by oral evidence that an indorsement in terms "with recourse" was intended by the parties as one "without recourse."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1799.]

3. Bills and Notes—Construction—Terms of Payment.

A note for $900 provided for payment of that sum six months after date, with interest at 1½ per cent. per month, payable monthly, and that, should interest not be paid when due, it should become part of the principal, and bear interest, or at the option of the holder of the note the whole principal and interest should become immediately due and payable, and concluded: "Principal and interest payable in gold * * * in sums of $25 or more monthly, together with interest monthly." *Held*, that the provision as to payment of $25 or more monthly was merely an option to the makers to make partial payments of principal in advance of maturity of the note, and did not limit their obligation to pay interest monthly, or destroy the holder's right to declare the entire sum due in case of default in interest.

4. Same — Indorsement — Demand for Payment.

Under the provision in a note that, in case of default in payment of an installment of interest when due, the whole sum of principal and interest shall become immediately due and payable at the option of the holder of the note, the holder has a reasonable time as against the indorser of the note, as well as its maker, to exercise the option, at least for the purpose of making the indorser liable for the principal and interest accruing after exercise of the option.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1327.]

5. Same — Actions — Presentment for Payment—Pleading.

The complaint against the indorser of a note, alleging presentment of it for payment at the place where the maker had her place of business and residence at the time of her death, and that payment on behalf of her was refused, is not demurrable on the ground of uncertainty, because not showing to whom the demand was delivered; this being a matter of evidence.

6. Same.

Where the complaint in an action on a note alleges the place where demand of payment on behalf of the deceased maker was made, but not the person to whom demand was delivered, defendant, on proof of the person being made, being without evidence to meet it and desiring time therefor, should ask for a continuance.

7. Same—Action Against Indorsers—Prior Resort to Mortgage.

Though the makers of a note give a mortgage to secure it, an indorser may be sued on the note without prior resort to the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 605.]

8. Same—Action Against Guarantor—Prior Resort to Mortgage.

A guarantor of payment of a note may be sued thereon, without prior resort to the mortgage security given by the makers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 605.]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by E. F. Kinsel against L. M. Ballou. Judgment for plaintiff. Defendant appeals. Affirmed.

Tanner, Taft & O'Dell, for appellant. H. R. Hervey and W. W. Butler, for respondent.

SLOSS, J. Appeal from a judgment in favor of plaintiff in an action brought against the defendant as indorser of a promissory note. The appeal was taken within 60 days, and the evidence is brought up in a bill of exceptions.

The note, which is set out in full in the complaint, reads as follows: "$900.00. Los Angeles, California, Feby. 18th, 1904. On or before August 18th, 1905, after date and for value received, we jointly and severally promise to pay to C. W. Hatch and E. E. Hatch, or order, at Los Angeles, California, the sum of nine hundred dollars, with interest from date until paid at the rate of 1½ per cent. per month, payable monthly. Should the interest not be so paid, it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States in sums of twenty-five dollars or more monthly, together with interest monthly. E. M. Jennings. Mary S. Jennings." Indorsed: "Without recourse on us. C. W. Hatch. E. E. Hatch." "Pay to the order of E. F. Kinsel, with recourse to me. L. M. Ballou."

1. One of the defenses was that the defendant had indorsed the note without recourse to him, by simply signing his name below that of the prior indorsement without recourse, and that the words, "Pay to the order of E. F. Kinsel, with recourse to me," had, after the delivery of the note, been written above his signature without his knowledge or consent. The court found against this allegation, and there was ample evidence to sustain the finding.

2. The defendant attacks the finding that notice of default had been given him; but the complaint alleges the giving of such notice, and the answer fails to deny it.

3. The answer alleges that at the time the defendant transferred the note to plaintiff it was understood and agreed that the plaintiff should have no recourse to the defendant, should such note not be paid when due, and that plaintiff should rely solely upon the security of a chattel mortgage by which the note was secured. The evidence fully supports the findings of the court against such agreement, if it could be conceded that the defendant was entitled to introduce evidence of an oral understanding directly controverting the terms of his written agreement. It is true that, as between himself and his immediate indorsee, the indorser may sometimes show that the indorsement was made merely for the purpose of transferring the instrument. Allin v. Williams, 97 Cal. 403, 32 Pac. 441; Kendall v. Parker, 103 Cal. 319, 37 Pac. 401, 42 Am. St. Rep. 117. These were cases dealing with a simple indorsement, which was not inconsistent with the verbal agreement proven. But we are cited to no case holding that, in the absence of fraud or mistake, oral evidence may be introduced to show that an indorsement "with recourse" was intended by the parties to be "without recourse."

4. The complaint alleges that interest was paid to August 18, 1904; that on the 3d of October, 1904, default having been made in the payment of the interest installment due on September 18th, plaintiff elected to declare the whole sum of principal and unpaid interest immediately due and payable, and on said 3d day of October, 1904, notified the makers of such election and presented the note for payment; and that plaintiff on the same day notified the defendant of his election and of the nonpayment of the note. The last sentence of the note reads: "Principal and interest payable in gold coin of the United States *in sums of twenty-five dollars or more monthly, together with interest monthly.*" The italicized words are in writing; the rest of the note, with the exception of the names and figures, being printed. It is urged that the provision quoted is in conflict with the provision allowing the principal sum to become due for default in payment of a monthly installment of interest, and that the note read as a whole should be construed to provide merely for monthly payments of $25 for principal and interest together, at least until the 18th day of August, 1905. But we see no conflict between the different clauses. The provision for the payment of $25, or more, was merely an option given to the makers whereby they were permitted, in advance of the maturity of the note, to make partial payments on account of the principal. It did not limit their obligation to pay the interest monthly, nor did it destroy or modify the holder's right to declare the entire sum due when there should be a default in the payment of interest.

5. It is argued that, since the unpaid installment of interest fell due on September 18th, demand should have been made on that day, and immediate notice given to defendant as indorser, in order to hold him. The demand was made, and the notice given, on October 3d, and the contention is that the delay of 15 days discharged the defendant. Rauer v. Broder, 107 Cal. 282, 40 Pac. 430; Civ. Code, § 3131, subd. 5. But this action was not brought to recover the interest due on September 18th alone. Its purpose was to enforce the liability arising under the provision of the note that, in the event of default being made in the payment of any installment of interest when due, "then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note." This liability did not arise until the latter exercised the option so given to him, and, as the complaint alleges and the court finds, he exercised it on the 3d day of October. On the same day he made his demand on the

makers and gave notice to the indorser. Under a clause of this kind, the holder is allowed a reasonable time in which to determine whether or not he will exercise his option and declare the principal of the note at once due and payable. Hewitt v. Dean, 91 Cal. 617, 28 Pac. 93, 25 Am. St. Rep. 227; Fletcher v. Dennison, 101 Cal. 292, 35 Pac. 868. Crossmore v. Page, 73 Cal. 213, 14 Pac. 787, 2 Am. St. Rep. 789, cited by appellant, declares nothing to the contrary. The court there said that "the holder was entitled to a reasonable time to exercise his option." In that case the holder had permitted 7 months to elapse, and the court held that this was more than a reasonable time. In Fletcher v. Dennison, supra, a delay of 59 days was held not to be unreasonable, as matter of law. Where the delay was 15 days, it certainly cannot be said that the trial court was not justified in finding, as it impliedly found here, that the holder had acted with reasonable promptness, especially in view of the evidence that prior installments of interest had been paid on the 1st day of the month succeeding the one in which they fell due.

It is argued that the rule allowing a reasonable time for the exercise of the option has no application to the indorser of a note; that as to him the option must be declared and the demand made on the very day the interest installment falls due. But we see no reason for this distinction. The indorser of a negotiable instrument warrants, inter alia, that if the instrument is dishonored he will, "upon notice thereof duly given to him, pay the same with interest." Civ. Code, § 3116. A negotiable instrument is dishonored when it is not paid on presentment for that purpose. Id. § 3141. The instrument must be presented on the day of its maturity. Id. § 3131, subd. 5. Notice of dishonor, when given otherwise than by mail, must be given on the day of dishonor, or on the next business day thereafter. Id. § 3147. If given by mail, it must be deposited in the post office in time for the first mail which closes after noon on the first business day succeeding the dishonor. Id. § 3148. In the present case, the principal sum was not due until the holder had exercised his option to declare it due. This he did on the 3d day of October, and on the same day he made presentment and gave notice of dishonor to the defendant. He thereby complied with every step required to fix the liability of the indorser. If it be said that an installment of interest was due on September 18th, and that as to this the holder could not delay presentment until October 3d, and still hold the indorser, it may be answered that the judgment did not include any interest accruing up to September 18th. The amount recovered was the principal of the note, with interest from September 18th. The interest accruing between said date and the 3d day of October, became due, like the principal, at the option of the holder, for failure to pay the preceding installment.

6. Mary S. Jennings, one of the makers, had died prior to maturity of the note, and there had been no administration of her estate. We need not here decide whether, as to her, presentment was excused by these facts. The court found that the plaintiff presented the note for payment to the person in charge of the hotel in which Mary S. Jennings resided at the time of her death. The appellant attacks this finding. The only specification of insufficiency is that "no proof was introduced as to who was in charge of the Hotel Wheeler"—a specification that is not sustained by the record, since the plaintiff testified that he had presented the note to Mrs. Pool, "who was in charge of the Hotel Wheeler." The complaint alleges that the plaintiff had presented the note for payment at the place where Mary S. Jennings had her place of business and her residence at the time of her death, and that payment on behalf of the said Mary S. Jennings was refused. The defendant demurred on the ground of uncertainty, in that it did not appear to whom the demand on Mary S. Jennings was delivered. We think the overruling of the demurrer was proper. The name of the person to whom presentment was made was a mere matter of evidence. But, even if there may have been some want of certainty in the allegation, it was not of a character to injure the appellant. If, when the proof was made, he was without evidence to meet it, and desired time to procure such evidence, he should have asked for a continuance for that purpose.

7. As a separate defense the answer alleges that the makers of the note, at the time of its execution, executed and delivered to the original payees, as security for the note, a chattel mortgage of certain property, and that this mortgage was assigned and transferred to the plaintiff with the note. It is further alleged that no proceedings to foreclose this mortgage have been taken by the plaintiff. It is argued by the appellant that by reason of the existence of this mortgage the liability of the makers was not absolute, but was contingent upon a failure of the mortgaged property to realize, on foreclosure, an amount sufficient to pay the note, and that the indorsement of defendant imposed upon him no greater liability than that of the original mortgagors. On those grounds it is claimed that, so long as no sale of the mortgaged property had taken place, the defendant's obligation to pay had not become fixed. It is no doubt true that, so far as the mortgagors themselves were concerned, an action to recover the amount of the note could not have been maintained apart from a foreclosure of the mortgage. As to them the mortgaged property constituted a primary fund for the discharge of the debt, and no personal judgment could have been en-

tered against them, unless after foreclosure a deficiency had appeared. Code Civ. Proc. § 726; Bartlett v. Cottle, 63 Cal. 366; Porter v. Muller, 65 Cal. 512, 4 Pac. 531; Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Barbieri v. Ramelli, 84 Cal. 154, 23 Pac. 1086. But the defendant was not the mortgagor. His contract of indorsement was collateral to the original obligation of the mortgagors, and was not secured by the mortgage. In Vandewater v. McRae, 27 Cal. 596, the court said: "The mortgage given in this case was executed by the makers of the note, and the only personal liability secured by it, or intended to be secured by it, was that of the makers of the note as such. * * * The promise of the maker of a note is one thing, and the promise of an indorser is another. One is primary, and the other is secondary. One is absolute; the other turns upon conditions. Each may be secured by a separate mortgage, or one mortgage may be so framed as to secure them both. * * * On the ground, then, that the right which this action is brought to enforce is unsecured by mortgage, we consider that the plaintiff is at liberty to pursue the defendants in personam on their contract of indorsement." Carver v. Steele, 116 Cal. 116, 47 Pac. 1007, 58 Am. St. Rep. 156, was, like the present case, an action by the holder of a promissory note against indorsers. The defendants relied upon the plea that the note was secured by mortgage and that the holder had failed to enforce and foreclose his mortgage. The court, holding that this was no defense, used the following language: "In general, unless some agreement or special circumstance imposes diligence upon the creditor as a duty, he does not, by mere failure to pursue the person primarily liable, discharge the guarantor, surety, or indorser, even though his passivity in this regard may result in barring his remedy against the original debtor. Whiting v. Clark, 17 Cal. 407; Bull v. Coe, 77 Cal. 54, 60, 18 Pac. 808, 11 Am. St. Rep. 235. Accordingly the rule is that the creditor loses no rights against the indorser, whose liability has become fixed, by mere failure to enforce his lien against the property mortgaged for security for the debt. First Nat. Bank v. Wood, 71 N. Y. 405, 27 Am. Rep. 66; Hoover v. McCormick, 84 Wis. 215, 54 N. W. 505; Fuller v. Tomlinson, 58 Iowa, 111, 12 N. W. 127; Colebrooke on Collateral Securities, § 241, and cases cited." The court goes on to say that, even though the failure to foreclose the mortgage may have barred a personal action against the mortgagor, this consideration "does not reach respondents' case. Their contract to pay Montgomery was not the same as that of Staples (the mortgagor). 'The promise of a maker of a note is one thing and the promise of an indorser is another;' and their promise was not secured by the mortgage held by Montgomery. Vandewater v. McRae, 27 Cal. 596, 603." These cases are directly in point, and establish the proposition that in this state the indorser of a note secured by mortgage may be sued upon his obligation without a foreclosure of the mortgage.

In what has been said in this opinion we have treated the contract of defendant as one of indorsement, and this is the aspect in which both parties have treated the case in their briefs. If, however, the defendants could be held to occupy the position of a guarantor (the view taken by the District Court of Appeal, when the case was pending in that court) it would make no difference in the result. "There is no privity, or mutuality, or joint liability, between the principal debtor and his guarantor." The defendant as guarantor, if he was such, made an independent contract, upon which he was liable without regard to foreclosure of the mortgage as against the principal debtors. Adams v. Wallace, 119 Cal. 67, 51 Pac. 14.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

151 Cal. 451

## LAMB v. WEBB, Atty. Gen., et al. (L. A. 1,864.)

(Supreme Court of California. July 29, 1907.)

In Bank. On rehearing. Denied.

For majority opinion, see 91 Pac. 102.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause, for the reason that the questions which the department has deemed it unnecessary to decide are the only questions presented by the record, while the ground upon which the decision is rested —the assumed exercise by the Attorney General of his discretion in deciding a question of fact—is shown by the record to have no existence. All the allegations of the petition for the writ of mandate are admitted to be true. They show, among other things, that there are certain standing rules of the Attorney General's office governing applications for leave to sue in the name of the people, and that this petitioner, in presenting his application for leave to sue, complied in every particular with the rules. One of their requirements is that the relator must produce with his application the sworn complaint which he proposes to file, and they require nothing more for the purpose of satisfying the Attorney General that there is a meritorious cause of action. In this instance a sworn complaint was presented with the application for leave to sue. If the Attorney General was not satisfied of the good faith of the petitioner, or of the truth of the matters alleged on his information and belief—matters which in cases of this kind can rarely be within the personal knowledge of the relator—it would seem that he should have given him an opportunity of supporting his petition by corroborative affidavits, and no doubt he would have done so if he had deemed it material. But he did not consider this matter at all. He did nothing in the exercise of that discretion which the court assumes that he exercised in denying the application, and this is affirmatively shown by the record. The petition sets forth a copy of the written opinion of the Attorney General, giving his reasons, and his only reasons, for denying the application. In that opinion he assumes the truth of every fact alleged in petitioner's complaint and refuses leave to sue upon the ground, first, that the complaint does not state a cause of action, and, second, if there ever was a cause of action the petitioner ought not to be allowed to maintain it after having been a candidate at the special election. Whether these were good reasons for refusing leave to sue, and whether in any case the Attorney General may be compelled by mandamus to grant leave to sue in the name of the state, were the questions really involved in the appeal; but they are not decided, because it is assumed that the Attorney General was not satisfied of the existence of facts which he has made the basis of his written decision, and its sole basis.

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151 Cal. 778

## CORY v. SANTA YNEZ LAND & IMP. CO. et al. (L. A. 1,898.)

(Supreme Court of California. Aug. 23, 1907.)

1. Mortgages—Mortgagee in Possession.

Where a mortgagor places the mortgagee in possession of mortgaged premises as additional security, the mortgagee thereby acquires the right to retain possession as long as the secured debt is unpaid, though foreclosure be barred by limitations.

2. Same—Evidence.

Evidence in trespass *held* to show that defendant, the mortgagee of the premises, was in possession by the tacit, if not express, agreement of the mortgagor, for the purpose of additional security.

3. Same—Forfeiting Right—Initiating Adverse Claim.

A mortgagee in possession may, without forfeiting his right of possession, initiate an adverse claim, which will ripen into a prescriptive title, in default of redemption.

4. Same—Right of Mortgagor to Maintain Trespass—Regaining Possession.

The right to maintain trespass against the mortgagee in rightful possession was not gained by the mortgagor entering the inclosure of the mortgagee, which included other lands in addition to those mortgaged, pitching a tent on the mortgaged land, and marking the corners of it, and commencing to set fence posts, he then being notified by the mortgagee that he was trespassing, and warned to desist, and, disregarding this, being forcibly removed with his belongings 20 days after his entry.

5. Same—Evidence of Mortgagee's Possession.

The inclosure by a mortgagee of the mortgaged land, with other lands belonging to the mortgagee, does not cease to be evidence of possession of the mortgaged land by the mortgagee on his selling and giving possession to the vendee of a small part of the other land within the inclosure.

In Bank. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Nathan T. Cory against the Santa Ynez Land & Improvement Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendant company appeals. Reversed.

C. P. Robinson and W. S. Day, for appellant. Wm. G. Griffith, for respondent.

BEATTY, C. J. This is an action of trespass, in which the plaintiff recovered a judgment for $368.50 and costs. The corporation defendant appealed to the District Court of Appeal from the judgment, and from an order denying a new trial. The justices of that court having been unable to agree as to the proper disposition of the appeal, the cause was transferred to this court for hearing and decision.

It appears from the pleadings and the uncontradicted evidence in the record that, prior to the 28th of January, 1888, the appellant had subdivided a large tract of land in Santa Barbara county, and that on that date it conveyed to J S. Shoemaker, then a resident of Reno, Nev., a subdivision known as lot No. 13, containing 40 acres. The agreed price of the lot was $3,000, of which $1,000 were paid at the date of the conveyance. For the balance Shoemaker executed two promissory notes for $1,000 each, payable respectively January 20, 1900, and January 20, 1901, and secured by mortgage of the land. Shoemaker leased the land to tenants who occupied it until the year 1892. In the meantime, he had paid no part of the principal or interest of the two purchase-money notes, and in May, 1893, they had been placed in the hands of defendant Robinson for foreclosure. He, as agent and attorney for the appellant, agreed with Shoemaker at that time to cancel the first note and to remit the accrued interest on both notes amounting to $480, upon the agreement of the latter to pay the second note in the course of eight or ten months. This agreement was ratified by the corporation and the first note canceled. Robinson testifies that it was at the same time agreed by Shoemaker that appellant should have and maintain possession of the mortgaged premises until the remaining note was paid. Shoemaker denies that he made any such agreement, but the undisputed fact is that the corporation, through its agents, took possession of the lot about that time, and for fully 10 years kept the undisputed possession through tenants rendering rent to it. It is also an undisputed fact that the appellant permitted the second note to become barred by the statute of limitations on January 20, 1895, without any attempt to foreclose, and that afterwards, on February 27, 1895, Shoemaker gave a new mortgage to secure a new note for $1,050, the amount of the second note and accrued interest. At the date of this new note and mortgage, the appellant was in the peaceable and undisputed possession of the land. No part of the principal of this renewal note was ever paid, and only part of the interest. In August, 1899, the right to foreclose was barred. But the corporation had been in possession all the time by its tenants and in receipt of the rents, and as its mortgage interest exceeded the assessed value of the land it paid all the taxes. Matters remained in this posture until 1901, when the appellant directed the assessor to omit any further mention of the mortgage, and to assess the land to it as a part of the larger tract of which it was a subdivision. In 1902 Shoemaker had the land assessed in his name, but down to the trial of this action in 1905 the appellant had paid all the taxes. In view of these facts it is difficult to believe that Shoemaker did not expressly agree, as testified by Robinson, that appellant should take and hold possession of the land, and it cannot be doubted that there was at least a tacit agreement to that effect. If not, why did Shoemaker, for a period of 10 years, acquiesce in such possession, actual, open and unequivocal? Men in their senses do not allow their land to be unlawfully occupied by other persons for so long a period without some sort of protest, and it must be concluded on the evidence that in October, 1903, the appellant was a mortgagee in lawful possession of the mortgaged premises, unless, as seems to be contended, its direction to the assessor in 1901, to omit any mention of the mortgage in assessing the land to it, deprives it of that status. When the respondent, as agent of Shoemaker, went upon the land for the purpose of taking and holding possession, October 20, 1903, the larger tract, 435 acres, of which lot 13 was a part, was completely inclosed by a fence sufficient to turn stock, and had been cultivated that season by tenants of the appellant. The crops, however, had been harvested, and it was being used only for the pasturage of stock. All the land within the large inclosure, except lot 13 and a similar subdivision which had been sold to a third party, belonged to appellant. Respondent under these circumstances entered the large inclosure with a camping outfit and a kit of carpenter's tools. He pitched his tent on lot 13, and proceeded to cut from trees growing on the premises posts for a fence. He had marked the corners of the lot, and was engaged in setting the fence posts, when, about a week after his entry, he was notified by agents of the appellant that he was trespassing and warned to desist. He disregarded this and other warnings, and on the 10th of November was, by order of the appellant, forcibly removed from the land with all his belongings. These are the salient facts of the case, and its minor circumstances do not alter their complexion. The motion of appellant for a new trial was based upon the grounds that the verdict was not sustained by the evidence and that the court had erred in its instructions to the jury. As to the principal question of law arising upon the facts above stated there is no controversy. It seems to be conceded that if a mortgagor places his mortgagee in possession of the mortgaged premises as additional security, the mortgagee thereby acquires the right to retain possession as long as the indebtedness so secured remains unpaid—a right additional to, and independent of, his right to foreclose, and which is not extinguished or affected by the fact that an action to foreclose may be barred by the statute of limitations. Spect v. Spect, 88 Cal. 440, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Zellerbach v. Allenberg, 99 Cal. 69, 33 Pac. 786; Boyce v. Fisk, 110 Cal. 113, 42 Pac. 473.

We think it clear, as above stated, that appellant was in possession of the mortgaged premises by Shoemaker's tacit, if not by his express, agreement, and for the purpose of additional security. Indeed, we think the evidence of an express agreement to that effect is free from any substantial conflict. There are many cases in which actions speak louder than words, and here is presented a series of acts of the parties of a highly significant character, every one of which consists with the testimony of Robinson and conflicts with the testimony of Shoemaker. It was a most reasonable and moderate condition of remitting one third of the purchase price of the land and all accrued interest, and extending the time of payment of the other third, that the appellant should have the possession of the land as further security, and it was a condition which, while beneficial to the appellant, so far from imposing any hardship upon Shoemaker, entirely comported with his interest and convenience. The omission of appellant to foreclose, not once only, but twice in succession, until the statute had barred that remedy is strong evidence that its officers, including Robinson, considered that they had other sufficient security, and Shoemaker's acquiescence for a period of 10 years in the possession of the appellant is to my mind conclusive that he knew it to be a rightful possession.

But it is contended that the appellant by causing the land to be assessed to it independent of the mortgage, thereby initiating an adverse claim which would ripen into a prescriptive title at the end of five years, forfeited its right of possession as mortgagee, and restored to Shoemaker the right to recover the possession without paying his debt. If this is true it places a mortgagee in possession after the action to foreclose is barred in this position. While he can keep the land forever if he makes no other claim to it than that of mortgagee, he can never sell it because he can never make an indefeasible title, and he can never put improvements on it which will make it profitable to the mortgagor to redeem. The land is out of the market for all time, and forever condemned to lie idle and unimproved. Such a result is opposed to public policy and to the policy of express law. We think it much more reasonable to hold that the mortgagee in possession has, as he ought to have, some means of quieting his title to the mortgaged premises, and, since he can no longer foreclose, that he should be allowed to set in motion the time which will bar the right of the mortgagor to redeem, by plainly manifesting his intention to claim the land as his own, so that at the end of five years, in default of redemption, he will be invested with a prescriptive title.

If this view is correct, the appellant was in the peaceable and rightful possession ot lot 13 on the 20th of October, 1903, when respondent made his attempt to take possession. It is extremely doubtful whether the respondent ever had anything more than a mere scrambling possession of any part of the premises. He had gone inside of appellant's inclosure upon land every foot of which, except 40 acres belonging to a third party, was in the exclusive possession of the appellant, and was attempting to inclose the 40 acres composing lot 13. He had pitched a tent, marked the corners of the lot, and set some posts on one side when, on the 10th of November, he was dispossessed. By these wrongful acts he had gained at most a right to recover in an action of forcible entry. He was himself a trespasser, and by virtue of his 20 days' occupancy had gained no right except that which was secured by a statute whose principal object is to prevent breaches of the peace by punishing the aggressor. He could perhaps have recovered in forcible entry, but he cannot recover damages in trespass against the party rightfully entitled to the possession. Burnham v. Stone, 101 Cal. 164, 172, 35 Pac. 627.

It is unnecessary to consider the objection (not raised by respondent, but suggested in one of the opinions transmitted from the district court of appeal) that the errors specified in the instructions of the court cannot be considered because it is not made to appear that they were excepted to before the jury retired. I think it does sufficiently appear that exceptions were taken in time; but, assuming they were not, the instructions appear in the record and serve to explain the erroneous verdict of the jury. They imply that the complete inclosure of the larger tract of which lot 13 was a portion was not evidence of possession of that lot by appellant if there was other land (referring to the 40-acre lot belonging to a third party above mentioned) within the inclosure which appellant did not claim. This instruction probably accounts for the disregard by the jury of the overwhelming evidence of appellant's rightful possession at the date of respondent's wrongful entry. The facts of this case are widely at variance with those of Walsh v. Hill, 41 Cal. 571, upon which the instruction referred to seems to be based. The appellant having a large tract of land inclosed conveyed 40 acres within the tract and put its vendee in possession. This did not put an end to appellant's possession of the residue. It only entitled the vendee to a right of way across the residue. There should have been a new trial granted on the evidence.

The judgment and order of the superior court are reversed.

We concur: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

SHAW, J. I concur in the judgment and in all of the opinion of the Chief Justice, with two exceptions.

The opinion appears to suggest that there was no substantial conflict in the evidence in regard to the fact of there having been an agreement between Shoemaker and Robinson, as agent of the Santa Ynez Land & Improvement Company, to the effect that that company should, as mortgagee, take and retain possession of the mortgaged land until the mortgage debt was paid, and in regard to there having been any express consent thereto by Mr. Shoemaker. I think there is a substantial conflict on this subject, but Mr. Shoemaker does not dispute the fact that the company was in the exclusive, actual, and peaceful possession of the land continuously, with his knowledge, receiving to its own use the rents and profits thereof, from 1893 to 1903, nor the fact that during that period he made no objection thereto and demanded no accounting, that, in short, he acquiesced in its possession as mortgagee. This being the case, the question whether or not there was an express agreement or a formal consent is immaterial. The company must be deemed to be lawfully in possession as mortgagee by implied agreement and by tacit consent. The fact of such implied agreement arises from the circumstances stated, and neither the circumstances nor the implied agreement arising therefrom is denied. The case comes within the rule laid down in Burns v. Hiatt, 149 Cal. 623, 87 Pac. 196, and the company, having lawfully acquired possession, has the same rights as mortgagee in possession as if its possession was under the sanction of an express agreement.

In the statement in the opinion suggesting that the record sufficiently shows the taking of an exception to the instructions, I understand the Chief Justice to be stating his personal opinion, and not that of the court.

We concur: SLOSS, J; ANGELLOTTI, J.

151 Cal. 785

## FOGARTY v. SOUTHERN PAC. CO. et al.

(L. A. 1,712.)

(Supreme Court of California. Aug. 23, 1907.)

1. Master and Servant—Injury to Servant—Proximate Cause—Question for Jury.

In an action against a railway company for injuries to a car repairer while working under a car in consequence of the car being struck by another car placed on the track, *held*, that the questions whether the proximate cause of the accident was the negligence of the company in failing to inspect the latter car and discover defects in the brake thereof, or whether the accident was due to the negligence of a fellow servant, or disobedience by him of a rule of the company, or in the examination of the brakes thereof, were for the jury.

2. Negligence—Question for Jury—Proximate Cause.

Where the evidence, in an action for personal injuries, does not, as a matter of law, show what the proximate cause of the accident was, the question is for the jury.

3. Master and Servant—Injury to Servant—Rules of Employer—Violations—Evidence.

A car repairer was injured while working under a car in a yard in consequence of the car being struck by another car. The brake of the latter car was out of repair and was placed on a track by the use of a flying switch. The company had a rule which provided that flying switches should not be made except where it would cause great delay to do the work in any other manner. *Held* that, if the company relied on a violation of the rule, it should make it appear that the work could have been otherwise done without great delay under the circumstances, and five or ten minutes might constitute such a great delay under certain circumstances.

4. Same.

Where the inspection of cars and the discovery of defects therein were confided by a railway company to car inspectors, a rule of the company that flying switches should not be made without testing the brakes of the cars did not make employés engaged in switching agents for the inspection of the cars and the discovery of defects, and it was not liable to an employé for the negligence of a fellow employé violating the rule.

5. Same—Evidence—Instructions.

Where, in an action against a railway company for injuries to a car repairer while working under a car in a yard, in consequence of the car being struck by another car because of a defect in the brake thereof, the evidence did not, as a matter of law, establish negligence of the company in failing to inspect the car and discover the defect, instructions authorizing a recovery if an employé engaged in moving the car negligently omitted to discover the defect, were erroneous, for the employé was not the vice principal of the company for the inspection of the car.

6. Trial—Errors in Instructions.

An error in an instruction is not cured by the giving of a correct instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 718.]

7. Master and Servant—Inspection of Appliances—Delegation of Duty.

A railroad company must inspect its cars, including brakes thereon, and it cannot escape responsibility by any delegation of such duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 175.]

In Bank. Appeal from Superior Court, San Luis Obispo County; N. P. Unangst, Judge.

Action by Thomas Fogarty against the Southern Pacific Company and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Judgment modified, order denying a new trial reversed, and cause remanded.

The following is the opinion in department, referred to in opinion:

"ANGELLOTTI, J. This is an action for damages for personal injuries alleged to have been suffered through the negligence of the defendants. Plaintiff was given a verdict against all the defendants for the sum of $50,000, on which judgment was entered. On motion for a new trial, the trial court required plaintiff to remit $10,000 thereof, as a condition precedent to the denial of the motion. This plaintiff did, and the motion was denied, and the judgment modified accordingly. Defendants appeal from the judgment, the modified judgment, and from the orders denying the motion for a new trial.

"The defendant Southern Pacific Company, which will hereafter be designated herein as the defendant, is a railroad corporation, owning and operating a railroad in this and other states. Plaintiff was a car repairer in its employ. At the time of the accident he was, as such car repairer, working under a car that was standing on what is known as the 'cripple track' in defendant's yard at San Luis Obispo, about a quarter of a mile thereon from its junction with the main track. This track was so designated because it was the place where cars were kept while waiting or undergoing repairs. It becoming necessary to run another car in the yard a portion of the way down the cripple track from the main line, where it was to be unloaded, a switching crew, including defendants Nelson and Waters, took the car, attached to an engine, up the main line, and then switched it on to the cripple track by means of what is called a 'flying switch.' The car passed to the cripple track, going at the rate of six to eight miles an hour. The cripple track from the main line was sufficiently down grade to require efficient brakes to stop the car before it reached the place where plaintiff was working. Defendant Waters was on the moving car, charged with the management thereof, and at a point about a thousand feet from the car under which plaintiff was working first commenced to apply the brake. He at once discovered that the brake had no effect on the car, and, climbing down, endeavored in other ways to obstruct its movement, but without effect. The car continued to move until it collided with the car under which plaintiff was working, causing that car to run over plaintiff's legs, injuring them to a degree requiring amputation. Examination subsequently made of the car so switched to the cripple track showed that the reason why the brake did not hold the car was that it had not been adjusted for some time and had become too slack in parts; the result being that as to some of the wheels the brake shoes would not reach and hold. To remedy this defect, all that was essential was to take up the surplus slack, which could be done by shifting a key bolt in a lever from one hole to another. This was a comparatively simple thing to do, requiring the use only of a hammer and chisel, and occupied only 15 minutes in this case. This was apparently the only defect in the brake. Plaintiff's claim is that the injury was caused by this defective brake, and that defendant was negligent in not having discovered and remedied the defect. There was a rule of defendant for the government of its employés which provided that running or flying switches must not be made except where it would cause great delay to do the work in any other manner, and that 'whenever they are made the train must first be stopped and before the engine is again started the switch and also the brakes on the car to be set out must be tested and great care used.' This rule, so far as it required the testing of the brakes, was entirely ignored by Waters and the remainder of the switching crew on the occasion in question. It is undisputed that no test of the brake was made by the crew before throwing the car on to the cripple track, and that the brake was in no way examined or touched until Waters attempted to use it as heretofore described. The evidence was such that we cannot say that it was not sufficient to sustain in conclusion that if the rule had been observed the defect would have been apparent and the accident avoided.

"We may assume, for the purposes of this decision, that the evidence was such that it must be held that it was the personal duty of the employer to use reasonable care to ascertain and remedy such a defect as here existed, and also, that there was evidence which would have sufficiently supported a finding that it failed to use such care, and that this failure was the proximate cause of the accident. But, assuming all this, the question as to whether defendant had so failed to exercise such care in the matter of the inspection of the brake as to make it guilty of negligence was for the jury to determine, under proper instructions, from the circumstances of the case as shown by the evidence. It could not be liable unless it had failed to exercise such reasonable care. It appears very clear to us that, in the determination of this particular question, the violation by Waters of the rule requiring the brakes to be tested before making a flying switch was an immaterial matter. If at a time when an inspection was required of the railroad company in the exercise of reasonable care, by reason of a negligent failure to inspect the brakes at all, or a negligent inspection, the defect remained undiscovered and caused injury, the defendant would be liable for injuries proximately caused thereby, notwithstanding a violation of this rule by Waters, even though had the rule been observed the defect would have been discovered. On the other hand, the rule in no degree added to the liability of the defendant, so as to make it liable to an employé for the negligence of a fellow employé violating its provisions. It did not operate to make those engaged merely in switching its agents for the inspection and discovery of defects in the cars, for whose negligence it would be responsible to other employés. That duty had been confided to regular car inspectors, who represented their principal in that matter, and for whose negligence the defendant would be liable. The rule was simply one relative to the manner in which the switching crew should perform the work of switching, prohibiting the making of a flying switch by them without testing the brakes. The distinction between train hands required by rule of the employer to make some examination of the appliances on the cars operated by them for the ascertainment of defects preventing the proper operation thereof while in their charge, and those specially charged by the employer with the regular duty of full inspection for the discovery and remedying of defects, is noted in several cases cited by plaintiff, especially in the case of Eaton v. N. Y. C., etc., R. R. Co., 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600. In that case a recovery was allowed to a brakeman for injuries resulting from a defective brake on a car operated by him, notwithstanding a rule requiring brakemen at all stoppings of the train 'to inspect the wheels, brakes, and trucks of the car and report any defects immediately to the conductor,' where a reasonably careful inspection of the brake by the employé would have disclosed the weakness of the parts of the brake. It was said therein that while the effect of this rule was to impose on the trainmen the obligation of the examination of the appliances which their service compelled them to use, both for their own protection and the protection of the property of their master and the persons of their fellow servants, the examination contemplated was not that of an expert inspector, but only such as the ordinary knowledge of brakemen and the time allowed for the purpose consistent with their other duties would enable them to make. It was held that the train hands upon whom such a duty was devolved by rule were not follow servants of the regular inspectors of the railroad company. We can see no foundation for any contention that it was intended by this rule to make the train operatives engaged in the many and pressing duties of operation the agents of the company for that thorough inspection of the appliances that is required by law of the employer. The rule was merely one as to the manner of operation, and a negligent failure on the part of one of the switching crew to comply therewith could be, as respects other employés, only the negligence of the employé and not that of the defendant.

"As we read various instructions of the trial court, however, the question as to whether defendant had been negligent in the matter of the inspection of the brakes was made to turn upon the violation of this rule by Waters. The jury was told, in instruction No. 15, that if it was the duty of Waters to test the brake before making a flying switch, and he negligently omitted to so do, the negligence of Waters was the negligence of the railroad company. In instruction No. 17, it was substantially said to the jury that if the brake was defective or insufficient by reason of slack, and Waters negligently omitted to inspect said brake, and by reason of such negligence on his part the car was allowed to run on to the cripple track and collide with the car under which plaintiff was working, inflicting the injury upon him, the verdict must be for the plaintiff and against the defendant, if plaintiff himself was free from fault. Instruction 18 was as follows: 'If you believe from the evidence that Waters negligently omitted to test the brakes of the loaded car in his charge on the 16th day of December, 1901, and if you believe that it became or was his duty to test said brakes before or at the time he made a flying switch, if he made such flying switch, then, I charge, that his negligence is the negligence of the defendant corporation, and if by reason of his negligence the car in his charge collided with the car under which Fogarty was working, then your verdict must be in favor of the plaintiff and against the defendant corporation for an amount not exceeding the amount prayed for in plaintiff's complaint, if you further believe from the evidence that the plaintiff himself was free from fault.' The effect of these instructions plainly was to render Waters, solely by reason of this rule, the vice principal or personal agent of the defendant for the inspection of the car, and to make the violation of the rule by him negligence on the part of the defendant. By them the jury was clearly instructed that if Waters had violated the rule, which concededly he had done, his violation thereof was negligence on the part of defendant, and if the injuries to plaintiff were caused by this violation of the rule, the verdict must be for plaintiff. We can conceive of no sound theory upon which these instructions can be upheld. Waters was not the personal representative of the defendant in this matter, and his failure to observe the rule enacted by the defendant for its own protection and the protection of Waters himself and his fellow employés was not negligence on the part of the railroad company. As we have intimated, there may have been sufficient evidence to warrant the jury in finding that the defendant had been negligent in the matter of inspecting this car, and that the accident was caused thereby; but such negligence is not shown as a matter of law, and we cannot say, in the face of these instructions, that the jury so found. They may have concluded simply that the failure of Waters to observe the rule caused the accident, and that the only negligence on the part of defendant was this violation of the rule by Waters, for so concluding their verdict would have been warranted by the instructions. It does not assist that the trial court in two other instructions charged the jury in direct conflict with the instructions above referred to, and in terms too favorable to defendant. The conflicting statements of the court in this regard were each equally positive and plain, and no one can tell which the jury followed. It follows that a reversal must be had on account of these instructions.

"One or two other matters should be discussed for the purposes of a new trial. Much of the argument of counsel has been devoted to the contention of defendant that the condition of slack in the brake was a mere matter of detail in the operation of the car, not involving any breach of original duty on the part of the employer, and the remedying of which was a part of the proper operation of the car by train hands or switching crew. By this contention, it is sought to bring the case within the doctrine of Helling v. Schindler, 145 Cal. 303, 78 Pac. 710, where the rule that the employer is not liable for defects arising in the daily use of an appliance which are not of a permanent character and do not require the help of skillful mechanics to repair, but which may easily be and usually are repaired by the workmen, and to repair which proper and suitable materials are supplied, was applied in the case of an injury to an operative on a planing machine, the knife of which had become dull and the belt slack by use therein by him and others using the machine with him. See, also, Towne v. Electric Co., 146 Cal. 766, 81 Pac. 124, 70 L. R. A. 214; Leishman v. Union Iron Works, 83 Pac. 30, 148 Cal. 274, 3 L. R. A. (N. S.) 500. It was there said that this rule is, 'at least so far as those engaged in the common use of an appliance are concerned' sustained by the great weight of authority. This rule is a qualification of the general rule relative to the duty of the employer to furnish an appliance that is reasonably safe, and to use reasonable care to keep the same in proper repair, and, as stated in Helling v. Schindler, supra, it 'relates only to such slight defects attendant upon the operation of machinery as from their nature require remedying at the hands of the operators themselves and as a part of the proper operation of the machine.' It was manifestly applicable to such defects as were considered in that case, under the circumstances there appearing. We are unable, however, to see the application of this rule to the case at bar. The management of cars by train hands is a very different matter from the operation of a single piece of machinery that is continually under the direct management of a single employé or a single group of employés, to whom the slight defects attendant upon the daily use of the appliance, such as the dullness of knives, become at once apparent. In the case of a railroad of any considerable extent, any particular car is only very temporarily in the charge of any particular group of train hand employés, and their work in regard thereto has ordinarily to do only with its operation as a completed appliance, and consists simply in moving it as the needs of the railroad company may require. The most that can be said of the evidence relative to the duty of train hands or switching crew as regards the work of remedying such a defect as here existed was that, where the same became apparent in the course of the operation of the car, they should take up the slack. This was simply emergency work. There was nothing to indicate that it was the general duty of such operatives to keep the brakes in proper condition in this regard, and clearly such a requirement would generally be impracticable, considering the other duties and obligations of such employés. It appears to be thoroughly settled by the authorities that it is the primary and nonassignable duty of the employer to use reasonable care to discover and remedy any defect in the car as a completed appliance, and that it is responsible to any employé injured by reason of its failure to so do, except, of course, to an employé whose duty it is to discover the defect, and whose negligent failure to do so contributes to his own injury. The duty of reasonable inspection by the employer for the discovery of any defect that would render the operation of the car dangerous is rigidly insisted on, and we can see no reason why this requirement does not include any defect in the adjustment of the brakes which renders them wholly ineffectual, however arising, just as fully as any other defect. The employer cannot escape responsibility in this matter by any delegation of the duty. See Bailey v. Rome, etc., Co., 139 N. Y. 302, 34 N. E. 918; Eaton v. N. Y., etc., Co., 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600; Chicago, etc., Co. v. Kneirim, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; Cincinnati, etc., Co. v. McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; Sheedy v. Chicago, etc., Co., 55 Minn. 357, 57 N. W. 60; Bender v. St. Louis, etc., Co., 137 Mo. 240, 37 S. W. 132; Union Stock Yards Co. v. Goodwin, 57 Neb. 138, 77 N. W. 357; Galveston, etc., Co. v. Templeton, 87 Tex. 42, 26 S. W. 1066; Richmond, etc., Co. v. Burnett, 88 Va. 538, 14 S. E. 372; Texas, etc., Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. The question as to defendant's negligence, as we look at it, in view of the evidence contained in the record, was simply this: Did defendant fail to use reasonable care, that is, such care as was under all the circumstances reasonably consistent with a due regard for the safety of its employés, in inspecting this car for the discovery and remedying of such defects as would render the car an unsafe appliance? If it did not do this, and its failure to do so contributed directly to plaintiff's injuries, and plaintiff himself was not guilty of contributory negligence, it is liable for such damages as will properly compensate plaintiff for such injuries. In determining the question of fact as to whether reasonable care was used in the matter of inspection, it is, of course, proper to take into consideration with the other circumstances the fact that the car was not then being used for transportation purposes, but was being temporarily kept for unloading in the San Luis Obispo yard of defendant, and also that there was a rule prohibiting the employés from making a flying switch with it without first testing its brakes. There was some evidence tending to show that the difficulty with this brake was of a character that such cursory test by a switchman as may properly be held to be contemplated by this rule would not disclose it. All these are circumstances which may justly be considered in arriving at a conclusion as to whether reasonable care was exercised by defendant in the matter of keeping the car in proper condition; their effect being solely for the jury. If the accident was in no degree caused by the negligence of defendant, but was wholly due to the neglect of employés in a mere matter of detail in the operation of the car, defendant cannot be held liable.

"It cannot be said that the evidence showed plaintiff guilty of contributory negligence as a matter of law. Defendant does not point out specifically wherein the instruction of the court upon this subject was erroneous. If plaintiff was negligent in the matter of not indicating his presence under the car by flags, and his negligence directly contributed to his injuries, there can, of course, be no recovery.

"Other points made by defendant will probably not arise on a new trial, and need not here be considered.

"The judgment, the modified judgment, and the orders denying a new trial are reversed, and the cause remanded.

"We concur: SHAW, J.; SLOSS, J."

Wm. F. Herrin, P. F. Dunne, and W. S. Spencer, for appellants. Sullivan & Sullivan and Theo J. Roche, for respondent.

ANGELLOTTI, J. A rehearing was granted in this case, after decision in department, principally because of the complaint of plaintiff that no reason had been assigned for the reversal as to the defendants Nelson and Waters, employés of the principal defendant and fellow servants of the plaintiff. Upon the reargument, plaintiff's counsel, while urging that the judgments and orders should be affirmed as to the railroad company, stipulated that, in the event of reversal as to it, the judgments and orders should also be reversed as to the other defendants. We are satisfied that this course should be adopted. On further consideration, we see no reason to modify the views expressed in the department opinion as to certain instructions given to the jury at the request of the plaintiff, and on account of which the reversal was ordered.

Learned counsel for defendant railroad company earnestly urge that the department opinion be modified in certain particulars. Much of what is said by counsel in this behalf is due we cannot but feel to a misconception of the opinion. Certainly, that opinion cannot be construed as declaring that the proximate cause of the accident was the nonadjustment of the brake. The assumption to this effect of which defendant complains was expressly limited in the opinion to the discussion of the question as to the alleged negligence of the defendant in the matter of the inspection of the brake, and the instruction given to the jury in that connection, and on account of which the reversal was ordered. It is declared, in effect, over and over again in the opinion, that the question as to the proximate cause of the accident was, in this case, one for the jury. Unless the jury can find, upon sufficient evidence, that the railroad company was negligent in the matter of the inspection of the brake, and that this negligence contributed directly to plaintiff's injury, there can, of course, be no recovery by plaintiff. If the accident was wholly due to the negligence of a fellow servant of plaintiff, or disobedience by him of a reasonable rule enacted for his guidance in the operation of the car, either as to the making of a flying switch at all, or examining the brakes before making the same, there can be no recovery, even though the defendant had itself been negligent. Kevern v. Pro., etc., Co., 70 Cal. 394, 11 Pac. 740; Vizelich v. S. P. Co., 126 Cal. 587, 59 Pac. 129; Luman v. Golden, etc., Co., 140 Cal. 707, 74 Pac. 307. The evidence in the record before us cannot be held, as a matter of law, to show what was the proximate cause, and hence the question is necessarily one for the trial jury. It should also be said, in this connection, that the showing in the record now before us, as to whether the conditions were such as to make the rule prohibiting a flying switch "except where it would cause great delay to do the work in any other manner" applicable, is extremely weak, if, indeed, there can be said to be any showing at all on the subject. It was because of this that the matter was not referred to in the former opinion. If defendant relies on a violation of this portion of the rule, it should make it appear that the work could have been otherwise done without what would have been "great delay" under the existing circumstances. Five or ten minutes might have constituted such a great delay under certain circumstances.

The question as to whether or not the condition of slack in the brake was a mere matter of detail in the operation of the car, the discovery and remedying of which was a part of the regular operation of the car by train hands or switching crew, was discussed in the former opinion in the light of the evidence contained in the record. We are satisfied with the views expressed in the opinion in regard to that question, as applied to the case shown by such record, and see no occasion to add thereto.

The portion of the former opinion reading as follows: "If at the time when an inspection was required of the railroad company in the exercise of reasonable care, by reason of the negligent failure to inspect the brakes at all, or a negligent inspection, the defect remained undiscovered and caused injury, the defendant would be liable for injuries proximately caused thereby, notwithstanding a violation of this rule by Waters, even though had the rule been observed the defect would have been discovered"—should be stricken out, together with the words "on the other hand," immediately succeeding.

With this exception the department opinion is adopted as the opinion of the court in bank, supplemented by what we have heretofore said.

The judgment, the modified judgment, and the orders denying a new trial are reversed, and the cause remanded.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

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## PEOPLE v. SOLANI. (Cr. 39.)

(Court of Appeal, Third District, California. July 10, 1907.)

1. Criminal Law—Former Jeopardy—Plea—Requisites.

A plea of former jeopardy, failing to state where the judgment of conviction was rendered, as required by Pen. Code, § 1017, subd. 3, was fatally defective.

2. Same—Time.

A plea of former jeopardy may be interposed at any stage of the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 667.]

3. Same—Prior Conviction of Lesser Offense.

Where a new trial is granted after conviction of manslaughter on an information for murder, it is no violation of defendant's constitutional right to protection against being twice put in jeopardy for the same offense to again place him on trial for murder, unless he pleads former conviction.

4. Same—Harmless Error.

A new trial having been granted defendant after conviction of manslaughter on an information charging murder, he was again placed on trial for murder, and the trial proceeded without any plea of former conviction until nearly all the instructions had been given, when an ineffectual plea of former conviction was offered. This was disallowed, and was not corrected until the jury had reached a verdict convicting defendant of manslaughter. *Held*, that defendant, having received the same sentence at both trials, was not prejudiced by the court's denial of the plea.

5. SAME — ADMISSION OF EVIDENCE — CURING ERROR.

In a prosecution for homicide, the court having withdrawn from the jury a statement alleged to have been made by defendant while in jail, and having admonished the jury to disregard the statement, any error in its admission was cured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3141.]

6. SAME—EXPERIMENTS.

Where, in a prosecution for homicide, the evidence was conflicting and unsatisfactory as to there being any powder marks plainly discernible around the wound on deceased's body, it was not error to refuse to permit a witness to testify with reference to experiments made at various distances with a revolver loaded with black powder, as to whether powder marks were left on pieces of white paper; the caliber of the revolver used for the experiments not being shown with certainty to be the same as that used by defendant, and there being no evidence that the cartridge used was similarly loaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 854.]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

John Solani was convicted of manslaughter, and he appeals. Affirmed.

W. F. Cowan and Jos. P. Berry, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of manslaughter upon an information charging murder. He appealed from the judgment of conviction to this court and a new trial was ordered. 2 Cal. App. 225, 83 Pac. 281. At his second trial he was tried upon the original information. He was not again arraigned, and the trial proceeded without further plea of the defendant than his original plea of "not guilty." After the cause had been argued to the jury and as the court was about concluding its instructions, counsel for defendant asked leave to interpose a plea of once in jeopardy and former acquittal, and also asked the court to instruct the jury upon the theory of once in jeopardy. The plea offered was defective, in failing to state where the judgment of conviction was rendered, as required by subdivision 3, § 1017, of the Penal Code. The court declined to allow the reading of the instructions to be interrupted and stated that it would later consider the offer of defendant. At the conclusion of the reading the matter was again brought before the court. It appears that at the opening of the trial it was agreed between the district attorney and defendant's counsel that defendant would take 20 peremptory challenges "as long as this information charged murder," and that the case was tried and the instructions framed upon the theory that the charge being investigated was murder. It further appeared that to grant defendant's request would have required the instructions already given to be recast to some extent. Upon this state of facts the court denied defendant's request. The court, thereupon, gave the jury five forms of verdict which do not appear in the record. The instructions were full and clear as to what constitutes murder in the first and second degree and manslaughter, and it must be presumed that the forms of verdicts embraced manslaughter among other crimes of which defendant might have been found guilty or not guilty. Later, when the jury was about to return with its verdict, but before it had been brought into the courtroom, defendant asked leave to correct his plea of jeopardy so as to state therein at what place the former judgment of conviction had been entered and that the jury "be directed to return a verdict of once in jeopardy." The court directed that the jury be brought in, without giving any further instructions. Thereupon the jury came into court and rendered its verdict of murder in the second degree. Before it was recorded defendant objected to the recording of the verdict on the ground that "the court is without jurisdiction to pronounce the judgment allowed by law, and the verdict is illegal, and the jury without legal authority to find the same." Motion was regularly made in arrest of judgment and for a new trial, which was denied, and defendant appeals from the judgment and order denying his said motion.

1. The principal question presented by the appeal arises out of the refusal of the court to permit the defendant to plead jeopardy. If, as appellant contends, the court was without jurisdiction under any circumstances to try him for the crime of murder, clearly he had the right at any stage of the trial to raise the question by any appropriate step. But in the numerous cases where there has been a new trial granted, after conviction of manslaughter upon an information for murder, thus acquitting the defendant of the crime of murder, the Supreme Court of our state has held that it is no violation of the defendant's constitutional right to protection against being placed twice in jeopardy for the same offense, unless he pleads former conviction. It was said in People v. Bennett, 114 Cal. 58, 45 Pac. 1014: "The law's method must be pursued by him who asks the protection of the law." It was also said: "The fact that the first trial was held in the same court, and before the same judge as the second trial, in no way excused the necessity of the plea of once in jeopardy." The question was discussed at some length in People v. McFarlane, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245, where the opinion upon the point met the concurrence of the full court by refusing a rehearing. Nothing in People v. Smith, 134 Cal. 453, 66 Pac. 669, can be said to be in conflict with the views expressed in People v. McFarlane, which is confirmed by the fact that the writer of the opinion in the Smith Case inferentially approved the opinion in the McFarlane Case. In the recent case of Huntington v. Superior Court (Cal. App.) 90 Pac. 141, the

court held that the trial court was without jurisdiction to try the defendant for murder; but as we understand the opinion, written by Presiding Justice Cooper, it was so held because the offense charged did not involve the elements of manslaughter, and, as the defendant could not be convicted of murder, there was no authority to try him on the charge of murder or manslaughter. The question, therefore, was one of discretion with the trial court whether or not to admit the plea under the circumstances, and unless that discretion was abused this court will not interfere. It is not claimed that counsel for defendant were ignorant of his rights or of the decisions upon the very point in question. With this knowledge counsel, we must presume, intentionally chose to go to trial without a plea of jeopardy. They claimed and exercised the right to 20 peremptory challenges, when otherwise but 10 were allowed, tried and argued the case, and stood by until nearly all the instructions of the court had been given the jury, and then offered an ineffectual plea (State v. Lewis, 31 Wash. 86, 71 Pac. 778, citing People v. O'Leary, 77 Cal. 30, 18 Pac. 856), which was not corrected until the jury had reached a verdict. It seems to us that there was no abuse of discretion in the action of the court. Defendant received the same sentence at both trials, so that, while his counsel may reproach themselves for the risk they took in not pleading jeopardy, both they and defendant may find consolation in the fact that defendant has probably suffered no prejudice thereby.

2. In the course of the trial plaintiff offered in evidence a statement which plaintiff claimed defendant had made in the county jail in the presence and hearing of the district attorney, and which was reduced to longhand by the official court reporter, who was also present and heard defendant make the statement. It was objected to as immaterial, irrelevant, and incompetent. "The Court: I suppose that covers everything. I suppose it includes the accuracy of the transcription, and the accuracy of the interpretation. Mr. Cowan (attorney for defendant): No; we admit the accuracy of what Mr. Lafferty [court reporter] took down; that Mr. Lafferty took down what he heard. The Court: Of course I can't tell whether it is competent or not. I have not seen it or heard it. * * * The objection is overruled to the introduction of the statement." Later during the trial the question of the admissibility of this evidence came before the court, and the court said: "Gentlemen of the jury, I will admonish you that you are to disregard the statement read to you and alleged to have been the statement of Mr. Solani." In People v. Prather, 134 Cal. 436, 439, 66 Pac. 589, 590, the court said "Whatever error may have occurred in the admission in evidence of the verdict and judgment in the larceny case was cured by the subsequent action of the trial court in taking the evidence away from the jury. At that time the court instructed the jury specially not to consider the evidence so taken from them, and it will be presumed that the jury obeyed the instruction." The court further said that it is only in certain exceptional cases where the action of the court in withdrawing evidence from the jury, which it deems erroneously admitted, may not be held to cure the error committed in its admission. Under ordinary circumstances the court should be allowed to correct an error of this kind, and, we think, it should be done under the present circumstances.

3. The homicide occurred in front of the Roma Hotel in the town of Glen Ellen at about 10 or half-past 10 o'clock at night. The evidence is conflicting as to the relation of the defendant and deceased to each other at the instant the fatal shot was fired. Two witnesses for the prosecution located deceased as standing from five to eight feet distant from the hotel porch, on which, or on the lower step leading up to the porch, the defendant stood. Another witness, a fellow Italian, was near the parties, when some angry words passed between them. He testified to having separated them at one time when defendant had drawn his revolver as though to shoot deceased. His testimony was that deceased was standing in the middle of the road when the shot was fired, and defendant was three or four steps from the porch, and about six or seven steps from the deceased; that deceased fell backwards to the ground when shot, and at the time was standing with his hands on his hips (showing the hands on the hips outside of the coat). Witness testified that he grappled with defendant after the first shot and threw him down, and while in this position defendant fired two more shots; both taking effect on witness. Witness Dr. Crepin, who assisted Dr. Thompson at the autopsy, testified for the prosecution at the first trial that there were powder marks on the skin around the wound. At the second trial he testified that he saw no powder marks and was quite sure there were none, but that he "could not swear to an absolute certainty that there were no powder marks." Dr. Thompson testified for the defense that there was discoloration around the orifice of the wound, which in his opinion "was caused by a powder burn," which did not extend beyond an area greater than two inches in diameter; that his opinion was based upon the appearance of the skin—"something embedded in the skin" which he "took to be particles of charcoal, * * * particles of powder underneath the skin, underneath the cuticle." He further testified that he did not examine these particles to determine what they were; that he was not asked to do so; that his opinion was formed merely from surface indications; that he had no experience in the use of a gun, and in his medical experience he

had not had occasion to examine or study gunshot wounds to any extent. Witness Hardman testified for the defense that he assisted in dressing the corpse for burial; that "there were little black specks, or rather black and blue, that was around that wound, from a distance—well the size of a half dollar or a dollar." Again: "What I have reference to by the grains was the impression. You could not see exactly the grains, but the impression as the corpse was stiff. * * * That is as near as I can explain it. There was congested blood all over the face and forehead. There were little indentations on the skin." The testimony of defendant, in his own behalf, was that he had been thrown down by deceased and a friend of deceased, one Ricci; that Ricci was on top of him as he was lying on the ground, and deceased close by on the ground or on top of him. Defendant was corroborated in some degree as to his being down, and a witness testified that deceased was on top of him when defendant fired. It appeared that the revolver introduced at the first trial was not identified with certainty as the revolver introduced at the second trial as the one used by defendant, and there was some question whether it was a 32 or 38 caliber. Witness Boswell testified for defendant that he had experimentally fired into white paper with a 32-caliber revolver with a cartridge loaded with black powder, at distances of eight and fourteen inches and two and four feet. Defendant's counsel offered to prove by the witness that the revolver discharged at a distance of eight inches from the muzzle of the revolver to the paper produced an effect similar to that described by witness Hardman. The witness was asked whether there were any powder marks shown in the experiments made at the other distances and if so to describe them. Certain four exhibits were shown the witness and offered for identification, which it was claimed tended to prove the result of Boswell's experiments. These exhibits were not offered, except for identification, and do not appear in the record. The district attorney objected to all this offered evidence as immaterial, incompetent, and irrelevant. The court sustained the objection on the grounds that the "experiments do not seem to have been under the same conditions or upon the same substance."

Among the cases which have come before our Supreme Court where this class of evidence has received attention are the following: People v. Clark, 84 Cal. 573, 24 Pac. 313; People v. Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631, People v. Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833, and People v. Weber, 86 Pac. 671, 149 Cal. 325. The question is quite fully discussed in State v. Justus, 11 Or. 178, 8 Pac. 337, 50 Am. Rep. 470. In People v. Woon Tuck Wo, supra, it was held that the admission of such evidence is largely within the discretion of the trial court, and that a case will not be reversed for an abuse of discretion by the court in rejecting such evidence, unless it comes clearly within the principles by which it is allowed. The principle upon which this class of evidence is held admissible is stated as follows: "Unless the experiments are shown to have been under essentially the same conditions that existed in the case on trial, the tendency is to confuse and mislead, rather than enlighten, the jury"—citing Lake Erie, etc., R. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564. The court further said: "There must be a possibility of reproducing substantially the same conditions which existed when the original occurrence took place, or the evidence will not be admitted." We should be unwilling to hold that under no circumstances could experiments be made in a case such as we have here, unless made upon a live human being. In Burg v. Chicago R. R. Co., 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419, it was held that the rule does not exact more than a substantial or reasonable similarity; and in Fein v. Cov. Mut. Ben. Ass'n, 60 Ill. App. 274, it was held that an experiment made upon white paper to test the distance at which powder would burn the human skin presented conditions substantially the same as the occurrence itself. The court said: "The difficulty of obtaining the latter substance for such an experiment is manifest, without argument to show that the substitution of paper was the best that could be done under the circumstances." In the case of People v. Clark, supra, the experiment with a Winchester rifle was made upon clothing to show that at a given distance no powder marks were made. In that case the evidence was admitted, but it was also an admitted fact that there were no powder marks upon the clothing of the deceased. In the Woon Tuck Wo Case the fact in dispute was whether the homicide could have been witnessed from the point where the witness stood who testified that he saw it committed. It was sought to prove by a witness standing at that point that he could not see and recognize a person standing where the defendant stood. The court said: "We think there could be no substantial reproduction of the same conditions under which the witness for the prosecution testified to having seen the homicide committed by the defendant and to have recognized him immediately afterward. The testimony of the various witnesses who testified for the prosecution and for the defendant, who were at the scene at the time of or immediately after the homicide, was very conflicting as to the condition of the lights at that time; and under these circumstances the proposed testimony of the witness McFarlane would have 'tended to confuse and mislead, rather than enlighten, the jury.'" In the case here the evidence was not only conflicting, but far from satisfactory, as to there being any powder marks plainly discernible around the wound. The caliber of the revolver used for the experiment was not shown with certainty to be the same as that used by the defendant, nor was there any evidence that the cartridge used for loading was the same in its contents.

It may be further observed that it nowhere appears in the record that the witness Boswell was asked to state the result of any experiment, except the one made at eight inches' distance from the paper. It was not shown what he would testify to as to other distances, or what the exhibits showed. Error must be made affirmatively to appear. Non constat but all his other experiments would have shown no powder marks, and thus have confirmed the theory of the prosecution.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

6 Cal. App. 144

## FISHER v. LUDWIG. (Civ. 353.)

(Court of Appeal, Third District, California. July 30, 1907. Rehearing Denied by Supreme Court Sept. 26, 1907.)

1. GIFTS—INTER VIVOS—REQUISITES—DELIVERY—EXECUTED GRANT.

Civ. Code, § 1146, defines a gift as a transfer of personal property, which, when made in writing, is by action 1053 designated as a grant, conveyance, or bill of sale, and by section 1083 vests in the transferee all the actual title to the thing transferred which the transferror then had, unless a different intention is expressed or is necessarily implied, and section 1054 declares that the estate transferred is vested in the transferee on the donor's delivery of the grant. *Held*, that manual delivery of personal property is not essential to the validity of a gift thereof, evidenced by a written instrument duly executed and delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 37.]

2. SAME—EVIDENCE—BANK DEPOSIT—TRANSFER.

Decedent, prior to his death being the owner of a bank deposit, executed a writing by which he authorized the bank to pay to defendant any money standing to his credit as a deposit in the bank, represented by a pass book with a specified number. This order, with the book, he gave to defendant, who filed the same with the bank, by which the order was accepted prior to decedent's death. *Held*, sufficient to establish a valid gift of the bank deposit inter vivos, although the account was not formally transferred on the bank's books until after decedent's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 52–57.]

Appeal from Superior Court, Placer County; J. W. Bartlett, Judge.

Action by George H. Fisher, as administrator of the estate of George Ludwig, deceased, against Caroline Ludwig. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

A. K. Robinson, for appellant. John M. Fulweiler, for respondent.

BURNETT, J. Plaintiff, as administrator, brought the action for the recovery of $5,170, claiming that it belongs to said estate, and that the defendant unlawfully collected and embezzled said amount after the death of said George Ludwig. The defense is that the money was given to defendant by the said George Ludwig some time previous to his death. The issue is squarely presented by the pleadings, as follows. The complaint alleges: "That thereafter, to wit, January 29th, 1903, the said George Ludwig without any consideration therefor, and for the purpose that the said indebtedness due to him from the Sacramento Bank aforesaid and represented by said pass book 22,603 aforesaid might be drawn and collected therefrom and held in trust by the said defendant for his use and benefit, gave to the said defendant a power of attorney of which the following is a copy: 'Sacramento, Jan. 29, 1903. I hereby authorize the Sacramento Bank to pay to Caroline Ludwig any money standing to my credit as a deposit in said bank, represented by pass book No. 22,603. [Signed] George Ludwig.'" Defendant denies this allegation, and avers "that said George Ludwig, on the 29th day of January, 1903, executed and delivered to Caroline Ludwig, this defendant, for good and valuable consideration, an order, assignment, and transfer to defendant, absolutely and without any reservation, all the sums of money coming to said George Ludwig from, or standing to his credit in said Sacramento Bank as a deposit in said bank in his name and as represented by pass book No. 22,603, in words and figures as follows, to wit." Then follows the order hereinbefore set out. It is also averred in the answer that "the control and possession of said pass book No. 22,603 was also delivered to this defendant by said George Ludwig."

A distinction of importance is recognized in some of the decisions between a gift resting in parol and one made effective by virtue of a written instrument. In Driscoll v. Driscoll, 143 Cal. 535, 77 Pac. 471, Mr. Justice Harrison, who seems to have written most of the cases on this subject while he was a member of the Supreme Court, speaking for the court, says: "There is no statutory requirement in this state that a gift which is effected by an executed grant shall be accompanied by a delivery of the property given, and, as between the parties to the transaction, there is no violation of law or infringement of public policy, if the donor, after he has executed the instrument of gift, shall retain possession of the property. A gift is declared by section 1146 of the Civil Code to be 'a transfer of personal property' which if made in writing is by section 1053 called a 'grant or conveyance or bill of sale,' and by section 1083 'vests in the transferee all the actual title to the thing transferred which the transferror then has unless a different intention is expressed or is necessarily implied.' As under section 1053 of the Civil Code this promise applies to personal as well as real property, the interest intended to be transferred is under section 1054 of the Civil Code vested in the transferee upon the donor's delivery of the grant." The rule as to verbal gifts is provided in section 1147 of the Civil Code as follows: "A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor if it is capable of delivery unless there is an actual or symbolical delivery of the thing to the donee." The delivery of the written instrument to the donee in the one case then vests in him the title, but in the other case the means of obtaining possession must be given, and if capable of delivery the thing given must be actually or symbolically delivered to the donee before he can claim title. A failure to observe this distinction at times has led to some confusion and apparent conflict in some of the decisions. In fact, due consideration to this difference seems to have been given for the first time by our Supreme Court in the Driscoll Case, supra. Another consideration sometimes ignored is the difference between an action brought by an administrator of an estate as such and one brought by a creditor of the donor within the provision of section 3440, Civ. Code. But in the case at bar, whether the transaction be regarded in the light of a verbal gift or one effectuated by a written instrument explained by parol testimony, the evidence is clear and convincing that decedent prior to his death had voluntarily transferred the money in question to the defendant.

The evidence is without substantial conflict, and in its salient features is as follows: A. L. Smith, cashier of the Placer County Bank, testified: "I had something to do with the drawing of that order of July 29, 1902. [This was similar to the said order of January 29, 1903, but related to pass book 136.] I called at the office of the Sacramento Bank and was furnished with the original order that is dated July 29, 1902, by the cashier. I brought the order to Auburn with me and a few days later it was signed by George Ludwig. After it was signed by him it was filed with the Sacramento Bank. Prior to the drawing of that order I had a conversation with George Ludwig regarding moneys that stood in the Sacramento Bank in his name. He stated to me that he desired all his funds to go to Mrs. Caroline Ludwig before he died, in order to save any probating of the estate, and the order was drawn in connection with that particular matter. I had something to do with the drawing of the order of January 29, 1903. It was filed with the Sacramento Bank by me for Mrs. Ludwig. Pass book 136 was the term deposit, and 22,603 was the ordinary deposit. On the morning of March 12th, I received from Mrs. Caroline Ludwig an order requesting the Sacramento Bank to transfer the amounts due to George Ludwig to a joint account in the name of Caroline Ludwig and George Ludwig. I wrote a letter to the Sacramento Bank requesting them to do that, and I sent the pass books which I had held in my possession for months for Mrs. Ludwig." He testified further that the Sacramento Bank replied suggesting some embarrassment that might arise in case of a joint account, and advising that it be opened with one who could give the other authority to draw. This letter was written March 14th. March 17th Mr. Ludwig died, and on the same day Mr. Smith, by direction of Mrs. Ludwig, wrote the Sacramento Bank to transfer the account to Mrs. Ludwig, which the said bank did on March 18th.

Mrs. Caroline Ludwig testified as follows: "I knew George Ludwig for 39 years. He was my brother-in-law and lived on our ranch nine miles from Auburn. Prior to July 29, 1902, I had a talk with him about the disposition of his money. He wanted to give me the money, and he did give it to me. He gave me the bank book and an order for the money. When he gave it to me he told me to keep it. He told me he give me all the money he has got, and I shall keep it for myself. He said about the money represented by those books—he told me to keep them, and if I wanted some money to go and get it, and any time he wanted money he come to me and get some. He gave me another order afterwards. When he gave that order he said to me, he gave me the order. He give me the books, and he told me to keep the money. I brought the books to the bank, and I gave them to A. L. Smith, and he kept them in the bank. I have drawn money out of the bank on Mr. George Ludwig's account. Whenever he told me he wanted money I drew it. If I had money in my pocket I went out and gave it to him without drawing it. I gave him all the money he wanted and everything he wanted. He simply gave me that money in the bank and wanted me to keep it because we worked together and earned it together, and he said it isn't more than right, because he didn't want to go through court."

J. M. Henderson, cashier of the Sacramento Bank, among other things, said: "The order of July 29, 1902, stands filed among the records of the bank as received on July 30, 1902. It authorized the bank to pay to Caroline Ludwig any money standing to the credit of George Ludwig represented by pass book 136, and the order of January 29, 1903, authorized the bank to pay to Caroline Ludwig, represented by pass book No. 22,603; and it was upon the strength of these orders that we recognized the subsequent orders of Caroline Ludwig dated March 12, 1904."

It is not contested that the whole amount in question is shown as a credit in said pass book 22,603. Of course, it may be that Mrs. Ludwig did not tell the truth; but as there is nothing inherently improbable in her statements, and as the trial judge accepted them as true and based the findings upon her testimony and that of the other witnesses, we are not at liberty to discredit her testimony, but we must construe all the evidence so as to uphold, rather than overthrow, the judgment of the lower court. The record thus discloses every element of a gift. The deceased expressed clearly and unequivocally his intention that the defendant should have as her own the money immediately, and, since the property was not in his possession, he did all that the statute and decisions require. He gave her the means whereby she could reduce the property to her possession, to wit, the order upon the bank where the money was deposited. The elements necessary to the validity of a gift inter vivos have been specifically stated as follows: (1) The donor must be competent to contract. (2) There must be freedom of will. (3) The gift must be complete, with nothing left undone. (4) The property must be delivered by the donor and accepted by the donee. (5) The gift must go into immediate and absolute effect. Mercantile Safe Deposit Co. v. Huntington, 89 Hun, 465, 35 N. Y. Supp. 390; Matthews v. Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054; Telford v. Patton, 144 Ill. 611, 33 N. E. 1119. Reduced to simpler form, it is held that a gift must be voluntary, gratuitous, and absolute. Williamson v. Johnson, 62 Vt. 378, 20 Atl. 279, 9 L. R. A. 277, 22 Am. St. Rep. 117. The foregoing elements must all be present to constitute a gift in this state, except that delivery is modified, as we have seen, by the provisions of the Civil Code. And the only controversy here is as to whether there was such a delivery as is required by the statute. The said order of January 29, 1903, was delivered to and accepted by the bank, and, if that be regarded in connection with the transfer of the pass book as a written instrument of gift, then the delivery of the money under the decision in the Driscoll Case, supra, was not required. That the said order was intended as an assignment of the money is shown clearly by the parol testimony, and there is no good reason why it should not be given the effect that was intended by the parties. But in any event, the order constituted the means whereby defendant could secure possession of the money, thereby satisfying the requirement of said section 1147, Civ. Code, since the property was in the hands of the bank and could not be actually delivered by the donor. The only circumstance in this connection urged by appellant entitled to any consideration is that the bank did not actually transfer the money to the account of defendant until the day after the death of the donor. It is difficult to see how the validity of the gift as between the donor and donee could be affected by any action of the bank. And it must be remembered that the plaintiff is in no better position to question the gift than would the donor be if alive. To protect itself the bank might refuse to recognize the transfer, but the bank is not a party to the action, and, besides, the testimony of Mr. Henderson shows that the bank accepted and acted upon the orders before Mr. Ludwig's death. The fact that the clerical work of transferring the account had not been done is of no consequence, as the gift was complete prior to Mr. Ludwig's death. As stated in Hart v. Ketchum, 121 Cal. 428, 53 Pac. 931: "Money deposited in a savings bank may be the subject of a gift causa mortis if it appears from the transaction that the donor intended to confer upon the donee a present right to the money and at the same time clothed him with the means of obtaining it." And this applies equally to gifts inter vivos, as the only difference between the two relates to the power of revocation. Pullen v. Placer Co. Bank, 138 Cal. 170, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19.

It is claimed that the view of the lower court is opposed to certain decisions of the Supreme Court; but it is apparent that the facts in those cases are dissimilar to those before us, as will be disclosed by a brief reference to them. In Zeller v. Jordan, 105 Cal. 143, 38 Pac. 640, it was held that "the giving of a check by the wife to the husband in consideration of love and affection, with the understanding that the check is not to be used or presented until after her death, unaccompanied by the delivery of the pass book or of any order accompanying the pass book, as required by the rules of the bank, is invalid." Here the gift was to take effect immediately, and it was accompanied by the delivery of the pass books and an order upon the bank for the payment of the money. In Hart v. Ketchum, supra, the alleged gift was not absolute, but it was an unsuccessful attempt to make a testamentary disposition of property, as is apparent from what the intestate said: "I want you to draw this money and pay it out as I wish to have it done to different parties." There was nothing in his declarations to show an intent to make a present gift of the money. The case is not at all like the one at bar. In Knight v. Tripp, 121 Cal. 674, 54 Pac. 267, as stated in the syllabus, it is held that "oral declarations by an invalid woman preceding a written assignment of her personal property in contemplation of death, stating 'I want to give it to you or place all of it in your hands and tell you those I want should have it,' and other such declarations accompanying the transfer of bank books to the effect that she wanted to assign the money under certain conditions that she had given in regard to its disposal, are insufficient to sustain the claim of a gift." It is manifest that it was not the intention of the intestate in that case to vest the title in the defendant, but to constitute him her agent, rather than beneficiary, to carry out a testamentary disposition of her property. This was made clear by written instructions as to what should be done with the property in the event of her death. In Vance v. Smith, 124 Cal. 219, 56 Pac. 1031, the gift was not to take effect until some time in the future, and hence it was declared invalid. In Denigan v. Hibernia, etc., Society, 127 Cal. 138, 59 Pac. 389, it was properly held that "the retention by the wife of the right in herself to withdraw the whole of the money from the bank" is inconsistent with the idea of a gift. This must be so, because it is not a gift unless the donor divests himself of all control and dominion over the property. In Pullen v. Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19, John W. Clarke, Sr., for the purpose of making a gift of $1,000 to his son, John W. Clarke, Jr., drew his check upon the bank for that sum and delivered it to his son, saying that he could get the money from the bank, but after delivering it to him stated that he wished he would not present it until after his death. The son did not present it till the morning after his father's death. It was held that the gift was not complete, since the son did not present the check and secure possession of the money during the father's lifetime. However, the court said: "The check was not a symbolic delivery of the money, but it was a delivery of the means by which the son could obtain possession of the money." This would seem to meet the requirement of section 1147, Civ. Code, where the property is in possession of a third party; but, at any rate, the case is not controlling here, because the order in the case at bar was presented to the bank and accepted by it before the death of Mr. Ludwig. In Noble v. Garden, 146 Cal. 225, 79 Pac. 883, it was held that the transaction did not amount to a gift, where the deceased in her lifetime maintained dominion and control over the certificates of stock in controversy, and where she gave her agent oral directions to deliver the assigned shares to certain persons after her death, and the agent complied with the directions. Since the pretended gift was not to take effect until after the death of the transferror, it is clear that it could not be held to be a gift. The decision in Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500, was based upon an alleged gift of money represented by a certificate of deposit evidenced by the following writing on the back of the certificate: "Pay to Martin Basket of Henderson, Ky.; no one else; then not till my death. * * * I may live through this spell. Then I will attend to it myself." It will thus be seen that the foregoing cases are not decisive here. As an illustration of transactions upheld as valid gifts, we may refer to Vandor v. Roach, 73 Cal. 614, 15 Pac. 354; Field v. Shorb, 99 Cal. 661, 34 Pac. 504; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Calkins v. Equitable B. & L. Association, 126 Cal. 531, 59 Pac. 30.

The only other point worthy of notice relates to alleged erroneous rulings of the court upon objections to certain evidence. We do not deem it necessary to refer to them specifically. We have examined them all, and we find no prejudicial error.

The cause appears to have been justly decided, and the order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

6 Cal. App. 122

## PEOPLE ex rel. McCARTY v. WILSON.

(Civ. 321.)

(Court of Appeal, Third District, California. July 30, 1907.)

1. JUDGMENT — CONCLUSIVENESS — ELECTION CONTEST.

A determination in an election contest, against the contestee's objection that the law authorizing "no nomination" to be printed on ballots, where no nomination had been made, was unconstitutional, and that hence no such ballot should be counted, became res judicata, barring the contestee from asserting the unconstitutionality of the statute in quo warranto subsequently brought against him by the contestant, in whose favor the contest had been decided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1251.]

2. SAME.

The final judgment in an election contest in favor of contestant was admissible on subsequent quo warranto by the people on the relation of the successful contestant against the contestee; the parties being essentially the same in both actions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1177.]

3. SCHOOLS AND SCHOOL DISTRICTS—SUPERINTENDENT OF SCHOOLS' RESIDENCE.

A successful contestant for the office of county superintendent of schools did not disqualify himself to hold the office because, pending the determination of the contest, he went to an adjoining county to teach a term of school, where he owned a house and personalty in the county of the contest, and left a considerable portion of his household goods there, claiming that county as his residence; his name remaining on the great register as a voter, and he returning when the term of school closed.

4. OFFICERS—FILING OATH—TIME FOR CONTEST.

Pol. Code, § 907, prescribing the time within which one elected to an office must take and file his oath of office, does not apply where a contest is pending, and where a contest grew out of an election held November 4, 1902, and remittitur on the affirmance of a judgment for contestant was filed April 4, 1906, and he filed his oath and bond April 14th, he acted within a reasonable time in qualifying.

Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Quo warranto by the people of the state of California, on the relation of T. E. McCarty, against S. B. Wilson. From a judgment for relator adjudging him to be entitled to an office, defendant appeals. Affirmed.

W. F. Bray, for appellant. U. S. Webb, Atty. Gen., Chas. A. Swissler, and Abr Darlington, for respondent.

HART, J. This is an action in the nature of a quo warranto to determine the right or title to the office of superintendent of schools of El Dorado county. The respondent obtained judgment in the court below, adjudging him to be entitled to the office, and appellant takes this appeal from the judgment, upon a bill of exceptions.

The history of the differences between the parties over the title to the office in question is as follows: On the 4th day of November, 1902, at the general state election held in California on that day, the relator and the defendant were rival candidates for the said office of superintendent of schools of El Dorado county. Thereafter a canvass of the returns of said election by the board of supervisors of that county established, at least prima facie, the election of the defendant, and he was by said board so declared elected, and thereupon a certificate of election issued to him by the county clerk. The relator was the then incumbent of the office, having been elected thereto at the general state election held in the year 1898. After the receipt of the certificate of his election, as declared by the board of supervisors, the defendant duly qualified by taking the oath of office and filing the same and recording his official bond, it having been first approved by the judge of the superior court, and upon the expiration of the previous term took charge of and entered upon the discharge of the duties of the office. Thereafter and within the time limited by the law, the relator instituted a proceeding in the superior court, under the authority of section 1111 of the Code of Civil Procedure, contesting the defendant's right to the office. A trial of the contest resulted in a judgment for the defendant, and thereupon the relator took an appeal from said judgment to the Supreme Court, and said judgment was thereafter reversed and the cause remanded "for further proceedings." McCarty v. Wilson, 146 Cal. 324, 82 Pac. 243. The grounds upon which the reversal of that case was founded involved rulings of the trial court overruling appellant's (respondent here) objections to the admission in evidence of a large number of ballots upon which the voters had stamped a cross after or opposite the words "No nomination," printed upon said ballots, and also because of the overruling of the objections to the reception in evidence of seven ballots containing as many votes for respondent in that case (appellant here), on "each of which ballots the voter had written a name in the blank column on the ballot, and had stamped a cross after each written name." Upon a retrial of the case in the court below, the objections to the counting of the said ballots were, in conformity with the ruling of the Supreme Court, sustained, thus eliminating them in the determination of the result of the election. The result of this ruling at the second trial was that the relator here received the highest number of votes cast for the contested office, and was therefore, on the 12th day of June, 1905, adjudged by the trial court to be entitled to said office. On the 29th day of June, 1905, the county clerk issued, in pursuance of the said judgment, a certificate of election to the relator, who, upon the same day, duly qualified and made a demand upon the defendant to surrender to him the office. The defendant refused to turn over the office to the relator, but served and filed a notice of appeal to this court from the judgment entered in said case. On the 30th day of January, 1906, this court rendered its decision in said cause, affirming the judgment appealed from, and the remittitur certifying the judgment so rendered by this court was transmitted to the county clerk and received by that officer on the 4th day of April, 1906. Thereafter, and on the 14th day of April, 1906, the county clerk again issued to the relator a certificate of election, and, after again duly qualifying for the office, the respondent demanded said office of and from said defendant, who refused to surrender it to the relator, and continued to usurp and unlawfully withhold the same.

Four points are urged in argument by the appellant for a reversal of the judgment: (1) That that portion of section 1197 of the Political Code, as it existed at the time of the general state election held in the year 1902, at which the electors of El Dorado county voted for candidates for the office in dispute, requiring the words "No nomination" to be printed on the ballots, when no nomination had been made by a political party for any office to be filled at the election, etc., was unconstitutional. (2) That the court erred in admitting in evidence the judgment in the case of McCarty v. Wilson, entered in favor of the plaintiff therein upon a second trial of that case. (3) That the relator, at the time of his purported qualification for the office after the remittitur from this court in the case of McCarty v. Wilson, supra, had been sent down and filed in the court below, was ineligible to hold the office because he was not a citizen of El Dorado county. (4) That the relator failed to qualify for the office within the time prescribed by law.

Counsel complains that, in the variety of forms in which the litigation of the question here has been before the courts of dernier resort, he has in vain vigorously insisted upon the determination of the proposition submitted by him that that portion of section 1197 of the Political Code, referred to here under the head of point No. 1, was violative of certain provisions of the state as well as the federal Constitution. The part of said section toward which hostility is thus directed was repealed by the Legislature of 1903 (St. 1903, p. 147, c. 134), but appellant declares that he is nevertheless entitled to a decision of the question. But, under the record before us, we think we are relieved from that duty, as we perceive nothing in the case at bar which is affected by the question; nor do we appreciate the importance of declaring that the criticised part of the section, having long since been repealed by the Legislature, is dead beyond the power or hope of resurrection. The proposition involves a moot question. It originally arose, however, in the first trial of the contested election case. Counsel for the plaintiff in that case objected to the counting of certain ballots, upon the ground that after the words, "No nomination," printed thereon, the voter had stamped a cross, and that thereby said ballots were wholly invalidated. Thereupon, counsel for defendant in that case raised the point and made the objection that the provision of the law authorizing the printing on the ballots the words "No nomination," in a case where a political party had in fact made no nomination, was unqualifiedly unconstitutional and void, and that consequently no ballot containing those words, whether a cross was stamped opposite them or not, should be counted. The trial court overruled the objection made by the plaintiff, as well as that interposed by the defendant in that case. The Supreme Court, as seen, reversed the cause, principally upon the ground that the court below erred in overruling the objection of plaintiff in said contested election case to the counting of the ballots upon which the words "No nomination" appeared with a cross stamped after them. It is at a glance perceivable that the objection challenging the constitutional validity of that part of section 1197, supra, referred to, cannot be raised here. The objection thus made simply meant that such ballots constituted testimony irrelevant to the issue in the election contest, for the reason that the act of printing the words "No nomination" upon the ballots was contrary to some provision of the Constitution. It having been one of the questions tried and conclusively determined upon the objection of appellant in the first litigation of the ultimate proposition in that case, and which is practically the same that is sought to be established by this proceeding, it became thereby res adjudicata. It does not matter that the form of the main question in that case was as to which of the rival candidates had been in fact and in law elected to the contested office, and therefore in whom was thereby invested the right and title to that office, while here the question, in form, is as to whether or not the defendant is usurping and unlawfully withholding the office from the relator. The fact is that it is undoubtedly correct to say that the ultimate point or final object sought to be achieved by both proceedings was and is to secure the occupation and control of the office. All the material issues tried and facts proven relevantly bearing upon such issues in the former case were necessarily definitively and conclusively determined by the judgment in that case. It follows, by consequence, that the question raised by appellant's objection upon constitutional grounds against the counting of the ballots in all cases where the words "No nomination" appear thereon, whether such words so appearing declared the fact and the truth or otherwise, having been passed upon and decided in the former case, is, as is true of all the other material questions therein adjudicated, merged in the judgment in said case, and upon which he is estopped from making an attack in a collateral proceeding, unless, of course, it appeared that the judgment was void upon its face or the record somewhere disclosed that the court did not have jurisdiction of the subject-matter or of the parties or either of them. No question here is raised that the judgment in that case was void for any reason.

As to the objection that the court erred in allowing in evidence here the judgment obtained by the relator at the second trial of the contest, counsel attempts to maintain that, upon the authority of the case of People ex rel. Drew v. Rodgers, 118 Cal. 394, 46 Pac. 740, 50 Pac. 668, the parties to the election contest and the parties to this proceeding are different and distinct from each other. He also claims that different issues were presented in this proceeding from those adjudicated in the former case; that the allegations in the complaint concerning the election contest, and the judgment therein, were not germane to any question here or necessary for a determination of any issues tendered in this cause, and should have been, upon his motion, stricken out. We are unable to agree with the learned counsel in this statement. There are, in the very nature of the proceedings before us, essentially some new issues tendered. For illustration, it is alleged by the relator that the defendant has unlawfully intruded into, usurped, and is unlawfully withholding the office from relator. This is an issue which was not, technically speaking, involved in the former case. It is also true that the defendant himself presents two new questions, numbered 3 and 4 in the order in which we are considering the points. But it does not follow from these considerations that the judgment in the former case was not an issue here. Indeed, it was an exceedingly important one to the relator—in fact, all-important, for without it he would have utterly failed to make a case against the defendant.

In the case of Drew v. Rodgers, supra, the court below admitted in evidence the judgment roll in the case of Drew v. Rogers (Cal.) 34 Pac. 1081. The plaintiff in the last-mentioned case was Moses M. Drew. The relator in the case subsequently tried was one Warren F. Drew. The object of both actions was to oust the defendant from the office of chief of police of the city of Sacramento. In the case of the People ex rel. Drew v. Rodgers, supra, the Supreme Court says: "The court erred in admitting in evidence the judgment roll in the case of Drew v. Rogers, supra, and in holding that the defendant was estopped thereby from proving that he had been a citizen of the United States for more than 90 days prior to the election in March, 1892. The judgment was not between the parties to the present action, nor was it between the relator and the defendant." The relator in the case at bar was the contestant in the former case, and merely because in this proceeding the law requires that he must first obtain the consent of the Attorney General before instituting it, and because the people are, eo nomine, made parties to it, renders him none the less the real party in interest. The object of this proceeding is, as is manifest, practically to enforce and carry out the judgment in the election contest. The appellant refused to surrender the office to the party adjudged by the courts upon a trial of the question to be entitled to it. He was therefore an usurper of the office, and the relator was compelled to resort to this proceeding for the purpose of securing what had been judicially determined to be his right. In order to establish that right here, it was not only proper but absolutely necessary for him to present to the courts the evidence of his title. In what other way could he have established the allegations that the defendant was unlawfully withholding the office from him, and that he was himself, under the law, entitled to exercise the duties of the office? The defendant had, as his authority for occupying the office, the certificate of election issued to him, as required by law, by the county clerk, upon the declaration by the board of supervisors, after canvassing the election returns, that he had received the highest number of votes cast at the election for that office, and was consequently elected thereto. The election contest prosecuted by the relator resulted in the annulment of the certificate so received by the defendant, and the judgment of the court so annulling it was the only authority of the clerk for issuing to the relator the certificate evidencing his right to exercise the duties of the office. The ruling of the court upon the point under discussion was, as we have said, not only proper, but necessary. We have thus disposed of the constitutional question presented by counsel, and also the second point, in the order presented by us.

There is no merit in the point that the relator was not qualified to hold the office because of nonresidence in the county at the time he took the oath of office and filed his bond after the remittitur from this court certifying its decision on the appeal from the judgment entered upon the second trial of the contested election case was received and filed in the court below. The evidence upon this point, consisting alone of the testimony of the relator, was to the effect that, pending the final determination by the courts of the election contest, the relator went to Placer county for the purpose of teaching school He owned a house and personal property in El Dorado county, and left a considerable portion of his household effects in his house. He testified that his residence in Placer county was only temporary, and because he was compelled to teach in order to earn a livelihood for himself and family. He never had any intention of abandoning El Dorado county as his home, and his name remained on the great register as a voter in that county; that as soon as the term of school he was teaching terminated he intended to and did return to El Dorado county. The court's finding against the contention of appellant upon this point is fully sustained by the evidence.

The contention that the relator failed to qualify within the time required by law finds no support either in principle or the decisions of the courts. It has been held in this state that, where a contest is pending for an office, section 907 of the Political Code, prescribing the time within which a person elected to an office must take and file his oath of office, has no application. People v. Potter, 63 Cal. 127. According to the agreed statement of facts here, the remittitur from this court certitifying the affirmance of the judgment of the court below was received and filed in the last-mentioned court on the 4th day of April, 1906, and the relator filed his oath and bond on April 14th. The relator acted within a reasonable time in qualifying.

Under all the circumstances of the case, as disclosed by the record, we think the defendant had no conceivable reason for withholding the office from the relator, after the decision of this court affirming the judgment and the order by the Supreme Court denying the petition for a rehearing of the case after judgment here.

There are some other points suggested, but we do not regard them worth noticing.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

6 Cal. App. 117

## DRINKWATER v. HOLLAR et al. (Civ. 354.)

(Court of Appeal, Second District, California. July 25, 1907.)

1. QUIETING TITLE—PLEADING—DELIVERY OF DEED.

In an action to quiet title, an allegation in the answer of the delivery of a deed, under which defendants claimed, is deemed controverted under Code Civ. Proc. § 462, providing that the statement of new matter in the answer in avoidance or constituting a defense, must at the trial be deemed controverted by the opposite party.

2. DEEDS—DELIVERY.

Delivery of a deed is as essential to the passing of title as the execution thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 116.]

3. EVIDENCE—PAROL—NONDELIVERY OF DEED.

While possession of a deed by the grantee is prima facie evidence of its delivery, parol extrinsic evidence is admissible to show that no delivery was ever made by the grantor with intent to pass title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1978.]

4. DEEDS—DELIVERY BY BROKER—AUTHORITY.
Certain brokers, acting for plaintiff and defendant in effecting an exchange of land for certain stock, received a deed from plaintiff, with instructions not to deliver the same until the transaction was completed, and plaintiff should have had time to investigate the value of the stock. Thereafter plaintiff told the brokers he was not satisfied, and was still investigating the stock; but the brokers, contrary to his instructions, delivered the deed to defendant. *Held*, that neither plaintiff's delivery of the deed to the brokers, nor their delivery thereof to defendant, was effectual to pass title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 124.]

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by T. P. Drinkwater against X. H. Hollar and others. From a judgment for plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

X. H. Hollar, Flint & Barker and Barker & Bowen, for appellants. G. R. Freeman and E. W. Freeman, for respondent.

SHAW, J. Action to quiet title. The verified complaint is in the usual form, ascribing possession and ownership of the property to plaintiff, and alleging an unfounded adverse claim of defendant thereto. The answer controverts the ownership of plaintiff, and alleges that by deed duly executed on December 28, 1904, and delivered to defendant on January 11, 1905, plaintiff conveyed the land in question to defendant. The deed was recorded on January 12, 1905, and this action instituted on the following day. Judgment went for plaintiff, from which, and an order denying defendant's motion for a new trial made upon a bill of exceptions, he appeals.

On December 28, 1904, the respondent, Drinkwater, executed an "agreement for exchange," which recited that he had placed with Rains & Hunter, who were real estate brokers acting as agents for both parties, the land in question (particularly describing it), which he desired to exchange for property consisting of $6,500 per value of the stock of the Toledo, Columbus & Cincinnati Railway Company, then owned by appellant, and authorized said Rains & Hunter to act as his agents in negotiating such exchange, and agreed if they should secure an acceptance of the proposition for such exchange to furnish a certificate of title and a deed of bargain and sale conveying a good and sufficient title to the property, and, upon securing the acceptance of the proposition to exchange the real estate for the stock, agreed to pay Rains & Hunter the sum of $275 as commission for their services. On the same day the appellant Hollar accepted the proposition by a written agreement to that effect, as follows: "This agreement witnesseth: That I, X. H. Hollar, of Lima, Ohio, owner of the second piece of property described within, hereby accept the proposition of exchange made therein, and upon the terms therein stated, and agree to furnish said stock mentioned in within agreement to T. P. Drinkwater or his assigns or representatives. And I further agree to pay Rains & Hunter commission for said exchange. * * * [Signed] X. H. Hollar." A deed of conveyance, whereby Drinkwater and his wife conveyed to appellant the real estate in question, was duly executed, and on January 4, 1905, said Drinkwater placed the deed, together with his note for the sum of $275, covering the agreed commission, with Rains & Hunter, who gave him a receipt therefor, as follows: "January 4, 1904. Received from T. P. Drinkwater deed to X. H. Hollar of lot 5 in block 47 of the lands of South Riverside Land & Water Co. in Corona, Calif. Agreement for certificate of title that land is to be free and clear except incumbrances mentioned in deed, and note of $275 as commission for the exchange of said property. Rains & Hunter. On the above we have $6,500.00 stock per value of the T. C. & C. Ry. Co., which we agree to deliver to said T. P. Drinkwater on demand. Rains & Hunter." Appellant's claim is based upon the deed executed by Drinkwater, which, it is alleged, was delivered to defendant Hollar on the 11th day of January, 1905.

Under section 462 of the Code of Civil Procedure this allegation of delivery of the deed is deemed to be controverted. Upon the issue thus tendered by the answer, the court found there had been no delivery of any deed conveying the property to the defendant. Assuming the evidence upon which the court based its conclusion to have been admissible, it was sufficient to justify the finding. The evidence tended to prove there was no delivery of the deed; that representations as to the value of the stock had been made to plaintiff; that, while he left the deed with Rains & Hunter, it was so deposited upon an understanding that they should retain possession thereof and hold until the deal was completed, and until he should have time to investigate the value of the stock; that thereafter he told them that he was not satisfied and was still investigating its value, but that, contrary to his instructions, they delivered the deed to appellant—to all of which, and other testimony of similar character, defendant objected, upon the ground that there was no issue under which such testimony was admissible. The action was prosecuted under the provisions of section 738, Code Civ. Proc. The deed upon which defendant bases his claim of title was duly signed, acknowledged, and recorded, and constituted an apparently good record title. But delivery of a deed is equally essential in transferring title as the act of signing. "Delivery is the force that vitalizes the instrument." Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323. While possession of the deed was prima facie evidence of its delivery, it was not conclusive, but might be controverted by extrinsic evidence showing that it was never delivered. If the deed was not delivered to the grantee, plaintiff was not divested of his title. In a legal sense, there can be no delivery of an instrument without the consent of the grantor. "It may be shown by parol evidence that a deed in the possession of the grantee was not delivered." Devlin on Deeds, §§ 294, 295. "And even if the deed is deposited with the grantee, but for a purpose other than delivery, it would not take effect as a deed; nor can a title be derived from a deed which has not been delivered. While, therefore, it is not competent to control a deed by parol evidence where it has taken effect by delivery, it is always competent by such evidence to show that the deed, though in the grantee's hands, has never been delivered." Washburn on Real Property, 311. "But whether there has been a valid delivery or not must be decided by determining what was the intention of the grantor and by regarding the particular circumstances of the case." Devlin on Deeds, § 269. The intent of the grantor, rather than the mode of executing the intention, is the crucial point. Corker v. Corker, 95 Cal. 308, 30 Pac. 541. It may be deposited with a third person merely as custodian for safekeeping, or, as in the case at bar, "to hold until this deal was completed subject to" respondent's "investigation of this stock." It is settled that delivery is not complete until the grantor has voluntarily surrendered all control over it. The sole issue is whether or not the deed in question was delivered—not that its delivery was procured by fraud, or breach of trust. Respondent contends that it was not delivered at all, and the court so found. Neither fraud nor breach of trust enter into the case. Hence the very able argument and cases cited bearing upon the subject of the cancellation of deeds and remedies where delivery thereof has been obtained through fraud do not apply to this case. Plaintiff, as said in the opinion of the Supreme Court in Cutler v. Fitzgibbons, 148 Cal. 562, 83 Pac. 1075, decided January 29, 1906, "is not trying to set aside a deed which conveyed the legal title, on the ground that the deed was procured through fraud, mistake, undue influence, conspiracy," etc. Plaintiff had the legal title. It certainly did not pass out of him by a written instrument which was never delivered. Having the legal title to the land, he brings this action to have his title thereto quieted against appellant, who asserts and proclaims an estate in the land based upon a deed which, according to respondent's contention, had never been delivered. The act of Rains & Hunter in turning over the deed to appellant contrary to the expressed wishes of Drinkwater was as ineffectual in divesting the latter of title as though it had been forged or stolen. Denis v. Velati, 96 Cal. 223, 31 Pac. 1; Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726. Rains & Hunter were the agents of both parties. The deposit of the deed with them, under the circumstances of this case, conferred no authority to deliver it to the grantee. Plaintiff does not seek a rescission of the contract, but contends that the deed is void for want of delivery; nor is it an action by one having an equitable interest to establish a trust in one holding the legal title. Delivery of an instrument is a question of fact independent of the writing itself, and extrinsic evidence to prove nondelivery is admissible, notwithstanding the fact that the adverse claim of title constituting the cloud is based upon an apparently good record title. Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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6 Cal. App. 116

## CONTINENTAL BUILDING & LOAN ASS'N v. BEAVER et al. (Civ. 411.)

(Court of Appeal, Second District, California. July 24, 1907.)

1. APPEAL—MOTION FOR DISMISSAL—NECESSITY FOR STATING GROUNDS.

That the notice of motion to dismiss an appeal did not specify appellant's failure to file an undertaking within the required time does not affect respondent's right to a dismissal on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3155.]

2. SAME—UNDERTAKING—TIME FOR FILING.

Under Code Civ. Proc. § 940, making an appeal ineffectual for any purpose unless an undertaking be filed within five days after service of the notice of appeal, the Court of Appeal acquires no jurisdiction where the undertaking is not filed within the required time, and the appeal must be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2065.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Continental Building & Loan Association against William J. Beaver and another. Defendants appeal from the judgment, and plaintiff moves to dismiss the appeal. Appeal dismissed.

C. W. Pendleton, for appellants. Frank G. Finlayson, for respondent.

SHAW, J. Respondent asks that the appeal from the judgment herein be dismissed. The ground for the motion, as stated in the notice thereof, is that the transcript of the record to be used on the appeal has not been filed, and the time for filing the same has expired. In support of the motion, a certificate of the clerk of the court rendering said judgment is presented. Among other facts disclosed by this certificate, it appears that the judgment was entered on January 24, 1907; that on the 19th day of February appellant duly served upon respondent his notice of appeal from said judgment; that on February 27, 1907, eight days after the service of said notice, appellant filed in the office of said clerk an undertaking on appeal. Section 940, Code Civ. Proc., provides that "the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal an undertaking be filed."

The notice of motion does not specify the failure to file the required undertaking within five days from service of the notice of appeal as a ground for dismissal of the appeal. This, however, is not necessary. The filing of the undertaking within the time fixed by the provision of said section 940, Code Civ. Proc., is absolutely essential to give this court jurisdiction. Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594; Hoyt v. Stark, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246. "The matter going to the jurisdiction of this court to entertain the appeal, it would seem to be immaterial in what manner comes the suggestion that the steps necessary to confer jurisdiction have not been taken." Bullock v. Taylor, 112 Cal. 147, 44 Pac. 457. When the facts appear showing want of jurisdiction, it is the duty of the court of its own motion to dismiss the attempted appeal. As the undertaking was not filed within five days after service of the notice of appeal, this court has no jurisdiction to entertain the same, and the appeal is therefore dismissed.

This conclusion renders it unnecessary to consider other points made in presenting the motion.

We concur: ALLEN, P. J.; TAGGART, J.

## CONTINENTAL BUILDING & LOAN ASS'N v. BEAVER. (Civ. 412.)

(Court of Appeal, Second District, California. July 24, 1907.)

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Continental Building & Loan Association against William J. Beaver. Defendant appeals from the judgment, and plaintiff moves to dismiss the appeal. Appeal dismissed.

C. W. Pendleton, for appellant. Frank G. Finlayson, for respondent.

SHAW, J. Motion to dismiss an appeal from judgment.

The facts in this case are identical with those involved in Continental Building & Loan Association v. William J. Beaver et al. (Civ. 411) 91 Pac. 666, the appeal in which was this day dismissed for failure to file the required undertaking within five days after service of notice of appeal.

Upon the authority of that case, the appeal herein is likewise dismissed.

We concur: ALLEN, P. J.; TAGGART, J.

6 Cal. App. 152

## STEWART et al. v. SMITH et al. (Civ. 345.)

(Court of Appeal, Third District, California. July 30, 1907. Rehearing Denied by Supreme Court Sept. 26, 1907.)

1. Specific Performance—Contract to Will—Requisites.

Under the express provisions of Civ. Code, § 3391, in order to entitle a party to specific performance of a contract to dispose of property by will, the contract must be based on an adequate consideration, must be just and reasonable as to the party against whom it is sought to be enforced, and certain and definite, not within the statute of frauds, free from fraud or undue influence committed by the enforcing party, and its enforcement must not invoke an invasion of the rights of an innocent third party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 223.]

2. Same — Parties Complainant — Misjoinder.

Where complainants were all interested in a suit to compel specific performance of a contract to dispose of real and personal property by will, there was no misjoinder of parties complainant, because they were not all interested to the same extent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 345.]

3. Same—Parties Defendant—Executor.

Where an executor had no interest in the distribution of an estate, he was not a necessary party to a suit between all the persons claiming an interest in the estate to enforce specific performance of a contract with testatrix for the disposition of her property by will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 347.]

4. Wills—Contract to Devise—Validity.

A contract by which testatrix agreed to convey property in a particular manner by will was not invalid as a contract providing for the sale of property, some of which had neither actual nor potential existence at the time, within Civ. Code, § 1722, providing that the subject of a sale must be property, the title to which can be immediately transferred.

5. Frauds, Statute of—Contract to Will—Performance Within Year.

A contract by which testatrix, in consideration of a transfer of certain property to her by her children, agreed to make a will, leaving at her death the whole of the property or residue thereof and all increase and accumulations to her children, share and share alike, and to execute a will so providing was not within the statute of frauds as an agreement not to be performed within a year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 81.]

6. Same—Agreement for the Sale of Real Property—Demurrer.

A bill for specific performance of an alleged contract to make a will devising and bequeathing all testatrix's property, of which she should die seised, alleging that at the time of her death she left an estate of the value of $32,547.23, was not demurrable, in that the agreement orally provided for the sale of real property within the statute of frauds (Code Civ. Proc. § 1973; Civ. Code, § 1624); it not appearing that such estate consisted of realty.

7. SPECIFIC PERFORMANCE—EXECUTED CONTRACT—RIGHT TO PLEAD STATUTE.

Testatrix's husband died seised of real and personal property of the value of $17,000, with debts not exceeding $1,000, all of which estate consisted of community property. Testatrix was appointed administratrix, and contracted with complainants, her children, that, if they would convey their interests as heirs at law in their father's estate to her, testatrix would enjoy the property for her support for life, and would invest the surplus income, and bequeath the residue and all increase and accumulations to her children at her death, in equal shares by will. *Held* that, complainants having executed a conveyance of their interests pursuant to such agreement, testatrix's contract to will became executed so far as complainants were concerned, so that the statute of frauds was no defense to a suit by them for specific performance.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Suit by John H. Stewart and others against Mary S. Smith and others, to compel specific performance of a contract to make a testamentary disposition of property. From a decree in favor of complainants, defendants appeal. Affirmed.

W. H. Carlin and M. E. Sanborn, for appellants. S. J. Stabler and A. C. McLaughlin, for respondents.

BURNETT, J. The action is in equity to compel specific performance of a contract to make a certain testamentary disposition of property. Two of the plaintiffs are children, and the other two are daughters, of a deceased child of James S. Stewart and Annie Stewart, decedents. All the other heirs, legatees, and devisees of said Annie Stewart, deceased, are made defendants. It appears from the complaint that said James S. Stewart, at the time of his death in 1870, left property, real and personal, of the value of $17,000. All claims against the estate did not exceed the sum of $1,000. In the same year Annie Stewart, widow of said James S. Stewart, was appointed administratrix of his estate, and remained such until the administration of the estate was closed, April 8, 1893. All the estate of said James S. Stewart was community property. Some time in the year 1873 the said Annie Stewart "for her better maintenance and support during her life orally solicited and requested her said sons, John H. Stewart and Charles E. Stewart and her said daughter Elizabeth Reilay (née Stewart), deceased, mother of said plaintiffs, Luella M. Reilay and Mabel S. Kellogg (née Reilay), to deed, sell, assign, and deliver to her all their and each of their shares and interests as heirs at law of their said father of, in, and to their said father's estate, upon the oral promise, contract, and agreement, in consideration therefor, that she, the said Annie Stewart, would use and enjoy the said property for her support and maintenance during her life, and would manage said property and invest the income, rents, issues, and profits thereof, and at her death she would leave the whole of said property, or the residue thereof, and all increase and accumulations thereof, to her said 10 children, share and share alike, and would make, execute, and leave in existence at her death a last will and testament, wherein and by the terms of which she would give, demise, and bequeath to her said 10 children, share and share alike, or to the heirs of any deceased child by right of representation all the property of which she might die seised or possessed." The said John H. Stewart and Charles E. Stewart and Elizabeth Reilay accepted said proposition and agreed to do as requested by their mother upon the terms proposed by her. Thereafter, on or about November 22, 1873, in compliance with their part of the agreement, they transferred to their said mother all their interest in the personal estate of their father, and in conjunction with the other children, and in pursuance of said agreement, they executed and delivered to their said mother a conveyance of their interest in the real property of their father, situated in Sutter county, Cal., and on or about June 5, 1883, in further compliance with said contract, and in full consummation thereof, and in conjunction with their mother, and with all of the other heirs of the said James S. Stewart, they made, executed, and delivered for a valuable consideration to one Charles P. Winzlau all their and each of their interests in and to all the real property of the estate of said James S. Stewart, situate in the state of Ohio, and all the corresponding proceeds of said sale were given to and accepted by said Annie Stewart in pursuance of said contract and agreement. The said Annie Stewart received the income and profits of said estate and applied a portion of the same and the proceeds of the sales of personal property to her support, and invested the residue in real property in the said county of Sutter. On April 8, 1893, the entire residue of the estate of the said James Stewart was distributed to the said Annie Stewart and was of the value of about $30,000. Said Annie Stewart died testate August 6, 1904, and left estate in said Sutter county of the value of about $32,000. Her will was admitted to probate, and letters of administration were issued to defendant William W. Stewart. Said last will and testament provides that neither of the plaintiffs should receive anything by virtue of said will, and the complaint alleges "that said Annie Stewart, deceased, thereby ignored, repudiated, and violated said contract and agreement so entered into as aforesaid and so as aforesaid fully performed on the part of said John H. Stewart, Charles E. Stewart, and Elizabeth Reilay." A demurrer was interposed and overruled, and, defendants declining to answer, judgment was entered as prayed for, establishing the agreement and decreeing distribution to plaintiffs of the proportion of the residue of the estate to which each is entitled under the terms of the said contract. From this judgment the appeal is taken.

That contracts providing for disposition of property by will are enforceable is clearly established by the authorities. There are, however, certain important conditions and limitations, hereafter to be noticed, under which a court of equity will decree a specific performance of such contracts. In the case of Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 776, it is said by the Court of Chancery of New Jersey that: "The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose as well by will as by a conveyance to be made at some specific future period, or upon the happening of some future event. It may be unwise for a man in this way to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction." The reports contain many cases abounding in interesting and instructive observations upon this subject, but we content ourselves with merely a citation of some of them: Kofka v Rosicky, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep 685; Lothrop v. Marble, 12 S. D. 511, 81 N. W. 885, 76 Am. St. Rep. 626; Svanburg v. Fosseen, 75 Minn 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490; Nowack v. Berger, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; Korminsky v. Korminsky, 21 N. Y. Supp. 611, 2 Misc. Rep. 138; Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; Whiton v. Whiton, 53 N. E. 722, 179 Ill. 32; Bush v. Whitaker, 91 N. Y. Supp. 616, 45 Misc. Rep. 74; Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008; Schaadt v. Mutual Life Ins. Co., 2 Cal. App. 715, 84 Pac. 249. The same general principles of equity jurisdiction apply to these cases, as stated in Johnson v. Hubbell, supra, that must be present in the enforcement of contracts to convey during the lifetime of the parties. In other words: There must be an adequate consideration; the contract must be just and reasonable as to the party against whom it is sought to be enforced; the other party must not have practiced fraud nor undue influence in securing the contract; it must be certain and definite, not within the statute of frauds; and its enforcement must not involve an invasion of the legal or equitable rights of an innocent third party. Section 3391, Civ. Code; Pomeroy's Equity Juris. § 1405; Davison v. Davison, 13 N. J. Eq. 252; Shakespeare v. Markham, 10 Hun (N. Y.) 322; Rivers v. Rivers, 3 Desaus. (S. C.) 190, 4 Am. Dec. 609; Stanton v. Miller, 58 N. Y. 192; McClure v. McClure, 1 Pa. 378; Wright v. Wright, 31 Mich. 380.

It is contended by appellants that the contract before us does not satisfy the requirement of these principles of equity, and, besides, that the complaint is objectionable in other respects, and to the consideration of the specific objections made by appellants and raised by their demurrer we direct our attention.

1. There is no misjoinder of parties plaintiff. The contention of appellants in this respect can be answered no better than by a quotation from the case of Whitehead v. Sweet, 126 Cal. 70, 58 Pac. 376, where the Supreme Court, speaking through Commissioner Cooper, says: "A court of equity abhors a multiplicity of suits. No fixed rule can be laid down by which to determine whether a given bill in equity is or is not subject to the objection of multifariousness. * * * A bill in equity is said to be multifarious when distinct and independent matters are joined therein. If the subject-matter in the main relates to one transaction around which the others cluster, and each party has an interest in some matters in the suit, and they are connected, even though all the parties do not have an interest in all the matters in the suit, the bill is not multifarious"—citing Story's Eq. Pleading §§ 271, 272a, Wilson v Castro 31 Cal. 429 See, also Lanigan v Neely (Cal. App) 89 Pac. 441. The purpose of the suit here is to enforce a contract made with decedent in which all the plaintiffs are directly interested. The subject-matter relates to that one transaction, and it is of no consequence that the plaintiffs are not all interested therein to the same extent. It would be a singular rule that would require these plaintiffs to bring separate actions to establish the same contract. If they had done so, defendants would undoubtedly have a right to complain of the inconvenience and unnecessary expense occasioned thereby. The cases cited by appellants, as we view the matter are not in point, and we deem it unnecessary to review them.

2. The executor is not a necessary party to the action. All the devisees, legatees, and persons claiming an interest in the estate are made parties plaintiff and defendant, and, as the executor has no interest as such in the distribution of the estate, he is properly excluded from a contest over the right to a distribution of the whole or a part of it. Estate of Wright, 49 Cal. 550; Jones v. Lamont, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251; Estate of Healy, 137 Cal. 474, 70 Pac. 455.

3 Attention is directed by appellants to several particulars wherein they claim the complaint is open to the objection that it does not state sufficient facts to constitute a cause of action. It is contended that, if

the contract of Annie Stewart is to be treated as a sale of her property to plaintiffs, it must be held to be void for the reason that it included property having neither an actual nor potential existence at the time. Civ. Code, § 1722. But it is too plain for argument that the contract does not purport to constitute a sale by her, but an agreement to convey at a future period. It is manifest that said section has no application. Again, it is urged that the contract is void for two reasons: "(1) By its terms the agreement was not to be performed within a year from the making thereof; and (2) it was an agreement for the sale of real property. Code Civ. Proc. § 1973; Civ. Code, § 1624; Story's Eq. Juris. § 752." In response to the former specification, it is sufficient to say that the contract in question is not "an agreement that by its terms is not to be performed within a year from the making thereof." It is said in McKeany v. Black, 117 Cal. 592, 49 Pac. 710: "If the contract by its terms is not to be performed within a year, it is void; but, if it may by its terms be performed within a year, it is not, even though it may not be performed within that time." To the same effect are Dougherty v. Rosenberg, 62 Cal. 37, and Blanding v. Sargent, 33 N. H. 239, 66 Am. Dec. 721. Again, the agreement on the part of said Annie Stewart was not to give, devise, and bequeath all the real property, but "all the property of which she might die seised or possessed." The complaint does not show the character of the property left by her, but the allegation is she "was at the time of her death a resident of said Sutter county and left estate therein of the value of $32,547.23." It does not appear, therefore, affirmatively, that the second specification of appellant to which we have above referred is in point. Appellants did not demur to the complaint on the ground of uncertainty as to the character of the property of the said Annie Stewart, and we cannot assume that it was not personal property. But the complete answer to the whole proposition is that the contract was entirely executed on the part of the three children. Relying, as they were justified in doing, upon the solemn promise of their mother to make the said testamentary disposition, they transferred to her all their interest in the father's estate, both personal and real, and the said mother used, enjoyed, and treated as her own said property, and upon well-known principles of equity defendants are estopped from assailing the contract upon the grounds we have been considering. But it is said in this connection that plaintiffs' remedy is at law, and not in equity. Certain cases are cited in support of this position which we shall consider briefly. In doing so the suggestion naturally arises that it is not surprising that there is some apparent conflict in the authorities in view of the fact that the rules of equity are somewhat flexible and in this class of cases considerable latitude is allowed to the discretion of the individual chancellor.

In Windsor v. Miner, 124 Cal. 492, 57 Pac. 386, specific performance was denied because the complaint did not state facts from which the court could determine whether the consideration was adequate, and the contract as to the defendant just and reasonable. The scope of Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548, is seen in the following quotation from the syllabus: "Under the settled rule of equity, specific performance cannot be decreed unless it affirmatively appears that the contract is fair, just, and equal in all its parts, and reasonable and equal in its operation; and if it is in any respect unfair or oppressive, the plaintiff will be left to his remedy at law." It was justly held in that case that the contract was unreasonable and unjust. Stiles v. Cain, 134 Cal. 170, 66 Pac. 231, is to the same effect. Specific performance was denied in Russell v. Agar, 121 Cal. 396, 53 Pac. 926, 66 Am. St. Rep. 35, for the reason stated by the court that plaintiff was suing "to enforce a contract whereby he was to be paid some undetermined and undeterminable sum of money." The contract was held to be too uncertain to be enforced in equity or even to be the basis for an action at law for damages. In Re Hayden's Estate, 81 Pac. 668, 1 Cal. App. 75, decided by this court, the contract was sought to be enforced against an incompetent. In the opinion written by Mr Justice McLaughlin, it is very properly said that: "Courts will be more strict in examining into the nature and circumstances of such agreements than any others and would require very satisfactory proofs of the fairness and justness of the transaction." It is pointed out in the course of the opinion that the contract was so lacking in the elements of certainty and fairness as not to commend itself to a court of equity. The same contract was under review in the case of Hayden v. Collins, 81 Pac. 1120, 1 Cal. App. 259, and a sufficient reason for a denial of specific performance is found in the following language: "A thorough analysis and study of the evidence convinces us that nothing was said or done to indicate an agreement. There was no meeting of minds on any definite proposition made by any of the parties. Nothing is indicated more than that Mrs. Hayden at one time probably intended to remember appellant in her will or 'do something for him.'" The decision in Henning v. Miller, 21 N. Y. Supp. 831, 66 Hun, 588, a case at law, really rests upon the doctrine that parol evidence is not admissible to vary the terms of a written instrument. Some unnecessary language was used apparently in line with appellant's contention here, but it must be limited to the facts of that particular case.

But appellants admit that part performance may take a case out of the statute of frauds, but claim that the facts here are insufficient to meet the requirement of the law in that regard. We proceed to notice some of the authorities upon which they rely to support this contention. Judge Story, in his Equity Jurisprudence (section 261), states the rule as follows: "But a more general ground, and that which ought to be the governing rule in cases of this sort, is that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him, unless the agreement is fully performed." The authorities all agree as to the rule, although it is expressed in varying phraseology. For instance, Professor Pomeroy, in section 1409 of his work on Equity Jurisprudence, says: "The ground upon which the remedy in such cases rests is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of partial performance, to interpose the statute as a bar to the plaintiff's remedial right. * * * The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements, and these two combined." Plaintiffs have brought themselves clearly within the rule as thus announced. If it would not be a fraud upon them to withhold specific performance, then we mistake the meaning of the expression. They have not entered into the actual possession of the real property and made valuable improvements upon it; but, relying on the promise of the mother, they surrendered to her the possession and deprived themselves of the use of the property and the opportunity and means to make valuable improvements thereon. In an action to enforce specific performance of such a contract, the surrender of possession of real property by one party to the other in reliance upon the latter's promise must be considered, in contemplation of equity, a factor as persuasive as though the former had acquired possession by virtue of said contract.

Of the cases cited by appellants in support of their contention, in the following specific performance was decreed: Nowack v. Berger, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; Quinn v. Quinn, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875; Svanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490; Lothrop v. Marble, 12 S. D. 511, 81 N. W. 885, 76 Am. St. Rep. 626; and Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685. In Dicken v. McKinley, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471, it was held that the act of statutory adoption is not sufficient to take the case out of the statute of frauds. In Shahan v. Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517, specific performance was denied because the acts relied upon were not necessarily referable to the contract, but might have been prompted merely by benevolence and affection. Grant v. Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379, is rather in line with the contention of appellants; but since plaintiff had been clothed, maintained, educated, and treated as a daughter by the Grants, it could be held that she had received full consideration for the services rendered by her. The decisive factor in Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, was the subsequent marriage of McNally. Hence it was held that the enforcement of the contract would wrong an innocent third party. Forrester v. Flores, 64 Cal. 24, 28 Pac. 107, and Salfield v. Sutter County, 94 Cal. 546, 29 Pac. 1105, are based upon the familiar doctrine that the payment of money alone is not sufficient to justify specific performance. Flood v. Templeton, 148 Cal. 374, 83 Pac. 148, was held to be not a case for specific performance, for the reason that there was no showing as to the value of the land at the time of the contract, or that plaintiff suffered any detriment, or that the promissor gained any advantage by said contract, and also, since plaintiff forebore to press a fixed monetary demand an action at law was the proper remedy.

In most of the cases cited where specific performance was decreed, personal services were the basis for the action, but in some of them the conveyance of property was the consideration. There is no difference, however, in principle, if the elements of equitable cognizance are present. In the case at bar, assuming, as we must, that all the facts alleged in the complaint are true, only one conclusion can be reached in consonance with the principles of equity and justice and in harmony with the best considered cases. No case cited appeals more strongly than this one to the conscience of the chancellor. There is no uncertainty as to the intention of the parties, and as to Mrs. Stewart the contract was eminently fair, just and reasonable. She received property more than 30 years ago from each of the children, of the value of nearly $1,000, upon the promise that she would leave to the promisee an indefinite amount—it might be much less than she received, and at some uncertain period—as it developed, more than 30 years thereafter. As a cold business proposition, no one would be so liberal as were the children. They deprived themselves of valuable property at a time when they probably could have used it to great advantage and profit for an uncertain amount that they might never live to enjoy. In fact, the mother did survive one of them. The circumstances of the transaction reveal clearly the adequacy of the consideration and cannot be aided by any comment in which we might indulge.

Again, the mother received real property as a part of the consideration, and the peculiar value of such property is a decisive element in actions for specific performance. If the children had parted simply with personal property, under the decisions it might be that application would have to be made to the law side of the court; but here no such contention can be maintained. If the plaintiffs did not present a case for specific performance, then it is idle to assert that it is ever proper to decree specific performance of an oral agreement to devise property to a particular individual. The decision of the court below upon the admitted facts was just and equitable, and a contrary view is intolerable in contemplation of fair dealing and good conscience.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

6 Cal. App. 139

## EWBANK v. MIKEL. (Civ. 338.)

(Court of Appeal, Third District, California. July 30, 1907.)

1. PUBLIC LANDS—CONTEST—ACTION—LIMITATION.

Under Pol. Code, § 3415, providing that, after an order is made by the surveyor general referring to the court a contest concerning the purchase of public lands, an action may be brought to determine the contest, and that the production of a certified copy of the entry made by the surveyor gives the court complete jurisdiction, and section 3417, providing that, unless the contestant commences his action within 60 days after the order of reference is made, his rights in the premises and under his application to purchase cease, the limitation begins to run from the making and entry of the order, and not from the time contestant is notified thereof, or from the date of the certified copy of the entry.

2. SAME — ATTACKING PATENT — SUIT BY ANOTHER THAN THE STATE.

A contestant of the right to purchase public lands having failed to bring his action to determine the contest within 60 days of the making of an order by the surveyor general, referring the contest to the court, so that under Pol. Code, § 3417, his rights in the premises and under his application to purchase had ceased, and he not having taken any steps to acquire any further or new right, and a patent having been issued to the contestee, he is not in privity with the state by reason alone of his occupation of the land as a settler, with the intention of purchasing it, so as to authorize his maintaining an action attacking the patent, on the ground that it was obtained by fraud, and for a decree, and that the patentee holds the title in trust for plaintiff.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Thomas Ewbank against J. A. Mikel. Judgment for defendant. Plaintiff appeals. Affirmed.

Robert W. Miller, for appellant. H. P. Brown and Chas. G. Lamberson, for respondent.

CHIPMAN, P. J. Action to obtain a decree that the legal title to certain state land, evidenced by a patent from the state to the defendant, is held by defendant in trust for plaintiff. A general demurrer to the complaint was sustained without leave to amend, and plaintiff appeals from the judgment dismissing the action.

The land in question is the east half of section 33, township 21 south, range 19 east, Mount Diablo base and meridian, being land uncovered by the recession of the waters of Tulare Lake, and which thus became state lands. It is averred in the complaint that said section 35 was surveyed and sectionized and the survey made to conform to the United States surveys, and a plat of the survey, with copy of the field notes, duly filed in the office of the state surveyor general on June 7, 1899, and said land became subject to sale by virtue of the act approved March 24, 1893. St. 1893, p. 341, c. 229. On July 15, 1903, defendant filed in the office of the state surveyor general his application to purchase the whole of said section, which was approved by said surveyor general, and on November 27, 1903, a certificate of purchase of said lands was issued to defendant. It is averred that in certain essential particulars, specifically set forth, the affidavit of defendant accompanying his said application was untrue; that on June 12, 1905, said land was vacant and unoccupied, and on that day plaintiff entered into possession of the east half of said section, with the intention of settling thereon, and pursuant thereto constructed a dwelling thereon; that on said day he filed his application with the said surveyor general to purchase said land, and at the same time made protest against the issuance of further evidence of title to defendant, and made demand that the contest thereby created be referred to the superior court of Kings county for adjudication of the respective rights of the parties to purchase said east half of said section; that on June 30, 1905, the surveyor general made and entered of record an order of that date referring the contest to said court, which said order is fully set forth in the complaint; that thereafter, to wit, on July 11, 1905, the said surveyor general caused the said profert of reference to be certified and plaintiff's attorney notified thereof by letter of the same date; and that said profert was received and filed in the office of the clerk of said court on July 13, 1905. It is then averred that with intention to deceive the surveyor general into believing that "full 60 days had elapsed since the issuance of the said profert and order of reference aforesaid," defendant, on August 30, 1905, caused the county clerk of said county "to certify to the said surveyor general that, up to that date, no action had been commenced in the said superior court" by plaintiff herein, in the matter of said conflicting claims, which said certificate defendant telegraphed to said surveyor general and demanded that a patent issue to defendant; that thereafter the said surveyor general issued to said defendant a patent for said land; that resting in the belief that he had until September 10, 1905, or 60 days after July 11, 1905, in which to commence his action in said court, plaintiff, on September 6, 1905, commenced said action. There is no allegation of intentional wrongdoing on the part of the surveyor general in the issuing said patent, but only that he was deceived by said certificate of said clerk and by the records in his office into the belief that full 60 days had elapsed since said order of reference and profert were made. The present suit was commenced September 21, 1905.

Assuming the averments of the complaint to be true, as we must, it may be conceded, as contended by plaintiff, that defendant's application was and is invalid; and that, the contest having been referred to the superior court for determination, the surveyor general was without authority to issue a patent, until the final judgment of the court had been duly certified to him. It must also be conceded that equity will control a patent in the hands of one who has procured its issue to him in fraud of the rights of the rightful owner. It was so held in McFaul v. Pfankuch, 98 Cal. 404, 33 Pac. 397, and Mery v. Brodt, 121 Cal. 338, 53 Pac. 818. Thus much conceded, still the judgment on the demurrer must be affirmed. Section 3417 of the Political Code is as follows: "Unless the party contestant commences his action within sixty days after the order of reference is made, his rights in the premises and under his application cease." The contest is certified to the court when the order of the surveyor general, as register of the land office, is made and entered in the proper record book. The 60 days mentioned in the statute begin to run when such order is made and entered, and the contestant may at once commence his action. The certified copy of the entry of the order may not be furnished until the trial, as it is but evidentiary of the fact that the order of reference was made. Sherman v. Wright, 133 Cal. 539, 65 Pac. 1096, where it was said: "Hence it is plain that the order of reference and the entry thereof constitute the act of certifying the contest to the district court." The contention of appellant that the 60 days began to run from the date of the certified copy of the order of reference sent to plaintiff's attorney finds no support in any proper construction of the statute or in the decisions of our courts. Plaintiff instituted the contest and was bound to take notice of the entry of the order of reference in the surveyor general's office and govern himself accordingly. Plaintiff is in error in his contention that it was the duty of the surveyor general to notify plaintiff of the order of reference, and that until he did so the time prescribed by the statute did not begin to run. It is true that section 3415 provides that complete jurisdiction of the court attaches upon the filing of the copy of the certificate of reference with the clerk, but jurisdiction may also attach by the filing of the complaint before such filing of the certificate. Section 3415 cannot be held to modify or change in any way the plain provisions of section 3417. The running of time under the latter section, as a statute of limitations, in no wise depends upon the jurisdiction of the court.

We are next to consider the effect upon plaintiff's rights through his failure to commence his action in time. This is very clearly pointed out in Greenwade v. De Camp, 72 Cal. 448, 14 Pac. 177: "The effect was to work a forfeiture of all rights of plaintiff, both in the application and in the premises." He could have filed another application, and thus have acquired a right (Id.), but he could not, upon an application thus forfeited, successfully pursue his rights under the action commenced by him after the statute had run against his right to commence the action.

Conceding that the averments of defendant's fraud are sufficient in law, it was still incumbent upon plaintiff to connect himself with the paramount source of title to entitle him to bring the action. Defendant's patent may be invalid by reason of the facts averred in the complaint, and yet this fact would be of no avail to plaintiff as a stranger to the title. Mery v. Brodt, 121 Cal. 332, 53 Pac. 818. There must be a privity of title between plaintiff and the state. He must possess some right, title, interest, or claim in or to the lands acquired before the final transmission of title and which is recognized by the laws of the state as valid. Robinson v. Forrest, 29 Cal. 320. In Plummer v. Brown, 70 Cal. 546, 12 Pac. 465, the court said: "To entitle the alleged owner, however, to equitable relief, he must show that he occupies such status as entitles him to control the legal title." But we have seen (Greenwade v. De Camp, supra) that plaintiff forfeited all right to the land and to his application by his failure to commence his action in time, and it is not shown that he took any steps to acquire any further or any new right. He has therefore failed to state a cause of action.

Appellant contends that he is in privity with the state by reason alone of his occupation of the land as a settler, with the intention, as he alleges, of purchasing it, citing Perri v. Beaumont, 91 Cal. 30, 27 Pac. 534; also, Hinckley v. Fowler, 43 Cal. 64. In the case of Perri v. Beaumont, supra, plaintiff by his complaint showed that he was an actual settler upon the land, having made valuable improvements thereon, and being desirous of purchasing the premises, and that he possessed all the requisite qualifications to purchase at the time he filed his application; but he failed to show that the land was surveyed at the date of his application to purchase. He also showed that defendant's application and certificate of purchase were invalid, and that he had no right to a patent. The trial court sustained a general demurrer to the complaint, and, plaintiff failing to amend his complaint, gave judgment for defendant. Upon appeal the court held that plaintiff had the right to institute the contest, and though not himself entitled to judgment, as he failed to allege that the land was surveyed, he had sufficient interest to entitle him to prevent defendant from obtaining a patent; that by its judgment the trial court placed defendant in position to obtain a patent which would have been conclusive against plaintiff; that the demurrer was improperly sustained; and that plaintiff should have leave to allege by amendment that the land was surveyed when he made his application. If plaintiff here had commenced his action in time, thus preserving his right under his application, the case of Perri v. Beaumont would apply. But suffering a forfeiture of all his rights, by his own act, he ceased to be in privity with the state. His status was altogether different from that of Perri in Perri v. Beaumont, who was a qualified purchaser, and who was in court upon a complaint insufficient in one respect as to his own rights, but sufficient to compel an adjudication of defendant's rights. The right to set aside the patent rests alone with the state. People v. Stratton, 25 Cal. 242; Carder v. Baxter, 28 Cal. 99; Peabody v. Prince, 78 Cal. 511, 21 Pac. 123.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

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6 Cal. App. 93

## ALBERGER v. KINGSBURY, Surveyor General. (Civ. 356.)

(Court of Appeal, First District, California. July 10, 1907. Rehearing Denied by Supreme Court Sept. 5, 1907.)

1. PUBLIC LANDS—GRANTS TO STATE FOR SCHOOLS—LANDS IN RESERVATION—LIEU LANDS.

   Land is within a reservation, within Rev. St. U. S. § 2275 [U. S. Comp. St. 1901, p. 1381], appropriating and granting to and authorizing the state to select other lands where the school sections are within any reservation, provided, however, that the state shall not be prevented from awaiting the extinguishment of the reservation, where it has been withdrawn by the Secretary of the Interior "pending determination as to the advisability of including the same within a forest reservation."

2. MANDAMUS—TO SURVEYOR GENERAL—COMMUNICATING WITH UNITED STATES LAND OFFICE.

   The surveyor general being, under Pol. Code, § 3398, the general agent of the state for location in the United States land office of the unsold portions of the land granted to the state for public schools and lands in lieu thereof, and it being made his ministerial duty by such section, when application for purchase of any of said lands is made to him, to communicate with such land office and ask that the land described in the application be accepted in part satisfaction of the grant under which it is sought to be located, mandamus will lie to compel him to receive an application for purchase of such lands and make such communication to and request of such land office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 184.]

Application by William C. Alberger for writ of mandamus to W. S. Kingsbury, surveyor general. Writ granted.

F. D. Brandon, for petitioner. U. S. Webb, Atty. Gen., for respondent.

COOPER, P. J. This is an original application to this court for a writ of mandate to compel the defendant to receive and file the plaintiff's application to purchase from the state of California section 5 of township 26 N., range 17 E., M. D. M., being in Lassen county, state of California, and to thereupon make selection and location in the proper United States land office, on behalf of plaintiff, as lieu land, of the lands so applied for by plaintiff, and to make such selection and location in lieu of section 16, township 42 N., range 3 E., M. D. M. Plaintiff alleges in his complaint his qualifications to purchase state school land, sets out a copy of his application, and also alleges that he tendered said application to the defendant with the proper fee for filing the same; that the land described in the application has been regularly surveyed and sectionized by the United States, and the township plat, showing that said land had been so regularly surveyed and sectionized, had been more than five years on file in the proper United States land office; that said section 16, township 42 N., range 3 E., for which the lands applied for are desired to be taken as lieu lands, is unsurveyed public land of the United States.

It is stipulated that the following are the facts on which this controversy hinges, to wit: "That the question, and only question intended by the parties to be presented by this record, is whether the lands or any of the lands described in the letter dated December 12, 1904, hereinafter specifically set forth, are located within a reservation, within the meaning of the act of Congress which is known as section 2275 of the Revised Statutes [U. S. Comp. St. 1901, p. 1381]. * * * That on the 12th day of December, 1904, James Wilson, the then Secretary of Agriculture, wrote that certain letter which is and was in words and figures as follows, to wit: 'Department of Agriculture, Office of the Secretary, Washington, D. C., Dec. 12, 1904. The Honorable the Secretary of the Interior—Sir: A field examination of the following described lands in the vicinity of Mt. Hoffman in the state of California has recently been made by the Bureau of Forestry, and the region as a whole has been found to be well adapted to forest reserve purposes. The best of the timber lands are rapidly passing into private ownership through lieu selections and timber and stone entries, and, in order that title to the remaining public lands may rest with the government until further action is decided upon, I have the honor to recommend that all the vacant unappropriated public lands in the following described townships and parts thereof be temporarily withdrawn from settlement at the earliest practicable date: * * * T. 42 N., R. 3 E., the entire township, * * * all numbered from the Mt. Diablo base and meridian. Very respectfully, Your obedient servant, James Wilson, Secretary.' It is further admitted that on the 13th day of December, 1904, E. A. Hitchcock, the then Secretary of the Interior, indorsed on said letter that certain indorsement which is and was in words and figures as follows, to wit: 'J. S. P. A. M. Dept. of the Interior, Dec. 13, '04. Respectfully referred to Com. Gen. Land. The public lands in the prescribed areas are hereby temporarily withdrawn from disposition under the public land laws, and the Comr. is directed to instruct the local offices in the premises, immediately, by wire, and report action, with return of letter. E. A. Hitchcock, Secretary.' It is further admitted that on the 13th day of December, 1904, W. A. Richards, the then Commissioner of the General Land Office, wrote that certain letter which is and was in words and figures as follows, to wit: 'Department of the Interior, United States Land Office, Washington, D. C., Dec. 13, 1904. Register and Receiver, Redding, California—Gentlemen: On December 13, 1904, the Secretary of the Interior temporarily withdrew all the public lands in the below described areas from settlement, entry, sale, or other disposal, except under the mineral laws, pending determination as to the advisability of including the same within a forest reservation. The lands so withdrawn are as follows: * * * Township 42 N., range 3 E., M. D. M. Note this withdrawal upon the records of your office. Very respectfully, W. A. Richards, Commissioner.' * * * It is further stipulated and agreed that said letters and indorsements thereon are still in full force and effect, and that the same have never been altered, withdrawn, or modified. It is further stipulated and agreed that at all times mentioned in the complaint and petition of plaintiff the Commissioner of the General Land Office had adopted, and the Secretary of the Interior had approved, and that there were in full force and effect, certain regulations governing selections of indemnity school lands; that, among others, said regulations contained the following provisions and regulations: 'The cause of the loss in each case must be specifically stated. If caused by an entry based upon a settlement claim initiated prior to survey, the number of the entry must be given. If occasioned by a reservation of the land, entitling the states to indemnity, the date, name, and purpose of the reservation must be stated. If the loss occurs by reason of the fractional character of the land, it must be set forth.' "

It is said in the points and authorities that the entire case depends and turns upon the proper construction of section 2275 of the Revised Statutes. Said section, so far as material here, is as follows: "Where settlements with a view to pre-emption or homestead have been or shall hereafter be made before the survey of the land in the field, which are found to have been made on sections 16 or 36, those sections shall be subject to the claims of such settlers, and if such sections or either of them be or shall be granted, reserved or pledged for the use of schools or colleges in the state or territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said state or territory in lieu of such as may be thus taken by pre-emption or homestead settlers. *And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory where sections 16 or 36 are mineral lands, or are included within any Indian, military or other reservation, or are otherwise disposed of by the United States.*" (The italics are ours.) The question is as to whether or not the said section 16, township 42 N., range 3 E., has been included within a reservation within the meaning of the italicized clause of the above section. The said section 16 has not been included in any Indian or military reservation, but it has been kept back or reserved "pending determination as to the advisability of including the same within a forest reservation."

The words "other reservations" are evidently used in a broad sense in the statute. The word "reservation" is defined in the Standard Dictionary as "that which is reserved, kept back, withheld." The said sixteenth section, to which the state would be otherwise entitled, has been by the proper authorities of the United States—the Land Department—kept back, withheld, and reserved. It has been reserved with a view to including it in a permanent forest reserve. The state is not now entitled to it, because the United States has seen fit to reserve it for its own uses. It is no answer to this to say that the reservation may not be made permanent, and that the state may yet be entitled to the land. That might be said as to any other kind of reservation—for military purposes, for Indians, or any other purpose. A reservation is a reservation, no matter what may be the purpose, nor for how long a time the reservation may continue. The statute does not fix a time during which it shall continue, and we are not at liberty to do so. In our opinion the question as to time refers only to the time when the state desires to take the land. Can the state take the section in place now? Evidently not, because it has been reserved and withheld from sale. This view is made clear by the concluding portion of the section, which is as follows: "Provided, however, that nothing herein contained shall prevent any state or territory from awaiting the extinguishment of any such military, Indian or other reservation, and the restoration of the lands therein embraced to the public domain, and then taking the sections 16 and 36 in place therein; but nothing in this proviso shall be construed as conferring any right not now existing." The above-quoted proviso gives the state the right to await the extinguishment of any reservation which includes a sixteenth or thirty-sixth section, and then to take the section in place; but that is a matter solely for the state. It need not wait for years or forever. It may at once take lieu lands and sell them to its citizens or to the persons authorized by statute to receive them. It makes no difference to the state as to whether it sells the sixteenth and thirty-sixth sections or lands in lieu thereof, because the price is the same in either case. When the reservation exists—no matter how long it may continue—and the state is deprived of the lands in place, it immediately has the right to select and take other lands in lieu of the lands withheld from it. This right continues as long as the withdrawal or reservation continues. We know of no decision or rule of law that requires the state to try the question as to the time the United States may desire to keep the land in reserve. The view we have taken seems to us to be the view of common sense and justice. Under it the state will get no more land than it is entitled to, and the United States will be deprived of no more of its public domain than if the state had waited and taken the section in place. The statute is to be given a liberal construction, so as to do justice and promote its objects and purposes.

While there are few decisions bearing upon the question that are directly in point, there are decisions which tend to sustain the view we have taken. In a decision rendered by Secretary Smith April 13, 1895 (20 Land. Dec. Dep. Int. 327), it appeared that the state of California had made a lieu selection in lieu of an unsurveyed sixteenth section included within a withdrawal. The Commissioner of the General Land Office had rejected the selection, holding that the law granting the lieu right must be held to apply only to reservations created by an act of Congress or by proclamation of the President, and not to a mere temporary withdrawal of lands pending an investigation as to the character of the trees growing thereon. From this decision the state appealed, so that the matter came up before the Secretary squarely upon the question of law. The Secretary in his opinion held that the state might take other lands, and said: "It is not necessary that the reservation of said section 16 be of a permanent character to justify indemnity selection made by the state." In Wolsey v. Chapman, 11 Otto (U. S.) 755, 25 L. Ed. 915, a construction was given to section 8 of an act to appropriate the proceeds of the sales of public lands and to grant pre-emption rights. 5 Stat. p. 455, c. 16. The section contained the proviso "that to each of the said states which has already received grants for said purposes there is hereby granted no more than the quantity of land which shall, together with the amount such state has already received as aforesaid, make 500,000 acres; the selections in all the states to be made within their limits respectively in such a manner as the Legislature thereof shall direct, and located in parcels conformable to sectional divisions and subdivisions of not less than 320 acres in one location on public land, except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States." The Supreme Court of the United States, in discussing the clause, said: "There seems to be no good reason why the selections of the preemptioner should be restricted within narrower limits than those of the state, and we cannot believe it was the intention of Congress to give a state the power to take lands under section 8 which had actually been reserved by the United States for any purpose whatever." In Wolcott v. Des Moines Nav. Co., 5 Wall. (U. S.) 681, 18 L. Ed. 689, the question was as to whether or not certain lands, which were within the limits of a grant made while they were withdrawn under authority of the Land Department of the United States, passed by the grant to the railroad company. The granting act contained a proviso that "any and all lands heretofore reserved by competent authority should not pass by the grant," and the court held that the temporary withdrawal of them by the order of the Commissioner was such a reservation as excluded them from the grant. In Northern Pacific Railroad Company v. Musser Sauntry Land, etc., Co., 168 U. S. 604, 18 Sup. Ct. 205, 42 L. Ed. 596, the question was whether a departmental withdrawal of certain lands within the indemnity limits of a railroad grant until it should be seen if they should be needed to satisfy that grant was a reservation, and the court held that it was. In the opinion it is said: "The withdrawal by the Secretary in aid of the grant to the state of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation." The following cases have more or less bearing upon the question: Riley v. Welles, 14 Sup. Ct. 1166, 154 U. S. 578, 19 L. Ed. 648; Dubuque Co. v. Des Moines R. R. Co., 109 U. S. 329, 3 Sup. Ct. 188, 27 L. Ed. 952; Bullard v. Des Moines Co., 122 U. S. 167; Wilcox v. Jackson, 13 Pet. (U. S.) 498, 16 L. Ed. 264.

Under section 3398 of the Political Code, the surveyor general is the general agent of the state for the location in the United States land office of the unsold portions of the 500,000 acres of land granted to the state for school purposes, and the sixteenth and thirty-sixth sections granted for the use of public schools, and lands in lieu thereof. When any person desires to purchase any portion of these lands, and makes the proper affidavit as prescribed in the Code, it is the duty of the surveyor general to file such application. Section 3406 of the Political Code provides as follows: "Duty of Surveyor General on Application for Purchase. The surveyor general must, whenever application is made to him for any portion of the lands mentioned in section 3398, communicate with the United States land office, and ask that the lands described in the application be accepted in part satisfaction of the grant under which it is sought to be located." It is thus made by the section the ministerial duty of the surveyor general by reason of his office to communicate with the United States land office, and ask that the lands described in the application be accepted in part satisfaction of the said grant to the state. It is not our business to anticipate the rulings of the United States Land Department upon the question herein decided, nor as to whether or not they will receive the application and grant the lieu land in place of the said sixteenth section. We must presume that the officers of the Land Department will obey the law, and we cannot in this decision anticipate any of its rulings.

It follows from what has been said that a writ of mandate should issue, directing and commanding the defendant, as surveyor general and ex officio registrar of the state land office, and as locating agent of the state of California, to receive and file the plaintiff's application on payment of the lawful filing fee therefor, and thereupon to communicate with the United States land office, and ask that the lands described in plaintiff's application be accepted in part satisfaction of the grant under which said lands are sought to be located; and it is so ordered.

We concur: HALL, J.; KERRIGAN, J.

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## KEATING v. MORRISSEY. (Civ. 340.)

(Court of Appeal, Third District, California. July 31, 1907. On Rehearing, Aug. 29, 1907. Rehearing Denied by Supreme Court Sept. 26, 1907.)

1. Bills and Notes—Action on Note—Prima Facie Case—Burden of Proof.

Offer and receipt in evidence of a note sued on constituted prima facie proof that the note was given for a sufficient consideration, as provided by Code Civ. Proc. § 1963, subd. 21, and Civ. Code, § 1614.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1816.]

2. Same—Want of Consideration—Burden of Proof.

Where a note sued on is offered in evidence, the burden of proving want of consideration is on the defendant, as provided by Civ. Code, § 1615.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1654.]

3. Contracts—Consideration—Forbearance of Prosecution of Another for Felony.

A note executed in consideration of a promise of the payee to refrain from prosecuting another for felony is void as opposed to public morals and public policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 633.]

4. Same — Forbearance of Civil Action — Evidence.

Defendant's son, while acting as plaintiff's agent for the loaning of her money, executed a note in his own name to plaintiff for part of the money loaned, and then executed in the names of fictitious persons other notes to plaintiff for the balance. After he had absconded, plaintiff discovered the fraud, and went to defendant, who executed the note sued on for the entire amount. *Held*, that such facts were sufficient to support a finding that defendant's note was made in consideration of plaintiff's forbearance to sue the son on his own note, and was not therefore void as a contract to refrain from prosecuting the son for forgery.

On Rehearing.

5. Bills and Notes — Consideration — Presumption.

Where a note sued on is proved and offered in evidence, it raises a presumption that it is based on a sufficient consideration, in the absence of evidence to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1653.]

6. Appeal—Evidence—Review.

Where there was evidence justifying a finding that the consideration for a note sued on was plaintiff's forbearance to sue the maker's son in a civil action on certain other indebtedness, and such finding by a jury was sustained by the trial judge, it could not be set aside on appeal, because there was other evidence that the note was given to save defendant's son from prosecution for forgery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3948–3950.]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by Mary L. Keating against Mary J. Morrissey. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, she appeals. Affirmed.

Arthur L. Levinsky, for appellant. Ashley & Neumiller, for respondent.

HART, J. This is an action upon a promissory note for the sum of $5,041, with interest at the rate of 5 per cent. per annum. Said note was made and delivered by the defendant to the plaintiff in the county of San Joaquin on the 16th day of July, 1902, payable one year after date. The case was tried by jury, a verdict returned in favor of plaintiff for the sum of $5,631.33, representing the principal and interest on said note, and a judgment entered accordingly. The answer sets out with minute particularity the circumstances which, it is alleged, attended the transaction resulting in the execution of the note, the substance of all which is that said note was secured from the defendant by the plaintiff by means of threats or duress, and that therefore there was no valid consideration for the same. The defendant prosecutes this appeal from the order denying her motion for a new trial, upon a bill of exceptions.

The defense relied upon for the defeat of the action, as must be inferred from the allegations of the answer, as we have briefly stated them, was that the note which forms the basis of the suit was without sufficient or any consideration. We will proceed to an examination of the record for the purpose of determining this question. The undisputed facts of the case, as developed by the proofs, are: Several years prior to the execution of the note which is the subject of this suit, the plaintiff made Walter Morrissey, a son of the defendant, her agent, with full power to negotiate loans of money for her. While so acting in that capacity for plaintiff, said Morrissey loaned, or pretended to have loaned, certain sums of money to different parties, taking in the name of plaintiff what purported to be their promissory notes therefor. These notes, 14 in number, were delivered to the plaintiff by Morrissey. All of these notes, with the exception of one which was made so as to mature one year after the date of its execution, were made payable "one day after date," and represented amounts varying from $150 to $800; the sum total of the money so claimed to have been loaned being $5,041. Some of these notes were made in the year 1899, others in the year 1900, and one in the year 1901. Three of these notes bear upon the backs thereof an indorsement, signed by the plaintiff, acknowledging the receipt of the interest which had accrued thereon. The plaintiff did not, at the several times at which she received said notes from Morrissey, either personally or by reputation, know persons bearing the names represented by the signatures subscribed to the notes. A short time before the making and delivery of the note by the defendant to the plaintiff, Morrissey, without previously apprising the plaintiff or any of his other acquaintances of his intention to do so, departed from San Joaquin county, or at least could not be found at his home or in that county. The plaintiff was desirous of securing the payment of the interest which was due upon the notes, and, not being able to find her agent, and, as stated, not knowing anything of or about the parties who were represented to have made the notes, proceeded to make an investigation into the matter. She sought the aid and advice of a Mr. Crane, of Stockton, and, as he was not acquainted with any persons of the names attached to the notes as representing the makers thereof, the great register and the tax roll of the county were carefully examined, with the result that neither contained the names attached to the notes. Thereupon the plaintiff called at the residence of the defendant and obtained from her the note, to secure the payment of which this action was instituted.

At the trial, the plaintiff offered, and the same was received in evidence, the note in dispute, and then rested her case. This constituted, of course, prima facie proof of all that the note purported to be. The presumption is that the note was given for a sufficient consideration. Section 1963, subd. 21, Code Civ. Proc.; section 1614, Civ. Code. The burden of proving want of consideration sufficient to support the note was upon the defendant. Section 1615, Civ. Code. The defendant, having been sworn as a witness, gave testimony directed to the support of the allegations of her answer, stating that on both occasions of the visit of the plaintiff at her residence the latter declared that she had investigated the great register and tax roll of the county, and that neither contained names corresponding with those attached to the notes delivered to her by Walter Morrissey; that she submitted to the defendant for inspection the 14 notes, said they were forgeries, and Walter was guilty of forgery, and, unless she was reimbursed or indemnified against the loss which it was probable she would sustain through the criminal acts of said Walter, she would cause him to be arrested and prosecuted for a felony and punished therefor by imprisonment in the state penitentiary. The defendant further testified that when the conversations occurred she was and had been for some time prior thereto in ill health, and, keenly realizing the humiliation and chagrin which the disgrace occasioned by the prosecution of her son upon a felony charge would entail upon herself and her family, and influenced by no other motive or consideration, readily agreed, on the occasion of the first interview between plaintiff and herself, to adjust the matter. On the following day. so defendant testified, the plaintiff returned to the residence of the former, and, presenting to her a printed blank form of a promissory note, requested her to fill it out and sign it, at the same time repeating her threat to prosecute Walter unless the note was given by defendant. The defendant thereupon filled out the note for the sum of $5,041, with interest at the rate of 5 per cent., and attached her signature thereto. Upon the suggestion of the plaintiff, the note was executed for the sum of $5,041, although the interest due on the 14 notes turned over to plaintiff by Walter Morrissey amounted to the sum of $600. Plaintiff waived her right to said interest, saying to the defendant that she would be satisfied with a note for the principal sum so obtained from her by Walter. A majority of these 14 notes called for interest at the rate of 8 per cent. per annum; the remainder provided for interest at the rate of 9 and 10 per cent. One of the 14 notes, so delivered to plaintiff by said Walter, purported to have been executed by "W. A. Morrissey" and one "Geo. L. Brown," and the defendant, while under cross-examination as a witness, admitted that her son's name was "W. A. Morrissey," and that the signature to the note of which we are speaking appeared to be in the handwriting of her son. The defendant's version of the transaction was corroborated to some extent by her daughter, who testified that, being in a room adjoining the one in which occurred the conversation between the parties on the day upon which the note was made, she overheard the plaintiff say "that, if a paper was not signed, she would have my brother Walter arrested." At the conclusion of the testimony thus given on behalf of the defendant, the defense rested.

The plaintiff was sworn as a witness in rebuttal, and not only denied making the threats to which the defendant and her daughter testified or using any language from which it might be inferred that she threatened to prosecute Walter for or even accused him of committing forgery, but also gave, in full and in detail, what she claimed to have been said by both herself and the defendant during the course of the only conversations held between the parties involving the transaction resulting in the execution of the note. She was exhaustively cross-examined, but nothing was thus brought out showing affirmatively or otherwise that there was not a valid consideration for the note. In other words, there was nothing stated by her as a witness which tended affirmatively to overcome the presumption of a consideration. Among other things, she declared that the defendant, in the first conversation, said that she had previously made efforts to secure for Walter the necessary money with which to reimburse the plaintiff, thus showing, at least, that the defendant knew of the financial transactions between her son and the plaintiff, and that she had before the conversations formed an intention to aid Walter in discharging his obligation to plaintiff. This part of the conversation was not disputed.

It is only elementary to say that the jury, or court trying an issue of fact, as the exclusive judge of the weight of all evidence submitted upon such issue and of the credibility of the witnesses, has the right to discredit the witnesses or disregard altogether evidence offered in support of a material issue in the case. And in the case at bar it was within the exclusive province of the jury to declare whether the evidence offered to overcome the presumption of consideration for the note was of sufficient strength to do so or not. Having determined that it was not, the verdict so returned is, as to the facts, unimpeachable, so far as this court is concerned. A court or jury is not bound to believe an interested witness as against a presumption, if the latter satisfies its mind. Code Civ. Proc. § 2061, subd. 2; Adams v. Hopkins, 144 Cal. 36, 77 Pac. 712; People v. Milner, 122 Cal. 179, 54 Pac. 833. In the last-mentioned case, the court, through Mr. Justice Henshaw, thus states the rule: "By section 2061, subd. 2, of the Code of Civil Procedure, jurors are to be instructed 'that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds.' In this is a distinct recognition of the facts: (1) That a presumption is evidence; and (2) that it is evidence which may outweigh the positive testimony of witnesses against it. It has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of proof of the facts, and that, when the fact is proven contrary to the presumption, no conflict arises, but the presumption is simply overcome and dispelled, citing Savings, etc., Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922. This is true. Against a proved fact, or a fact admitted, a disputable presumption has no weight; but, where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven, and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption."

It is, of course, at once to be conceded that a note executed in consideration of a promise to refrain from prosecuting a person for a felony would be absolutely void, for such a contract would be opposed to public morals, as well as public policy. In fact, such a consideration in this case, if a forgery had been committed by Walter, would itself constitute or involve the commission of a crime. But, as we have indicated, the jury found against the contention of the defendant as to the circumstances under which the note was given, and we are bound by that finding. It is also to be admitted that, if there is shown by the evidence, either by presumptive or positive proof, any valid consideration whatever for the note—if for instance, the note was signed upon an agreement or promise upon the part of the payee that she would refrain from instituting suit on the one note of the fourteen bearing the signature of Walter Morrissey—there would then be in law a sufficient consideration for the support of the note, for "the law will not attempt to measure the amount or weigh the quantum of the consideration." Whelan v. Swain, 132 Cal. 391, 64 Pac. 560; Pillans v. Mierop, Lang. S. C. L. Cont., p. 177. We think the evidence, both circumstantial and direct, fairly warrants the inference that Mrs. Morrissey, in executing the note, was influenced by the consideration that, for so doing, the plaintiff would forbear bringing a civil action against her son for the recovery of the money due plaintiff from him. If the facts of the transactions between plaintiff and Walter were such as the record seems to indicate them to have been, it is just as logical to infer that Mrs. Morrissey was almost as much in dread of the consequences of a civil as a criminal action, for it is only a response to the natural sentiment and love of a mother that she should spare no efforts to save her son from the disgrace and loss of confidence of the public generally which would follow the exposure through a lawsuit of bad faith and dishonesty in him in his business dealings with another party. Besides, the desire to save herself and family and family name from being linked with transactions of a shady nature or involving fraud or the elements of a public crime would serve as a strong incentive or inducement in a mother to prevent the institution of a civil action which would expose to the public the questionable circumstances giving rise to the suit. But, as we have declared, we are not called upon to hunt for the specific reasons which moved the defendant in signing the note. It is enough to know that, after all the evidence was introduced and considered, the jurors, guided presumably by all the criteria by which the law says they must be governed in weighing evidence, decided that the presumption of a sufficient consideration for the support of the instrument was not dispelled, or that such presumption satisfied their minds as against the other evidence which failed to possess such persuasive power.

We have consulted with painstaking care all the authorities cited by counsel representing both sides of this controversy. There is no conflict between the views here and those expressed in the cases to which our attention has been called. There is a large number of specifications of alleged error, involving rulings of the court in the reception and rejection of evidence and in the giving and refusal of instructions. It would require unnecessary labor to give all the assignments of error special notice. We may say, however, that we have given much time to an examination of the record and to a consideration of all the points urged, and we may state, generally, that we think the court carefully, fully, and correctly declared to the jury the law applicable to the issues and the facts, and that in the rulings upon the reception and rejection of evidence we find nothing which in any degree prejudiced the rights of appellant. It is noticeable that in all instances where questions were propounded to a witness and to which objections were sustained, the same questions to the same witness were at some other time during her examination allowed. The rulings of the court were therefore not erroneous. We think the case was fairly tried, and that the appellant therefore suffered no prejudice either from the rulings of the court upon the admission and rejection of testimony, or from the giving and refusing of instructions.

The order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

### On Rehearing.

HART, J. In his petition for a rehearing, counsel for appellant insists that this court was justified in declaring that the evidence introduced both upon the part of the defendant and the plaintiff, after the proof of the note upon which the action was brought, was sufficient to and did overcome the presumption of a consideration for said note. He calls our attention to certain language used in the case of Adams v. Hopkins, 144 Cal. 36, 77 Pac. 712, which, he claims, sustains his contention that upon the evidence as shown by the record the case should be reversed, because said presumption was, in truth, overcome. The language referred to reads: "It will be presumed that there was a good consideration for the written release, in the absence of evidence to the contrary." The rule as thus stated is undoubtedly sound and applicable to all disputable presumptions of fact. In truth, their very characterization by the Code provision as "disputable presumptions" carries with it necessarily the right to controvert them by other evidence and the complete exhaustion of their force when evidence has been introduced sufficient to destroy the verity of the facts for which, until then, the law, for reasons of expediency, makes them responsible vouchers. The presumption of a consideration is, indeed, enough to support the note, in the absence of evidence to the contrary. But in whom is vested, under our system, the exclusive province of determining when there is evidence to the contrary? There must be, as counsel will concede, a determination by somebody that there is in fact evidence to the contrary. The fact that the record here seems to show "evidence to the contrary" is not enough, so far as our power over the verdict and findings is concerned. It must have been "evidence to the contrary" to which the proper tribunal has given such weight as to enable it to say that such "evidence to the contrary" has overcome and dispelled the presumption. The learned counsel's argument would be valid and might be sound addressed to a jury or court trying the facts, but, when addressed to this court, it overlooks the constitutional provision limiting the power of the appellate courts of this state to the determination of questions of law alone, and that, therefore, the Supreme and this court would clearly transcend their appellate jurisdiction, as outlined by the Constitution, were they to engage in the business of indiscriminately setting aside verdicts of juries and findings and judgments of trial courts upon the ground of the insufficiency of the evidence to sustain them, except, of course, in such cases only in which it can truly be said that, as a matter of law, the evidence is not strong enough to uphold such verdicts, findings, or judgments. However differently the record evidence may strike different minds, it is evident that the jury trying the issues of fact did not think the evidence was strong enough to overcome the presumption, and it is equally evident that the trial judge, who presided at the hearing of the cause, and who heard the evidence, was of the same opinion when he made the order denying appellant's motion for a new trial. The weight of the evidence and the credibility of the witnesses were matters peculiarly within the duty of the jury to determine, and, having decided the facts against the appellant, and having, it is clearly apparent, in reaching their conclusion, disregarded or discredited the testimony offered by the defendant, we see nothing in the record which would warrant this court in declaring that, as a question of law, their finding is against the evidence.

As we stated in the main opinion, the Supreme Court, in the case from which we have here quoted the language upon which the appellant so implicitly relies, also uses the following language immediately following that quoted: "Indeed, the court is not bound to believe an interested witness against such a presumption if the latter satisfies his mind" —citing section 2061, subd. 4, Code Civ. Proc. The jury and the court appear to have not been satisfied that the evidence overcame the presumption. On the contrary, their minds seem to have been satisfied by the presumption as against the declarations of the witnesses directed against such presumption.

But the learned counsel seems to have formed a total misconception of certain language employed in the main opinion, when he says that "it means that it is conceded by reason of the testimony that Walter Morrissey was about to be arrested on a felony charge, and she (the defendant) desired to prevent it," etc. We were discussing the probable specific reasons which might have induced Mrs. Morrissey to sign the note in consideration of forbearance on the part of the plaintiff to institute a civil action against Walter. This discussion was only in reply to the elaborate argument of counsel to the effect that the evidence on the part of the defendant showed threats by the plaintiff of a prosecution of Walter for forgery, for which reason alone, he argued, the defendant signed the note. We stated that in our opinion the evidence fairly warranted the inference that she signed the note upon an understanding that the plaintiff would refrain from suing Walter in a civil action; that (if that were true), while it was not necessary to search for specific reasons which thus influenced her, yet it was equally as reasonable as any other deduction from the evidence that she was almost as much in fear of the consequences of a civil as of a criminal action; and that that fact might have been the cause moving her to execute the note in consideration of forbearance upon the part of the plaintiff to sue Walter in the civil courts. It appeared from the uncontradicted evidence in the record that the plaintiff, at the first interview with the defendant, exhibited the 14 notes to the latter, said to her that she did not know persons bearing the names ostensibly subscribed to the notes, and that such names could be found neither on the great register nor the tax roll of the county. While this did not involve upon the part of plaintiff the specific charge of a crime against young Morrissey, the inference was that the transactions represented by the notes were not altogether devoid of fraud of some sort, and we ventured the opinion, therefore, that Mrs. Morrissey, if receiving such an impression, might be nearly as anxious, under such circumstances, to avoid a civil suit as a criminal proceeding, realizing that in the former the facts would be brought before the public as readily as in the latter proceeding. The plaintiff had a perfect right to sue Walter in a civil action, not alone upon the note executed by him to her, but also the right to sue him for money had and received as to the sums represented by all the other notes, if said notes were in fact fictitious, subject, of course, to the defense of a bar under the statute, or to any other legal defense. If the defendant desired that her son should not be sued in a civil action, and signed the note in dispute in consideration of such an agreement on the part of the plaintiff, we cannot see that it would be particularly material to ascertain what the specific reason was that prompted her desire to prevent the institution of a civil suit against Walter. The defendant might have believed, from her inspection of the notes, or from any other circumstance brought to her notice, that said notes were forgeries, the result of the criminal acts of her son; yet, if the evidence, presumptive and otherwise, fairly warrants the inference that she was moved to sign the note solely because of an agreement upon the part of the plaintiff that she would not bring a civil suit against Walter, the mere fact of her belief that her son had committed a criminal offense would be, it seems to us, immaterial. All that Mrs. Morrissey said about her son having been accused by the plaintiff of committing forgery, and that the latter would prosecute him for the crime, was denied by Miss Keating. The jury, as stated in the main opinion, seem to have paid no attention to the testimony of the defendant. But it is enough for us to be satisfied that the evidence, both direct and circumstantial, fairly justifies the conclusion that the consideration for which the note was signed was based upon an understanding that the plaintiff would forbear suing Walter in a civil action; or that the evidence, in the minds of the jury and the judge trying the case, was not sufficient to overcome the presumption of a valid consideration; and that the record before us is not such as would sustain a conclusion by this court that, as a matter of law, the evidence is too weak to support the verdict of the jury and the findings of the court.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

151 Cal. 797

## PEOPLE ex rel. POST et al. v. SAN JOAQUIN VALLEY AGRICULTURAL ASS'N et al. (Sac. 1,481.)

(Supreme Court of California. Sept. 4, 1907. Rehearing Denied Oct. 4, 1907.)

1. Agriculture — District Associations — Public Corporations—Execution.

An agricultural association, incorporated under St. 1880, p. 62, c. 69, dividing the state into agricultural districts, authorizing a certain number of persons within such a district to organize such an association, its real estate to be used for the purpose of holding exhibitions of the live stock and products of the district, with the view to the improvement of all industries in the same, providing for a district board of agriculture, to be appointed by the Governor, and to qualify by oath, and declaring such an association, when formed, to be a state institution, and that such board shall have exclusive control and management of the association for and in the name of the state—is a public corporation created for the local administration of a part of the affairs of the state; so that its property, used to carry on the purposes for which it was formed, is not subject to execution, though such statute authorizes it to sue and be sued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Agriculture, §§ 7, 8.]

2. LIMITATION OF ACTIONS — FRAUD — COMPLAINT.

The complaint in an action to vacate a judgment because of fraud in not interposing a certain defense does not show a right to more than three years for bringing it, under Code Civ. Proc. § 338, subd. 4, providing that the limitation of three years for relief from fraud does not begin to run till discovery of the facts constituting the fraud, by the mere allegation that the failure to interpose the defense was not discovered till within two months before commencement of the action to set aside the judgment; no reason for failure to make the discovery being given, and it not being stated that any diligence was exercised, or that with reasonable diligence the discovery would not have been made sooner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 668.]

Department 1. Appeal from Superior Court, San Joaquin County; Paul W. Bennett, Judge.

Action by the people, on the relation of Fred J. Post and others, against the San Joaquin Valley Agricultural Association and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

Rehearing denied; Beatty, C. J., dissenting.

U. S. Webb, Atty. Gen., Aug. Muenter, and Aug. E. Muenter, for appellant. Nicol & Orr and Budd & Thompson, for respondents.

SHAW, J. The court below sustained a demurrer to the complaint, and thereupon gave judgment in favor of the defendants, from which the plaintiff appeals. By the action the plaintiff seeks to recover from the defendants R. W. Russell, Louis Gerlach, James H. Budd, M. A. Moore, Lotta Moore, and Nellie E. Jordan the possession of certain tracts of land, and to set aside a judgment rendered in favor of defendants Louis Gerlach, R. W. Russell, James H. Budd, and M. A. Moore against the defendant, the San Joaquin Valley Agricultural Association. The relators are members of said association and the action is prosecuted for said association's benefit to restore to it the possession of the land and to relieve it from said judgment. The defendants in possession of the land hold it under a sheriff's sale and deed, made in the enforcement of an execution issued upon the judgment. The plaintiff claims that the association is a public corporation created for the local administration of a part of the affairs of the state, and that, as such, its property is not subject to execution, unless made so by statute, that there is no such statute, and, hence that the sale and deed aforesaid are void. As to the judgment, the claim is that it was procured by actual and constructive fraud on the part of the judgment plaintiffs, extrinsic and collateral to the action in which it was given.

1. The association is a corporation formed under the act of April 15, 1880 (St. 1880, p. 62, c. 69). A consideration of the provisions of that act, in connection with the previous legislation on the subject of agricultural societies, the provisions of the Constitution of 1879, and the subsequent legislation concerning corporations of the character of the defendant corporation, clearly shows that the association is a public corporation engaged in carrying on one of the objects committed to the state government by the Constitution. In 1859 a general law was enacted authorizing the formation of local agricultural societies. St. 1859, p. 104, c. 110. Under this act, prior to 1880, some 12 societies were formed in various parts of the state. Among them was one in San Joaquin county, known as the "San Joaquin Valley Agricultural Association." In 1854 the "California State Agricultural Society" was incorporated by the Legislature. Neither this corporation, nor any of the societies formed under the act of 1859, was a public corporation, or, at all events, neither of them was a state institution, or under the control and management of the state, but were either private corporations, or quasi public corporations formed to promote an object in which the general public was interested and by which the public would be benefited, but for the profit and emolument of the persons interested therein. Melvin v. State, 121 Cal. 19, 53 Pac. 416. Under the Constitution of 1849, the legislative power to appropriate money directly to such institutions, and to authorize counties to give them pecuniary assistance, was unfettered. It became customary at every session of the Legislature to pass laws appropriating money to the State Agricultural Society and to each of the several subordinate societies organized under the act of 1859. Appropriations of this character were made to the San Joaquin Valley Agricultural Association aforesaid in the years 1861, 1863, 1872, and 1878. St. 1861, p. 407, c. 385; St. 1863, p. 522, c. 348; St. 1871-72, p. 442, c. 333; St. 1877-78, p. 332, c. 271. The Legislature at almost every session from 1860 to 1872 also authorized the county of San Joaquin to donate money to said society. Similar aid was authorized to other societies in other counties. In 1863 San Joaquin county was authorized to issue its bonds to the amount of $20,000, and give or loan the money thus raised to that society (St. 1863, p. 7, c. 4), and in 1865 a special tax was authorized to pay these bonds.

This was the situation when the present Constitution was framed and adopted in 1879. Article 4 of this Constitution contains radical measures concerning such legislation. Section 22 provides that "no money shall ever be appropriated or drawn from the state treasury for the use or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the state." Certain exceptions were made relative to the support of orphans which are immaterial to the present discussion. Section 29 was as follows: "The general appropriation bill shall contain no item or items of appropriation other than such as are required to pay the salaries of the state officers, the expenses of the government, and of the institutions under the exclusive control and management of the state." Section 31 took from the Legislature the power to give, lend, or authorize the giving or lending of the state's credit, or that of any county, city, and county, city, or township, or other political corporation or subdivision of the state, in aid of or to any person, association, or corporation, municipal or otherwise, or to pledge the credit thereof in any manner whatever, for the payment of the liabilities of any individual, association, municipal, or other corporation whatever, or to make or authorize the making of any gift of any public money or thing of value to any individual, municipal or other corporation whatever. These limitations divested the Legislature of all power to make appropriations of money to any private or quasi public corporation or to make any gift to any municipal or public corporation not under the exclusive control and management of the state. It also deprived the Legislature of the power to authorize counties to make donations, or gifts or pledges of credit to such associations. The Constitution does not give to any department of the state government any power whatever to engage in private business or enterprise or to manage and control private corporations or quasi public corporations for private profit, although such corporations may be carrying on enterprises or performing functions which are for general public benefit and which tend to promote the general welfare. Our state government has no such powers. It is not organized to promote the general welfare in that manner or by that means, but only by and through its public governmental powers, and by means of agencies which constitute part of the state government. These previously existing societies formed no part of the state government, and hence further aid to them by appropriations of money from the state was impossible.

Under these circumstances, and for the manifest purpose of creating such agencies to carry on the same public work, agencies to which money could be appropriated from the state treasury by the Legislature, the next succeeding Legislature in 1880 enacted two laws, one declaring the state agricultural society to be a state institution, organizing the state board of agriculture and charging it with the exclusive management and control of the state agricultural society as a state institution (St. 1880, p. 49, c. 60), the other, the act here in question, dividing the state into 11 agricultural districts, to be composed of certain named counties, and providing for the organization of corporations therein, to be known as agricultural associations (St. 1880, p. 62, c. 69). In many respects these statutes were similar, and both were obviously passed to carry out the same public policy and achieve the same general result. The general purpose of the first-mentioned act is shown by the duties enjoined on the state board, which were "to collect and disseminate all kinds of information calculated to educate and benefit the industrial classes, develop the resources, and advance the material interests of the state," and to obtain and publish "such suggestions and recommendations as experience and good policy may dictate for the improvement and advancement of the agricultural and kindred industries." The general purpose of the district associations was declared in the latter act to be "the improvement of the material industries of the state." In every legislative year thereafter, until 1903, the general state appropriation act has contained items appropriating from the state treasury various sums of money to the State Agricultural Society thus constituted, and to each of the several district agricultural associations that became organized under the act here involved. In 1895 the items relating to these district agricultural associations were vetoed by the Governor. The Legislature of 1903, and succeeding Legislatures, have, perhaps wisely, refused to appropriate money for these associations.

In the case of Melvin v. State, supra, it was held that the State Agricultural Society, as incorporated by the act aforesaid, was neither a private nor quasi public corporation, but was a public corporation, an agency of the state to carry out one of the functions of the state government, and that as such, in the absence of a permitting statute, it was not subject to suit by a private person. It was said in the opinion that the Legislature found ample authority for the organization of such public corporations in section 1 of article 9 of the Constitution, which declares that, "a general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Whether this provision was intended to give this power or not, it is undoubtedly within the power of the state to organize and carry on such institutions. In the opinion in Re Madera Irr. Dist., 92 Cal. 313, 28 Pac. 275, 14 L. R. A. 755, 27 Am. St. Rep. 106, the court says: "Whatever tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the entire state; and the right of the Legislature to make provision for developing the productive capacity of the state, or for increasing facilities for the cultivation of its soil according to the requirements of the different portions thereof, is upheld by its power to act for the benefit of the people in affording them the right of 'acquiring, possessing, and protecting the property,' which is guaranteed to them by the Constitution." And again, on page 315 of 92 Cal., on page 275 of 28 Pac., 14 L. R. A. 755, 27 Am. St. Rep. 106: "The means by which the Legislature may exercise this power is left to its own discretion, except as it may be limited by the Constitution. * * * It may, too, by general laws, authorize the inhabitants of any district, under such restrictions, and with such preliminary steps as it may deem proper, to organize themselves into a public corporation, for the purpose of exercising those governmental duties, upon the same principle that it authorizes the incorporation of any municipal corporation under general laws." And again (page 317 of 92 Cal., page 276 of 28 Pac., 14 L. R. A. 755, 27 Am. St. Rep. 106): "Although in this state the Legislature is required to provide such agencies under general laws, it is authorized, under its general power of legislation, to invest such corporations, when created, with the same powers which, without such restriction, it could itself have exercised; and in providing for such organizations it need confer upon them only such powers, as in its judgment, are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them. Being the representatives of the Legislature in the various localities of the state, the requirements for organization, as well as the powers to be exercised, vary with the character of the purpose for which they may be created." The carrying out of the purposes prescribed by these statutes regarding agricultural associations is a matter of general public interest, and would tend to increase the productive power of the land, the growth of the state in population, and the wealth of the people. It is as much a matter of state concern as are school districts formed to carry on the public schools, sanitary districts for the protection and preservation of the health of the inhabitants thereof, reclamation and levee districts to drain the swamp lands therein or to protect them from overflow, or irrigation districts to procure and distribute water for irrigation of lands within their limits, all of which have been declared to be public corporations or agencies of the state. See cases hereinafter cited. Although some of these institutions may be authorized by express provisions of the Constitution, all are not so authorized, and the power to create such agencies to carry on such operations exists in the government of the state without a more particular constitutional grant than those embraced in section 1 of article 4. In re Madera Irr. Dist., 92 Cal. 307, 28 Pac. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

The provisions of the act providing for district agricultural associations clearly evince an intention to make them public corporations. The entire state was divided into agricultural districts. Fifty or more persons, representing a majority of the counties within one of the districts, were authorized to form an association for the purposes of the act. The association was to have perpetual succession and certain enumerated powers. Its real estate was to be used for the purpose of holding exhibitions of the live stock and products of the district, "with view to the improvement of all industries in the same." It was to be managed by a district board of agriculture, consisting of eight members, who were to be resident citizens of the district, were to hold office four years, and were to be appointed by the Governor of the state, who was also authorized to fill vacancies. Each member of such boards was required to qualify by taking the oath of office of public officers prescribed by section 3 of article 20 of the Constitution within 10 days after his appointment. Section 17 (page 64) of the act is in part as follows: "Each association so formed and organized is hereby declared and shall be recognized a state institution, and the board so appointed and qualified shall have the exclusive control and management of such institution for and in the name of the state, and shall have the possession and care of all the property of the association and shall fix the terms of office and the bonds of the secretary and treasurer, and determine their salary and duties." The Legislature in subsequent acts assumed to exercise full power over these associations. The original act designated the counties of San Joaquin, Calaveras, Fresno, Kern, Merced, Mariposa, Stanislaus, Tulare, and Tuolumne as "Agricultural District No. 2." By subsequent acts the district has been changed and reduced, and in 1893 it was made to consist of San Joaquin county alone. St. 1893, p. 282. The number of districts in the state has been increased from time to time, until there are now 45. St. 1901, p. 304, c. 142. In 1891 a new statute was enacted, substantially the same as that of 1880, declaring that all associations formed under the previous act should be continued in force and made associations under the new act. St. 1891, p. 138, c. 126. In 1897 a similar act was enacted, and the previously established associations were continued in force and made agricultural associations under the latter act. This statute also provided that such associations should have the option of converting themselves into stock companies and issuing certificates of stock. St. 1897, p. 304, c. 125. It does not appear that the defendant association has ever availed itself of this privilege. If it had done so, interesting questions would arise concerning its status and its character as a corporation which are not presented as the case stands.

All these considerations conclusively demonstrate that these associations are public agencies of the state, within its exclusive management and control, and charged with the performance of a part of the functions of the state government. Such corporations in-this state have always been held to be public corporations. Dean v. Davis, 51 Cal. 410; People v. Reclamation Dist., 53 Cal. 348; People v. Williams, 56 Cal. 647; People v. Larue, 67 Cal. 528, 8 Pac. 84; People v. Reclamation Dist., 117 Cal. 119, 48 Pac. 1016; S. F. Sav. Union v. Reclamation Dist., 144 Cal. 643, 79 Pac. 374; Hoke v. Perdue, 62 Cal. 546; People v. Levee Dist., 131 Cal. 30, 63 Pac. 676, holding reclamation districts and levee districts to be public corporations; Hughes v. Ewing, 93 Cal. 417, 28 Pac. 1067; Estate of Bulmer, 59 Cal. 131; Kennedy v. Miller, 97 Cal. 432, 32 Pac. 558, declaring school districts to be public corporations; Turlock I. D. v. Williams, 76 Cal. 368, 18 Pac. 379; Irrigation Dist. v. DeLappe, 79 Cal. 353, 21 Pac. 825; People v. Selma, etc., Dist., 98 Cal. 208, 32 Pac. 1047; Crall v. Poso Irr. Dist., 87 Cal. 145, 26 Pac. 797; People v. Turnbull, 93 Cal. 632, 29 Pac. 224, holding irrigation districts to be public corporations; In re Werner, 129 Cal. 567, 62 Pac. 97, declaring sanitary districts to be public corporations. These institutions are public corporations "formed for the government of a portion of the state" as defined in section 284 of the Civil Code, but, as is pointed out in Dean v. Davis, supra, "to constitute a public corporation, it is not essential that it shall exercise all the functions of government within the prescribed districts. * * * It is but an instrumentality of the state, and the state incorporates it that it may the more effectually discharge its appointed duty." See, also, Dillon on Mun. Corp. § 25.

The case of Downing v. Indiana State Board of Agriculture, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664, holding that institution to be a private corporation, is cited as opposed to these views. There is, however, a marked distinction between the laws of Indiana organizing that corporation and our statutes and constitutional provisions above referred to. There was in that case no necessity for making the institution a public corporation in order to authorize the making of appropriations to carry on the same. And the intention that it should be a public corporation under the management and control of the state was not manifested by the provisions of the statute there under consideration as it is by the terms of our statute. The property of such corporations or stage agencies, which is used to carry on the purposes for which such institutions are formed, is so far public property that it cannot be taken in execution and sold thereon to enforce payment of a judgment, unless the state has manifested its assent thereto by a law permitting it to be done. S. F. Sav. Union v. Reclamation Dist., 144 Cal. 648, 79 Pac. 374; Hensley v. Reclamation Dist., 121 Cal. 96, 53 Pac. 401; Skelly v. School Dist., 103 Cal. 652, 37 Pac. 643; Emeric v. Gilman, 10 Cal. 410, 70 Am. Dec. 742; Mayrhofer v. Board, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451; Witter v. School Dist., 121 Cal. 350, 53 Pac. 905, 66 Am. St. Rep. 33; Whittaker v. Tuolumne, 96 Cal. 100, 30 Pac. 1016; Reclamation Dist. v. Sacramento, 134 Cal. 480, 66 Pac. 668; Ruperich v. Baehr, 142 Cal. 193, 75 Pac. 782; Gilman v. Contra Costa, 8 Cal. 58, 68 Am. Dec. 290; Hunsaker v. Borden, 5 Cal. 290, 63 Am. Dec. 130; Sharp v. Contra Costa County, 34 Cal. 290; Hart v. Burnett, 15 Cal. 583; 1 Dillon, Mun. Corp. § 100; 2 Dillon Mun. Corp. 576, 577.

The statute under which these associations were organized provides that they may sue and be sued. This, however, does not imply that the public property which such association holds and uses for the public purposes which it was created to serve can be seized on execution to pay a judgment recovered in such suit. This is abundantly shown by the authorities last cited. The complaint alleges that the real property in question has always been used by the defendant association for the purpose of holding the exhibitions which the association is required to hold annually by the provisions of the statute, and that it is needed for permanent use for that purpose. By the demurrer this allegation is admitted to be true. It follows that the property was not subject to execution; that the sale and sheriff's deed under which defendants claim title and possession are void; that plaintiff is entitled to recover possession; and that, as to this point, the demurrer was improperly sustained.

2. The right of action of plaintiff to vacate the judgment against the association on the ground that it was procured by fraud is barred by the statute of limitations. The date on which the judgment sought to be set aside was rendered does not expressly appear, but it is alleged that an execution was issued thereon on the 3d day of October, 1900, and consequently it must have been rendered prior to that date. The present action to set aside the judgment was begun on July 14, 1905, four years and nine months after the execution was issued. By subdivision 4 of section 338 of the Code of Civil Procedure, an action for relief on the ground of fraud must be begun within three years, but the period of limitation does not begin to run until the discovery of the facts constituting the fraud. It is alleged that the failure of the district board of agriculture of district No. 2 to allege, in their answer in the action in which the judgment was rendered, certain facts which it is claimed would have constituted a good defense to said action, was fraudulent, and that it was by means of this fraudulent neglect that the judgment against the association was obtained. The attempt was made to bring the action within the period of limitation above mentioned by the bare averment that the failure to include the so-called defense in the answer "was not discovered by the plaintiff, or the said relators, or any of them, until within two months next before the commencement of this action." This is not a sufficient allegation to excuse

the delay. It gives no reason for the failure to make the discovery, and does not state that any diligence had been exercised, nor does it show that, if reasonable diligence had been exercised, it would not have been discovered sooner. The answer in the action was filed on May 23, 1899, so that the act constituting the fraud, if fraud it was, was actually committed at that time, which was more than six years before the present action was begun. "It is not enough to assert merely that the discovery was not sooner made. It must appear that it could not have been made by the exercise of reasonable diligence. And that which reasonable diligence would have disclosed plaintiff is presumed to have known; means of knowledge in such a case being the equivalent of the knowledge which it would have produced." Truett v. Onderdonk, 120 Cal. 589, 53 Pac. 29. " 'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts constituting the fraud, within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must first be pleaded. It is not enough that the plaintiff merely aver that he was ignorant of the facts at the time of their occurrence and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them, as that they were done in secret or were kept concealed; and he must also show the times and circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged." Lady Washington Co. v. Wood, 113 Cal. 486, 45 Pac. 809.

For these reasons, we are of the opinion that so far as the action seeks to obtain a vacation of the judgment referred to it is barred by the statute of limitations.

The judgment is reversed, and the cause remanded.

We concur: SLOSS, J.; ANGELLOTTI, J.

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6 Cal. App. 184

## McVAY et al. v. CENTRAL CALIFORNIA INV. CO. (Civ. 349.)

(Court of Appeal, Third District, California. July 31, 1907.)

1. Negligence—Complaint—Identifying Destroyed Property.

The complaint for negligent destruction of property by fire from defendant's land sufficiently identifies the property by describing it and locating it at the time of the fire on lands owned by plaintiffs in a certain township and county and adjoining defendant's land.

2. Pleading—Presumption.

The presumption, from the allegation of a complaint for destruction of property, that plaintiffs were the owners thereof, is that they were tenants in common.

3. Damages—Pleading.

The averment that the loss of plaintiffs by the destruction of the property was a certain sum is the equivalent of the allegation that they were damaged in said sum.

4. Negligence—Sufficiency of Evidence—Setting Fires.

Evidence as to time and circumstances of setting fire on defendant's land, which spread to plaintiffs' land, *held* sufficient to authorize a finding of negligence in starting it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 267.]

5. Appeal—Harmless Error.

Error in admitting evidence is harmless; other evidence to the same effect having been admitted without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Appeal and Error, § 4164.]

6. Pleading—Answer—Issue as to Value.

No issue as to the value of the property destroyed is raised by the pleadings; the complaint being verified and specifically alleging the value of each article, and the answer, which denied that plaintiffs were the owners of the property or that fire destroyed it, or that defendant was guilty of any negligence, containing no other denial as to the amount of damages than that "defendant denies that the loss of plaintiffs, by reason of the destruction of the property described in said complaint as therein alleged, was $1,025," and not denying that it was of any sum less than that.

7. Negligence—Proximate Cause—Instructions.

There being evidence that the fire set by defendant on its premises was communicated to plaintiff's land by a sudden whirlwind, which defendant could neither anticipate nor control, it was entitled to the instruction, based on the doctrine of liability only for negligence which is the proximate cause of the injury, that, if it was impossible for defendant to have prevented the fire from getting beyond its control, owing to the sudden rising of the wind after the fire was set, defendant would not be liable, provided due care was taken before the fire was set.

8. Appeal—Record—Instructions.

An instruction appearing in the transcript not authenticated or incorporated in the bill of exceptions, and being no part of the judgment roll, and, moreover, printed only as a part of instructions "requested" by plaintiffs, cannot be considered as having been given, and so covering an instruction requested by defendant and refused.

9. Trial—Instructions—Preponderance of Evidence.

An instruction: "By preponderance of the evidence is not necessarily meant a greater number of witnesses, but only such weight of evidence as satisfies the jury of the truth of the allegation to be established"—is sufficient, though Code Civ. Proc. § 1835, provides that only evidence which satisfies the "unprejudiced" mind will justify a verdict.

Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by W. N. McVay and another against the Central California Investment Company. Judgment for plaintiffs. Defendant appeals. Reversed.

Morrison & Cope and Ernest Weyland, for appellant. Seth Millington, J. W. Goad, and Thomas Rutledge, for respondents.

BURNETT, J. The nature of the action is shown by the following allegation of the complaint: "The defendant on the 27th day of August, 1904, intentionally and negligently kindled a fire on said defendant's land in Colusa county, Cal., and adjoining the said land of plaintiffs, and negligently suffered said fire to extend beyond its own land, and so negligently watched and tended said fire that it came into the plaintiffs' said land and destroyed all the property hereinbefore described without any fault or negligence on the part of plaintiffs or either of them, and the loss of plaintiffs by reason of the destruction thereof was the sum of $1,025."

1. The court committed no error in overruling the demurrer. The property was sufficiently described for identification, and it was located "on lands owned by plaintiffs in township seventeen (17) north, range one (1) west in Colusa county" and adjoining the property of defendant. Defendant could hardly be mistaken as to what property was intended. As to the title, it was sufficient to allege "that on the 27th day of August, 1904, and for a long time prior thereto, plaintiffs were the owners of the following described property." When such an allegation is made, the presumption follows that they are tenants in common. The suggestion that the averment "and the loss of plaintiffs by reason of the destruction thereof was the sum," etc., is not equivalent to an allegation that plaintiffs were damaged in said sum, seems hypercritical and not entitled to serious attention.

2. It is claimed that no negligence was shown, and therefore the verdict of the jury is not supported by the evidence. In this connection the following cases are cited: Garnier v. Porter, 90 Cal. 105, 27 Pac. 55; Galvin v. Gualala Mill Co., 98 Cal. 268, 33 Pac. 93; Sweeney v. Merrill, 38 Kan. 216, 16 Pac. 454, 5 Am. St. Rep. 734; Needham v. King, 54 N. W. 891, 95 Mich. 303; Bolton v. Calkins, 60 N. W. 297, 102 Mich. 69. We deem it unnecessary to notice in detail these various decisions. They all substantially agree as to the law applicable to this class of cases. Indeed, there could be no dispute, and there is none here, that plaintiffs are not entitled to recover unless defendant was negligent in setting out the fire or in the management of it after it was started, and that this negligence was the proximate cause of the injury. No difficulty attends the determination of what is negligence in the abstract, but the attempt to apply the principle to concrete facts often gives rise to serious controversy. In the Needham Case, supra, the whole question of negligence in allowing fire to spread to the property of one's neighbor is discussed elaborately, and a large number of cases is reviewed. It is therein stated by the Supreme Court of Michigan that: "Fire is a dangerous element and in making use of it a degree of care is required corresponding to the danger." And the following is quoted with approval from Cooley on Torts: "Due care requires circumspection not only as to time and place of starting it, but in protecting against its spread afterwards." The opinion proceeds: "There is no doubt that a party having taken reasonable precautions to avoid the spread of fire may, on a calm morning in a dry time, set fire to rubbish upon his premises, and if, during the progress of the fire, a violent wind causes the fire to escape to his neighbor's premises, he cannot be said to have been negligent. But the law does not justify the use of fire at a time and place when the probable consequences are communication with the property of others." In the case at bar there was some evidence that a brisk south or southeast wind was blowing at the time the fire was started. Some of the witnesses denied this, but there was such a conflict as to make it a proper question for determination by the jury. The thistles on defendant's premises to which the fire was set were high and close together. It was late in the summer season, and everything was dry and inflammable. If the wind was blowing, we can understand how a reasonable man might reach the conclusion that the probable consequences of starting the fire would be the destruction of the neighbor's property on the north, and therefore that the defendant had not exercised due care under the circumstances. Besides, the evidence left it a disputable proposition whether the preliminary preparations were adequate to prevent the fire from spreading. It cannot be said as a matter of law that the jury was not justified in finding that the defendant was negligent in starting the fire.

3. Complaint is made of certain rulings of the court in the admission of evidence to show the amount of damage done to plaintiffs by the fire. Granting that some of them are technically erroneous, yet no prejudice is shown, as testimony to the same effect was received without objection. And, again, there is no issue raised by the pleadings as to the value of the property destroyed. The complaint was verified and the value of each article destroyed specifically averred. The answer denied that plaintiffs were the owners of the property, or that the fire destroyed it, or that defendant was guilty of any negligence; but the only denial as to the amount of damage is as follows: "Defendant denies that the loss of plaintiffs, by reason of the destruction of the property described in said complaint, as therein alleged, was the sum of $1,025." There is no denial that it was of any sum less than that.

4. There seems no escape from the conclusion that the court erred in its refusal to give the following instruction requested by defendant: "I instruct you that if for any reason it was impossible for the employés of the defendant company to have prevented the fire from getting beyond their control, owing to any sudden rising of the wind after the fire was set out, the defendant company would not be liable for the damages accruing to plaintiffs, providing due care was taken be-

fore the fire was set out." The instruction is based upon the proposition that, if defendant exercised due care in setting the fire, it would not be liable for any negligence in its subsequent care of said fire, if that negligence was not the proximate cause of the injury to plaintiffs. If by the exercise of due care in the management of the fire defendant could not have prevented the damage, it is not liable for its failure to exercise such care. The whole doctrine of responsibility for negligence is based upon the postulate that without such negligence the injury would not have occurred, or, in other words, that the negligence is the proximate cause of the injury. The following cases illustrate the point: Kevern v. Providence M. Co., 70 Cal. 394, 11 Pac. 740; Vizelich v. S. P. R. R. Co., 126 Cal. 587, 59 Pac. 129; Puckhaber v. S. P. R. R. Co., 132 Cal. 363, 64 Pac. 480; Luman v. Golden A. C. M. Co., 140 Cal. 706, 74 Pac. 307. Defendant was entitled to the instruction, as there was evidence that the communication of the fire to the premises of plaintiffs was caused by a sudden whirlwind which defendant could neither anticipate nor control. The instruction was adapted to defendant's theory of unavoidable casualty, which theory finds support in the testimony of some of the witnesses. That the failure to give the instruction may have resulted to the prejudice of defendant is apparent from the reflection that the jury under the evidence may have believed that defendant exercised due care in setting out the fire, but was negligent in caring for it, and also that the damage was caused by the whirlwind over which defendant could exercise no control. A verdict resting upon this state of facts would be unjustifiable as ignoring the doctrine of "proximate cause." Respondents' answer to the contention is that the principle was covered by another instruction appearing at folio 51 of the transcript. But the latter is not authenticated in any manner. It is not incorporated in the bill of exceptions, and it is no part of the judgment roll. In fact, it does not purport to have been given by the court, but it is printed as a part of "Instructions Requested by Plaintiffs." It is manifest that it cannot be considered. But, if it could be regarded, it is clear that it does not cover the contingency suggested, but requires defendant, in any event, to exercise ordinary care, in attending said fire, to escape responsibility.

Appellant criticises the action of the court in giving this instruction: "By preponderance of the evidence is not necessarily meant a greater number of witnesses, but only such weight of evidence as satisfies the jury of the truth of the allegation to be established." The contention is that section 1835, Code Civ. Proc., provides that it must satisfy the unprejudiced mind; whereas, the mind of the juror may be prejudiced. The argument is somewhat tenuous and metaphysical. The distinction is of no practical importance, as each juror, whether prejudiced or not, must necessarily be guided by the evidence as it affects his own mind, and it is impossible for him to determine how the evidence would influence some other mind. Besides, of course, the presumption must be indulged that each juror is unprejudiced and of average intelligence.

It is due the learned trial judge to say that he had no opportunity to review the record, as no motion was made for a new trial; the appeal being from the judgment alone.

For the error pointed out the judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

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6 Cal. App. 115

## SNIPSIC CO. v. RIVERSIDE MUSIC CO.

(Civ. 401.)

(Court of Appeal, Second District, California. July 24, 1907.)

APPEAL—TRANSCRIPT—CERTIFICATE OF CORRECTNESS—NECESSITY.

An affidavit of an appellant that the transcript is correct cannot be substituted for the certificate of the clerk or attorneys as to the correctness thereof required by Code Civ. Proc. § 953, and Supreme Court rule 2 (78 Pac. vii), and in the absence of the latter certificate the judgment appealed from cannot be reviewed.

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by the Snipsic Company against the Riverside Music Company. From the judgment, plaintiff appeals. Motion to dismiss appeal. Dismissed.

Howard K. James and F. G. Hall, for appellant. Purington & Adair, for respondent.

SHAW, J. This is a motion on the part of the respondent to dismiss an appeal from a judgment of the superior court of Riverside county. The transcript of the record contains no certificate either by the clerk or attorneys of the correctness of the same, nor does it contain any certificate of the clerk or attorneys that an undertaking on appeal in due form has been properly filed, or waiver thereof. Section 953, Code Civ. Proc.; Supreme Court rule 2 (78 Pac. vii). Appellant has presented an affidavit averring "the said transcript as the same is now of record is in all respects true and correct"; but the affidavit of appellant cannot be substituted for the certificate required by said section 953, Code Civ. Proc., and the rules of this court, in the absence of which, the judgment appealed from cannot be reviewed. Ellis v. Bennet, 3 Pac. 801; Pacific M. Life Ins. Co. v. Edgar, 132 Cal. 197, 64 Pac. 260.

The motion is granted, and appeal dismissed, without prejudice to another appeal.

We concur: ALLEN, P. J.; TAGGART, J.

6 Cal. App. 190

## EGILBERT v. SUPERIOR COURT OF SHASTA COUNTY. (Civ. 384.)

(Court of Appeal, Third District, California. Aug. 5, 1907.)

MANDAMUS—VIOLATION OF WRIT—CONTEMPT.

Petitioner for writ of review answered a petition for a writ of mandamus to compel him as secretary of a corporation to submit its books to examination, admitting that he was then, April 22, 1907, secretary of the corporation. The cause was set for trial on May 22, 1907, on issues joined, and on May 18th petitioner resigned as secretary, not for the purpose of evading the order of the court, and on the 25th, when he was served with a peremptory writ commanding him to submit the books of the corporation to examination, he was not secretary and could not comply with the order. *Held*, that he was not chargeable with contempt in failing to obey the writ.

Application for a writ of review by W. D. Egilbert against the superior court of Shasta county to determine the validity of a judgment against petitioner for contempt. Writ granted. Petitioner discharged.

Geo. O. Perry and C. H. Braynard, for petitioner. T. W. H. Shanahan, for respondent.

CHIPMAN, P. J. The petition shows: That on April 10, 1907, a petition for a writ of mandate was filed in defendant court, and thereafter, to wit, on May 22, 1907, a peremptory writ was issued out of said court, directed to affiant, as secretary of the Pacific Power Company, commanding affiant "as such secretary immediately after the receipt of said writ to permit one T. W. H. Shanahan, at whose instance and in whose behalf said peremptory writ of mandate was granted, to inspect all of the books * * * of the Pacific Power Company"; that said peremptory writ was served on affiant on May 25, 1907; that prior to May 18, 1907, affiant was secretary of said company, but resigned as such secretary, and his resignation was accepted on said May 18th, and at no time thereafter was he such secretary or in possession of or had control of said books. It next appears that on the —— day of June, 1907, said Shanahan made and filed in said court an affidavit setting forth, in substance, the foregoing facts: That he had made demand for the production and inspection of said books by virtue of said writ after service thereof on petitioner herein, but was not furnished access to or allowed to inspect said books, and that the said Shanahan prayed for an order of court requiring said Egilbert to show cause before said court on June 14, 1907, why he should not be punished for contempt of said court for failing and refusing to obey said writ; that affiant (petitioner herein) thereupon made and filed his affidavit in said court setting forth the fact of his resignation as such secretary and the acceptance thereof on May 18, 1907, and that since said day he had not had the custody or control of said books, and "that at the time of the service of said writ of mandate and demand, and at all times thereafter, said affiant W. D. Egilbert was unable to produce or submit for inspection said books"; that on said June 14, 1907, affiant appeared in response to said order of said court, and a hearing was had and evidence introduced in relation thereto; that at said hearing said Egilbert offered to produce evidence that his resignation as such secretary "was made without any intent or effort on his part to evade or render null or of no effect the order of said superior court, but said superior court thereupon refused to receive or admit such evidence"; that the fact that said Egilbert did not have the care or custody of said books was not controverted at said hearing; that the said court made findings in said proceeding and found that said Egilbert resigned from his said office on May 18, 1907, and it was not found or determined that he so resigned for the purpose of evading any order of the court, or that he did not resign in good faith; that petitioner was adjudged to be guilty of contempt, and as punishment was fined in the sum of $200, and in default of payment to be imprisoned one day for each $2 thereof. Most of the allegations of the petition are admitted. It is admitted in the return of the judge that Egilbert resigned on May 18, 1907, but it avers want of knowledge as to the acceptance thereof, and on information and belief denies that it was accepted; avers want of knowledge as to the allegation in the petition that Egilbert was not the secretary of the said company at the said date or in possession of certain of said books, and therefore denies said allegation; admits that Egilbert filed his affidavit in said contempt proceedings, setting forth the facts as above shown by him; admits that at the hearing he offered to prove that he acted in good faith in resigning and through no purpose to evade any order of the said court; and admits that the evidence that Egilbert was not secretary and did not have the care or control or custody of said books was not controverted. It further appears from the return of respondent that the petition for a writ of mandate was filed April 10, 1907; that an alternative writ was duly issued on that day, returnable April 17, 1907; that Egilbert made answer April 22, 1907, and admitted that he "was and now is" such secretary; that, issues being joined the cause was set for trial for May 20, 1907, and was then tried and judgment rendered in favor of petitioner, among other things, that at all times mentioned in the petition for writ of mandate, said Egilbert was and now is such secretary; that a peremptory writ was thereupon, on May 22, 1907, duly issued, was served on Egilbert on May 25, 1907, and he failed and neglected to obey its directions, and thereupon said proceedings in contempt were commenced; that at the hearing of the contempt proceedings the court determined that said Egilbert was secretary when the alternative writ was issued in April, but that he resigned on May 18th; that the cause was heard on May 20th; "that he failed and neglected either before or at the trial of said case to notify the court of his resignation, and allowed the court to proceed to judgment under the impression that he was secretary of the said Pacific Power Company; that at all times during said proceedings and up to the time of the present contempt proceedings he was a director of said corporation; that as such director he had actual knowledge that the judgment had been rendered against him as secretary of said corporation; that on the 25th day of May, 1907, he was duly served with a copy of the peremptory writ of mandate, the refusal to obey which resulted in the contempt proceedings." Reduced to the simplest statement, the material facts were: That in April Egilbert answered the petition for a writ of mandate, stating that he was then, April 22, 1907, the secretary of the company; that the cause was, on the issues then joined, set for trial May 20, 1907; that on May 18th he had resigned and thenceforward ceased to be secretary or to have control of the books of the company; that on May 25th, when the writ was served, he was not the secretary and could not comply with the order; that his resignation was not for the purpose of evading the order of the court. At the hearing on May 20th, the issue was the same as when Egilbert filed his answer, namely, that he was then, April 22d, the secretary of the company. If he continued to be such secretary until the hearing, May 20th, the fact should have been proven, or, if he resigned contumaciously to evade the operation of any writ that might be issued, that fact should have been shown. But the court conceded that the resignation had no such object in view, by eliminating all evidence on that point, and it not only did not find that Egilbert was secretary on May 20th, but did find that he had resigned on May 18th. The fact that Egilbert withheld from the court the fact of his resignation on May 20th, and allowed the court to grant the writ under the impression that Egilbert was then the secretary, is not the ground on which the contempt judgment was based. That judgment rested on his failure and refusal to produce the books of the company. Respondent did not appear at the hearing here and has filed no brief of points and authorities.

It clearly appears, and is not controverted, that it was beyond the power of petitioner to comply with the order when the peremptory writ of mandate issued and when it was served upon him, and that his inability to comply was not brought about through any design or purpose to evade the order of the court. Upon this state of facts the court was without jurisdiction to punish him for contempt. Adams v. Haskell & Woods, 6 Cal. 316, 65 Am. Dec. 517; Ex parte Cohen, 6 Cal. 319, cited in Ex parte Cottrell, 5 Cal. 420; Ex parte Todd, 119 Cal. 57, 50 Pac. 1071; In re Cowden, 139 Cal. 244, 73 Pac. 156. Petitioner could show his resignation, and that he was no longer in control of the company's books, as an answer to contempt proceedings for noncompliance with the writ of mandamus. U. S. v. Seaboard R. Co. (C. C.) 85 Fed. 955. The Supreme Court said, in Ex parte Hoar, 146 Cal. 132, 79 Pac. 853: "In cases of contempt, every court exercises a special and limited jurisdiction, and its authority to impose a fine or term of imprisonment must be shown by the record of conviction"—citing Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372.

The judgment adjudging petitioner guilty of contempt, and imposing punishment therefor, is hereby vacated and declared to be null and void.

We concur: HART, J.; BURNETT, J.

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6 Cal. App. 195

## BAUTER v. SUPERIOR COURT OF SHASTA COUNTY et al. (Civ. 385.)

(Court of Appeal, Third District, California. Aug. 5, 1907.)

MANDAMUS—VIOLATION—CONTEMPT.

Proceedings having been instituted against E., as secretary of a corporation, to compel him to produce the books of the company and submit the same for inspection, he resigned as secretary in good faith prior to the issuance of a peremptory writ commanding him to produce the books for examination, etc. Petitioner was elected temporary secretary to fill the vacancy until the permanent secretary, who had been selected, should take office. A copy of the peremptory writ was served on petitioner, and demand made on him to produce and submit them to inspection, but, before the time arrived for submission of the books, under an agreement with relator, petitioner resigned as secretary; the permanent secretary having assumed the office. *Held* that, petitioner being no party to the mandamus proceedings, the court had no jurisdiction to punish him for his failure to comply with the writ.

Petition for a writ of review by L. A. Bauter against the superior court of Shasta county and George W. Bush, judge thereof. Writ granted. Petitioner discharged.

Geo. O. Perry and C. H. Braynard, for petitioner. T. W. H. Shanahan, for respondents.

CHIPMAN, P. J. It appears from the petition herein that petitioner was adjudged to be guilty of contempt in disobeying the writ of mandate issued out of the proceedings in the cause entitled W. D. Egilbert, Petitioner, v. Superior Court of Shasta County (No. 384, this day decided) 91 Pac. 748, in which cause this petitioner was not a party in any capacity, and was not named therein. It is alleged that petitioner was on May 18, 1907, elected as temporary secretary of the Pacific Power Company to fill a vacancy caused by the resignation of said Egilbert, until one A. A. Martin, who had been selected as permanent secretary, should be able to take such office; that a copy of the said writ was served on petitioner on May 28, 1907, and demand was then made upon him to produce and submit for inspection the books of said company; that petitioner replied to said demand that the books were not in his possession or under his control, but that he would produce them as soon as he could procure possession and control of them; that thereafter he made an arrangement with T. W. H. Shanahan (who had procured said writ to issue) to submit said books to him for inspection on June 10, 1907, but that prior thereto he (petitioner) resigned as such secretary, said Martin having become able to take up the duties of said office. It is then shown that said Shanahan took proceedings to obtain an order of the court adjudging petitioner herein to be guilty of contempt for disobeying said writ of mandate; that at the hearing of said contempt proceedings, to wit, on June 14, 1907, this petitioner answered setting forth his appointment as secretary and resignation as aforesaid; that he was not a party to the mandate proceedings; that evidence was introduced and the court made findings upon the facts alleged by petitioner (but it is not shown what the findings were), and thereupon the said court decreed that this petitioner was guilty of contempt, and imposed as punishment therefor that he be fined the sum of $100, or be imprisoned one day for each $2 thereof.

Under the facts as they appear, the question is: Had the court jurisdiction to punish petitioner for contempt of the writ issued in a proceeding brought against Egilbert alone, to which proceeding at no stage was this petitioner a party, and in which he had no opportunity to be heard and was not heard? In our opinion the question must be answered in the negative. Whether or not petitioner was the successor of Egilbert as secretary, he was not bound by anything adjudged in the proceedings against Egilbert alone. Ex parte Tinkum, 54 Cal. 201. It was there held that the successor in office of the county treasurer could not be punished for contempt for refusing to obey a writ issued against his predecessor, who had gone out of office when the writ issued; that the judgment of the court against the former treasurer "had no validity against the petitioner, as his successor in office, because the court had not, by any proper proceedings had or taken in the action, made the petitioner a party defendant in the action." See Ex parte Widber, 91 Cal. 367, 27 Pac. 733; Ex parte Truman, 124 Cal. 387, 57 Pac. 223. See, also, Sargent v. Cavis, 36 Cal. 552; Ex parte Hollis, 59 Cal. 405.

The judgment adjudging petitioner guilty of contempt, and imposing punishment therefor, is hereby vacated and declared to be null and void.

We concur: HART, J.; BURNETT, J.

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6 Cal. App. 174

## COMMERCIAL NAT. BANK OF OGDEN v. SCHLITZ. (Civ. 343.)

(Court of Appeal, Third District, California. July 31, 1907.)

1. NEW TRIAL—NOTICE OF INTENTION—FILING.

The court may treat a notice of intention to move for a new trial as filed on the day on which it was served and was handed to the clerk, though for some unexplained reason he failed on that day to indorse it as filed; he having three days later, on his attention being called to it, marked it as filed as of the day it was left with him, and his failure to mark it on that day having been through no fault of plaintiff's attorney who handed it to him, though the fee was not then paid, no fee having been demanded, and there having been no refusal to file, and the clerk testifying that the failure to pay made no difference.

2. TAXATION—ASSESSMENT—PRESUMPTION OF REGULARITY.

As against the recitals of a tax deed that the assessment was made under a certain act, and the provisions of the tax laws that a tax deed is prima facie evidence that the assessment was levied according to law, the statement in a letter of the grantee in the deed is no evidence that the assessment was under another act, in which case it would be irregular.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1555, 1565.]

3. SAME—ASSESSMENT IN WRONG NAME.

The assessment of land in the name of another than the owner does not make it or the tax sale thereon invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 701.]

4. SAME—TAX DEED—DESCRIPTION OF PROPERTY.

The description in a tax deed, "strip of 50 acres on the north line of fractional N. W. ¼ of section 7," is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1520, 1521.]

5. ADVERSE POSSESSION—PAYMENT OF TAXES.

Under Code Civ. Proc. § 325, requiring one, as a condition to establishing title by adverse possession, to occupy it for five years continuously, and pay all the taxes, the running of the statute is interrupted by the true owner paying the taxes in any of such years prior to the payment thereof by the adverse claimant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 526.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Commercial National Bank of Ogden against John J. Schlitz. From an order granting plaintiff a new trial, defendant appeals. Affirmed.

C. L. Russell, for appellant. T. E. Clark, for respondent.

CHIPMAN, P. J. Action to quiet title. Findings and judgment were in favor of defendant. Plaintiff moved for a new trial, which was granted, and defendant appeals from the order.

Defendant urges that there was no proper bill of exceptions before the trial court on which to base a motion for a new trial, for the reason that the notice of intention was not filed in time. The notice of decision was served on plaintiff's counsel April 17,

1905. Notice of intention to move for a new trial was likewise served on April 24, 1905, but it is claimed by defendant that it was not filed with the clerk until May 27, 1905. There is evidence tending to show that counsel for plaintiff handed the notice of intention to the clerk, with other papers, on April 24th, but for some reason not clearly explained the clerk failed on that day to indorse the paper as filed. Later, on May 27th, his attention was called to the omission, and on this latter day he indorsed the paper: "Filed April 24, 1905. T. E. Clark, Clerk." The testimony of the clerk and of plaintiff's counsel was taken on the point, and we think there was sufficient to justify the conclusion of the trial court that the notice was in fact left with the clerk on the 24th of April, which was in time. His failure to mark the paper on that day as then filed is not shown to have been through any fault of plaintiff's attorney, and we do not think plaintiff should suffer from an omission of the clerk to perform an official duty. The fact that the fee was not paid until May 27th, when the omission was discovered, should not affect the question, for the clerk testified that failure to pay the fee on April 24th would have made no difference. In Davis v. Hurgren, 125 Cal. 48, 57 Pac. 684, cited by appellant, the clerk refused to file the notice because the fee was not paid in advance. Here no fee was demanded, and there was no refusal to file the notice. Nor can it be reasonably said that plaintiff's counsel was inexcusably neglectful. The circumstances are fully set forth in the testimony of counsel and of the clerk, and were such as to justify the court in treating the notice as filed April 24th. Section 473, Code Civ. Proc. See, also, Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332; Cameron v. Arcata R. R. Co., 129 Cal. 282, 61 Pac. 955; Murphy v. Stelling, 138 Cal. 642, 72 Pac. 176.

Plaintiff and defendant claim through a common source of title; plaintiff by deed from Lola E. Hill and Oscar E. Hill, dated July 8, 1893, duly recorded August 15, 1893, and defendant by tax deed of the collector of the Kern & Tulare Irrigation District, dated March 1, 1898. The premises described in plaintiff's complaint and deed is a tract of land described by metes and bounds, being a part of the northwest ¼ of section 7, township 24 south, range 26 east, Mount Diablo base and meridian, containing 149.05 acres. The premises, part of which is claimed by defendant, as appears from his said deed, was assessed for the year 1896 to Lola E. Hill, by the collector of said district, and is described therein as the "Frac. N. W. ¼ of section 7, township 24 south, range 26 east," and that the portion sold to defendant for delinquent taxes is described as a "strip of 50 acres on the north line of fractional N. W. ¼ of section 7, township 24 south, range 26 east, Mount Diablo base and meridian." It appears from the assessment rolls introduced by plaintiff that the tract was assessed to plaintiff for the years 1897 to 1904, inclusive. The acreage and description varied in different years (omitting here all of the part of section described), sometimes by metes and bounds, as in plaintiff's deed (1897, 1898, 1899, 1903, each assessment 153 acres, except 1903 for 149 acres); again, northwest ¼ (1900); south 110 acres of northwest ¼ (1901, 1902); and fractional south 149 acres of northwest ¼ (1904). Payment in full of taxes for these assessments was shown. Defendant introduced assessment rolls showing assessments to defendant (omitting all after part of section described) as follows: 1898, north 50 acres of northwest ¼, marked in red ink as follows, to wit: "Assessed also to Commercial National Bank of Ogden, Utah, vol. 3, page 2." Marked also in lead pencil on margin of book: "Double assessed page 2, vol. 3, T. C., Take Cr." 1899, same description and same note in red ink; 1900, fractional northwest ¼ * * * 50 acres; 1901, fractional northwest ¼ (being north 50 acres); 1902, north 50 acres of fractional northwest ¼; 1903, north 50 acres of fractional northwest ¼; 1904, north 50 acres of fractional northwest ¼. Defendant introduced receipts showing payments in full of assessments to him.

There is but little evidence outside of these official records. It appeared from the testimony of defendant and his son, and is uncontradicted, that defendant went into possession, as found by the court, July 20, 1898. Defendant testified: "I measured the land off myself so as to inclose what I thought was 50 acres and fenced it in. I measured 50 acres off of the north side of the land mentioned in plaintiff's complaint. I found the stakes at the corner of the land, placed there by the surveyors. I made my measurements according to each stake." He also testified that he has cultivated or pastured the land ever since. He explained that the northwest ¼ of section 7 became fractional in the distribution of an estate by a strip being cut off along the east side and a strip cut off the south side, thus leaving a fractional northwest ¼ of 149 acres. He testified that he had never had the land claimed by him surveyed and never notified plaintiff of his possession; that the land claimed by him was assessed in 1898, but he did not pay the taxes for that year; that the first taxes he paid was January 3, 1900, "for the taxes assessed to him for the year 1899"; that he never paid any of the taxes assessed to plaintiff for any year. It was admitted that the land in question is situated within the boundary of what was a legally constituted district, called the "Kern and Tulare Irrigation District," under the provisions of the act approved March 7, 1887 (St. 1887, p. 41, c. 34), and the acts supplemental to and amendatory thereof. Defendant testified that he claimed the land through purchase "on the delinquent assessment of

1896"; that this assessment was "levied to pay the indebtedness of the district for disorganizing. The district had been running several years without levying any assessment to pay expenses (the last previous assessment was in 1892) and had got considerably in debt; and the assessment was intended to cover, and did cover, all the debts of the district; the N. W. ¼ of section 7, township 24 S., range 26 E., was assessed to Lola E. Hill, and the taxes were not paid on it, and it was sold for the delinquent assessment in 1896, in the spring of 1897, and I bought the north 50 acres and paid the assessment. The tax collector of the irrigation district issued a certificate of sale to me, and it was not redeemed, and on March 1, 1898, the tax collector made me a deed to the land." Some letters were introduced by plaintiff, without objection, from which it appeared that on January 23, 1898, defendant wrote plaintiff that he had purchased 50 acres of the northwest ¼ at delinquent tax sale, but did not want the land, and would deed it to plaintiff for what it cost defendant. Plaintiff replied that defendant's letter was the first intimation it had of any such irrigation district as defendant mentioned; that plaintiff's title had been a matter of record since 1893. July 2, 1898, defendant replied, stating further facts about the district; that the last assessment prior to 1896 was in 1892, to Mrs. Lola Hill or Oscar Hill, and was paid; that the assessment of 1896 was to Mrs. Lola Hill, to whom notices were sent; that he supposed the land belonged to her "until some time ago, being at the assessor's office in Tulare county, giving in the list of my property, among which was the 50-acre piece purchased at delinquent sale, I found that the Commercial National Bank was paying the taxes on the N. W. ¼, * * * whence my communication to you." He then states: "Now regarding the * * * district, it is out of existence, the people in the district after having paid some $35,000 in taxes, and the district being about $10,000 in debt, and no prospect of getting water on the lands of the district, decided on disorganizing the district, which could be done legally by first paying outstanding indebtedness, and the people voted and authorized the assessment of 1896. The assessment was made and collected, and the delinquent property was sold, the same as state and county taxes, and on the 11th day of April, 1898, in the superior court of Kern county, upon showing that the affairs of the district had been wound up according to law and the outstanding debts of the district had all been paid, the court agreed (decreed?) that the * * * district should forever be dissolved." Plaintiff replied February 5, 1898, stating that the tax not having been assessed to plaintiff makes it void, as defendant will learn by consulting Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. 103; called attention again to its deed of 1893, and that defendant's tax was not levied until 1896. Thus ends the correspondence, and this is substantially all the evidence in the case.

Briefly summarized, the court found that the land described in plaintiff's complaint was, in the year 1896, "duly and properly assessed by the assessor of said district pursuant to and as required by law * * * to Lola E. Hill"; that all the property of the district was duly equalized in that year, and to pay the outstanding indebtedness of said district its board of directors duly levied an assessment upon all the lands therein, including the said lands described in plaintiff's complaint; that said assessment on plaintiff's said land became a lien thereon and was never paid; that on February 27, 1897, said property was duly offered for sale to pay said assessment, and defendant became the purchaser of the "north fifty acres of the tract of land described" in plaintiff's complaint; that said collector of said district executed and delivered duplicate certificate of sale of said property (reciting the facts as to said sale), a copy of which was delivered to defendant; that no redemption was made, and said collector on March 1, 1898, executed and delivered to defendant a deed to said north 50 acres of the land described in plaintiff's complaint, which was duly recorded April 16, 1898. The court then finds that defendant entered into possession of said land "under and by virtue of said deed" and constructed a fence inclosing the said land, and at all times since July 20, 1898, "he has been in the quiet, peaceable, continuous, actual, open, notorious, adverse and exclusive possession of said 50 acres of land, * * * cultivating and using the same * * * and claiming the same adversely to all other persons, for more than five years before the commencement of this action." As conclusion of law the court finds that defendant was the owner of the land in question at the commencement of the action and is now such owner. The original complaint was filed June 22, 1904, and the amended complaint on August 6, 1904. Plaintiff in its specifications challenges the sufficiency of the evidence substantially as to all the findings in defendant's favor.

The reason for granting the motion for a new trial is not given, but if any sufficient reason can be found the order must be affirmed. If, however, the proceedings leading up to defendant's tax deed were legal, and a valid title passed to defendant thereunder, it is immaterial whether the findings as to defendant's adverse possession are supported by the evidence. Likewise, if title by prescription is established, the findings as to the tax title may be disregarded. It becomes necessary, therefore, to examine both sources of title upon which defendant relies. Respondent attacks the findings on the following grounds: First, that the assessment in 1896 was made under the disorganizing act of 1893 (St. 1893, p. 523, c. 241), and not under the act of March 7, 1887 (St. 1887, p. 41, c. 34), and was therefore void because unauthorized by the act of 1893; second, that the title to the land in 1896, when assessed to Lola E. Hill, stood of record in plaintiff, and could not legally be assessed to any person other than plaintiff; third, that the attempted description of the land claimed by defendant as bid in by him and subsequently assessed to him does not definitely describe any land; fourth, that the whole of the fractional northwest ¼ of said section was assessed to plaintiff at the time the said 50-acre tract was bid in by defendant and at all times while subsequently assessed to defendant, which latter was a double assessment and void under section 3607, Pol. Code, and the concurring opinion in Cavanaugh v. Jackson, 99 Cal. 675, 34 Pac. 509; and the facts do not establish title by adverse possession.

### The Tax Title Considered.

We do not think that the facts warrant the assumption that the assessment was made under the act of 1893. It was doubtless made in anticipation of disorganizing the district, but not as a part of or through proceedings for that purpose. The collector's deed recites that the levy was made for the year 1896 by virtue and under the provisions of the act of March 7, 1887, and its amendatory acts. The letter of defendant to plaintiff, relied upon by the latter as showing that the assessment was made under the act of 1893, does not purport to be more than an outline narrative of certain proceedings, but does not show that the levy was under the act of 1893. The decree of the court, dissolving the corporation, was not made until two years later, and could not then have been made except upon a showing in the complaint and by the evidence that the debts of the corporation were paid. The record is not before us, and we must presume regularity so far as disorganization is concerned. By the act of 1897 (St. 1897, p. 254, c. 159) the assessor was required to assess all real property in the district to the persons who own, claim, have the possession or control the property, and he must specify in the assessment book: "(a) The name of the person to whom the property is assessed (if the name is not known to the assessor, the property shall be assessed to 'unknown owners')." Section 48 (page 271) provides: That the matter recited in the certificate of sale must be recited in the deed and such deed duly acknowledged or proved is prima facie evidence that: "(a) The property was assessed as required by law; * * * (c) that the assessments were levied in accordance with law"; and "such deed * * * is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment by the assessor inclusive, up to the execution of the deed." Like provisions are found in the act of 1887. Section 32 of the act of 1887 (also section 50 of the act of 1897) provides: "When the land is sold for assessments, correctly imposed, as the property of a particular person, no misnomer of the owner or supposed owner, or other mistake relating to the ownership thereof, affects the sale or renders it void or voidable." Under the provisions of section 3628 of the Political Code, before its amendment in 1880, it was held, as in Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. 103, that the assessment must be made to the owner, and if not known then to unknown owners. But in Escondido H. S. Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401, it was held that an assessment to a person not the owner does not affect its validity. To the same effect: Klumpke v. Baker, 131 Cal. 80, 63 Pac. 137, 676. It was said in Lake County v. Silver Bank, etc., Min. Co., 66 Cal. 20, 4 Pac. 876: "The ascertainment of the name of the owner is a matter with respect to which the assessor has discretionary power, and his judgment or conclusion in regard to it is final, so far as the validity of the tax is concerned." In Klumpke v. Baker, supra, the court said: "The name of the owner of the property assessed is an incidental provision for the sake of convenience, but a failure to give the correct name of the owner is declared by the statute not to impair the assessment." Again: "The assessment is not against the owner, but is of the property, and that must be correctly described." And this brings us to the remaining question touching the validity of the title based upon the tax deed.

The land, as said in the Klumpke Case, must be correctly described. The description must be definite, certain, and intelligible of itself, and not such as to require evidence aliunde to render it certain. Keane v. Cannovan, 21 Cal. 302, 82 Am. Dec. 738; People v. Mahoney, 55 Cal. 286; People v. C. P. Co., 83 Cal. 400, 23 Pac. 303; State v. C. P. R. R. Co., 21 Nev. 101, 25 Pac. 442; C. P. Co. v. Nevada, 162 U. S. 525, 16 Sup. Ct. 885, 40 L. Ed. 1057. "A description sufficiently certain to convey land between man and man, and which, if contained in an agreement to convey, would authorize a court of equity to decree specific execution, will not answer in the proceeding to enforce the collection of a tax." Blackwell on Tax Titles, p. 124. Defendant's deed takes its origin in and must be governed by the description of the least quantity of the land which defendant was willing to take and pay the assessment. This description reads as follows: "Strip of 50 acres on the north line of fractional N. W. ¼ of section 7," etc. We do not think that this description meets the requirements of the rule above stated. Quantity is the least certain element of description and is no description at all unless a definite and certain basis for its ascertainment is supplied. The north line of the 50-acre tract taken is not necessarily coincident with the entire north line of the northwest ¼. The description only calls for 50 acres on that line, but not along its whole length. If plaintiff and defendant had been bargaining for 50 acres on the north line, parol evidence might have been admissible to show their intention, but not so in tax proceedings, in their nature in invitum. The rule has been laid down that, where a given acreage is sold "off the side of a quarter section," it must be taken in a parallelogram, and when out of the corner it must be taken in a square. 4 Am. & Eng. Ency. of Law, p. 789. Even this rule could not have been applied owing to the irregular shape of the fractional tract out of which defendant sought to take the 50 acres. The uncertainty of description was attempted to be corrected in subsequent assessments, but obviously this cannot avail defendant as supporting his tax title, however much it may assist his claim by prescription.

The Title by Adverse Possession Considered.

The title by prescription turns principally upon the payment of the taxes by defendant. It was shown that plaintiff paid the taxes levied and assessed upon the fractional northwest ¼ of section 7 for the years 1897 to 1904, inclusive; that defendant had the land claimed by him assessed for 1898 and thence each year to 1904, inclusive, and paid the taxes for each year except 1898. But plaintiff paid the tax on all the land for 1903 on October 23, 1903, while defendant did not pay the tax on the tract separately assessed to him until November 23, 1903, and the tax for the year 1904 was paid by both parties on the same day, November 18, 1904. Whether the adverse occupant of land may have it assessed to himself while it is assessed also to the true owner, and may comply with section 325, Code Civ. Proc., by paying this double or second tax when for the same years the true owner also pays the tax, is a question not satisfactorily or clearly settled by our Supreme Court. In Cavanaugh v. Jackson, 99 Cal. 672,[1] the main opinion seems to answer the question in the affirmative. But in a concurring opinion, Mr. Justice Harrison, one of the three judges who pronounced judgment, dissented from the view of the majority and concurred only on the ground that the adverse occupant paid the tax before the true owner paid it. When the reasoning of the dissenting opinion is considered, together with some statements in Hayes v. County of Los Angeles, 99 Cal. 74, 33 Pac. 766, and the decision in Carpenter v. Lewis, 119 Cal. 18, 50 Pac. 925, is also taken into consideration, it must be apparent that the soundness of the Cavanaugh decision is to some extent at least to be doubted. However this may be, it seems quite clear to us that, where the true owner pays the tax upon an assessment to himself before the adverse claimant pays the second or double tax he has caused to be assessed to himself, the latter cannot claim compliance with the statute. This view makes it unnecessary to consider the other questions arising out of the facts connected with defendant's claim of adverse possession. The prior payment of the tax by plaintiff for the year 1903, not to mention the payment by both parties on the same day for the year 1904, interrupted the running of the statute of limitations, and defendant had not completed the requisite adverse occupation when the action was commenced.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

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6 Cal. App. 204

## MENZEL v. PRIMM et al. (Civ. 346.)

(Court of Appeal, Third District, California. Aug. 6, 1907.)

1. VENDOR AND PURCHASER—OPTIONS.

Even if a contract by which plaintiff agreed to sell mines to C. for $7,500, of which $3,500 was to be paid at a certain time and $4,000 later, was an option, yet the transaction became one of sale on $1,000 being paid, and plaintiff executing an agreement reciting that, whereas, there was then "due and owing" $2,500 on the claim, he agreed to accept in lieu thereof the note of C. and another of even date for that amount payable 60 days later.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 3.]

2. PAYMENT—PAYMENT BY NOTE.

Where, when a payment on plaintiff's contract of sale of a mine to C. became due, he executed an agreement reciting that, whereas, there was then due and payable $2,500, he agreed to accept "in lieu of the sum of $2,500" a note of even date signed by C. and P., payable in 60 days, with interest, said note was not taken in payment, but as evidence of the indebtedness payable at maturity of the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 70.]

3. PLEADING—ANSWER—CONSTRUCTION.

The allegation of the answer, in an action on a note, that the note was given in payment, which was contrary to defendant's contention in the case, and at variance with the language of the instrument under which the note was taken, and with the facts as disclosed, will be treated as an attempted statement that the note was given as an evidence of the indebtedness payable at maturity of the note, as was the fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 66.]

4. BILLS AND NOTES—DEFENSE AVAILABLE TO SURETY.

A surety on a note may, as against the original payee, defend on the ground of absence or failure of consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 163, 164.]

5. VENDOR AND PURCHASER—ACTION FOR PARTIAL PAYMENT—TENDER OF DEED.

Where a contract of sale of land, for a certain sum, payable in installments, is silent as to time of delivering a deed, it should be tendered before action can be maintained on a note given for one of the installments.

Appeal from Superior Court, Shasta County; C. M. Head, Judge.

Action by William Menzel against F. R.

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[1] 34 Pac. 509.

Primm and another. From an adverse judgment, plaintiff appeals. Affirmed.

Reid and Dozier, for appellant. T. W. H. Shanahan and Chas. H. Braynard, for respondent Primm.

HART, J. This action was brought by the plaintiff to enforce the payment of a promissory note for the sum of $2,500, made and delivered on the 28th day of May, 1903, by the defendants, and payable 60 days after date. The defendant, Chambers, was not served with process and made no appearance. The case was tried before the court, a jury having been waived by the parties, and judgment awarded to the defendant and respondent Primm. This appeal is from said judgment and the order refusing plaintiff a new trial.

The note which is the foundation of the action was the outcome of a certain agreement in writing, dated the 13th day of February, 1903, under the provisions of which the plaintiff, on certain specified terms, agreed to sell certain mining claims to the defendant Chambers for the sum of $7,500, of which the sum of $3,500 was to be paid on or before the 24th day of March, 1903, and the remainder, $4,000, on or before the 24th day of September, 1903. The agreement provided that Chambers should have immediate possession of said mining claims for the purpose of working, mining, and developing the same, and said Chambers agreed to "put two men to work thereon within 60 days" from the date of the agreement. Chambers was given the right to extract ores from said mining claims, but was to "leave all ores so extracted upon the dump, save and except such amounts as may be necessary for assay and sampling purposes." The agreement also stipulated that the "party of the second part (Chambers) shall have the use of a boiler now on said premises," and also "the use of the lumber and timber belonging to said mining property, and, in the event of the sale of said property, will pay to said party of the first part the sum of $250 for the timber and lagging now on the ground on said premises." And the parties finally agreed that, in the event the party of the second part shall fail to purchase said property, he shall have the right to remove all machinery which he may have placed on said mining ground. On the 26th day of March, 1903, plaintiff and Chambers entered into a second written agreement, by the terms of which the time for the making of the first payment, $3,500, was extended to the 24th day of April, 1903, or 30 days from the 24th day of March, 1903, on which day said payment was, as originally agreed, to be made. On the 21st day of April, 1903, a third written agreement was made by plaintiff and Chambers, whereby plaintiff released said Chambers from the obligation of paying said sum of $3,500 on the said 24th day of April, 1903, as provided in the agreement of the 26th day of March, 1903. In that agreement, mentioned as the third, plaintiff agreed to accept from said Chambers, in lieu of the $3,500 which the latter had promised to pay plaintiff on said 24th day of April, the sum of $1,000 in coin and the further sum of $2,500, to be paid on the 24th day of May, 1903. A fourth agreement in writing was made by the parties on the 28th day of May, 1903, by which the plaintiff agreed to accept from Chambers a promissory note for $2,500 in the place and stead of that amount of money which Chambers had agreed to pay plaintiff on the 28th day of May, 1903. Said note was executed by Chambers and the respondent, and is the instrument upon which this suit is based. The second, third, and fourth agreements to which we have just referred continued in force all the stipulations, covenants, and conditions contained in the original agreement, save and except only the portion thereof stipulating as to the times of the payments of the money which the second party agreed to pay for said property.

The answer alleges that on the 15th day of April, 1903, Chambers entered into a written agreement with one T. S. Henderson, of St. Louis, Mo., under and by which said Chambers, for and in consideration of the sum of $25,000, agreed to sell and convey to said Henderson all the mining claims mentioned in the agreement between said Chambers and the plaintiff, and said Henderson agreed to purchase the same for said sum, whereof $5,000 was to be paid upon the making of said agreement and $5,000 on the 15th day of September, 1903, and the balance to be paid in installments of $5,000 at the expiration of every six months thereafter until the full purchase price was paid. The answer further alleges that, on the 10th day of August, 1903, the plaintiff and the Great Western Gold Mining Company, a corporation, of which said T. S. Henderson was president and the financial agent, and who had the general management and control of all the business affairs of said corporation, entered into a written agreement, by the covenants of which plaintiff agreed to sell and convey by a good and sufficient deed to said corporation, and the latter agreed to buy, the mining claims mentioned in the original agreement between the plaintiff and said Chambers for the sum of $7,000, to be paid in certain specified installments; and it was further agreed by plaintiff that said corporation and its assigns might immediately, upon the execution of said agreement, enter into and take possession of said mining claims. It is also alleged in the answer that the agreement so entered into between the plaintiff and the said corporation "was made and entered into for the purpose and with the intent that neither said Great Western Gold Company or the said T. S. Henderson, either individually or as president, fiscal agent, and the person who had general charge and management of the affairs of said company, would make said payment of said sum of $5,000 to said Chambers which was agreed and understood should be paid on the 17th day of September, 1903, and that said plaintiff would sell to the said Great Western Gold Company the said mining claims hereinbefore mentioned for the said sum of $7,000." The answer avers that the promissory note set out in the complaint was given for the purpose and the intent that the same might become a payment upon said mining property, and that no demand for its payment was made until more than six months after its maturity. "For a third and separate answer," the answer reiterates that the note in dispute was made and given and accepted as part payment of the agreed purchase price of said mining claims, and avers that "up to and including the 10th day of August, 1903, said defendant, Chambers, had performed on his part all the terms, time given and conditions of" the four several agreements between him and the plaintiff. It is also alleged that the plaintiff put it out of his power to carry out his part of the agreement with Chambers by agreeing, without the knowledge or consent of the defendants, to sell said property to the corporation mentioned, and that therefore the consideration for said promissory note "wholly and entirely failed." It may here be stated that the property which is mentioned in the agreement between the plaintiff and the Great Western Gold Company is designated therein as the "Vandevere Mine," but the answer alleges that it is the identical property mentioned in the agreement between plaintiff and Chambers.

It is contended by the appellant that the agreement between the parties was intended and understood by them to be an option tendered to the defendant Chambers to purchase the property described in the instrument; while, on the other hand, the respondent maintains that it constituted a contract by the provisions of which the plaintiff agreed to sell, and the defendant Chambers agreed to purchase, said property. "The distinction between a contract to purchase or sell real estate and an option to purchase is that the contract to purchase or sell creates a mutual obligation on the one party to sell and on the other to purchase, while an option merely gives the right to purchase within a limited time without imposing any obligation to purchase." 29 Am. & Eng. Ency. of Law (2d Ed.) p. 606. In other words, an option is a contract by which the owner of property invests another with the exclusive right to purchase said property at a stipulated sum within a limited or reasonable time in the future. Or, stated in another form, it is a right "acquired by contract to accept or reject a present offer, within a limited or reasonable time in the future." 21 Am. & Eng. Ency. of Law, p. 924. When the offer thus made is, within the time stipulated, accepted by any sufficient act or words of the party acquiring the right to accept or reject such offer, the transaction between the parties, ipso facto, ceases to be an option, but becomes a sale or contract of sale, according to the circumstances of the acceptance.

Plaintiff testified that on the 21st of April, 1903, Chambers paid him the sum of $1,000. There is no provision in the agreement in express language which indicates that the document was intended as an option; but appellant undertakes to construe certain language contained therein as a manifestation that the parties intended and understood the instrument to be a mere offer to sell. But assuming that the original writing could be construed as a mere option, it is clear that the payment by Chambers, on the 21st day of April, 1903, of the sum of $1,000 to the plaintiff, operated as an acceptance of said option, and that, whatever may have been the previous intention of the parties as to the nature of their transaction, it took on, from the time of such payment, the character of an agreement or contract of sale, and its terms capable of being specificaly enforced. And assuming, further, that the plaintiff intended the original writing to be nothing more than an offer to sell, it is manifest that, after the receipt by him of said sum of $1,000, and from the language of the fourth writing, executed by all the parties to this action, he, too, treated said payment of $1,000 as an act of acceptance of the option by Chambers. The "fourth writing" referred to was made subsequently to the payment of the $1,000 to the plaintiff, and reads in part as follows: "Whereas, there is now due and owing claims in the sum of $2,500.00, now, for and in consideration of the sum of $1.00 to me in hand paid by said James Chambers, I hereby agree to accept a promissory note of even date herewith, signed by said Jas. J. Chambers and F. P. Primm, in lieu of the sum of $2,500.00, said note being payable sixty days from and after date hereof, with interest at the rate of 8 per cent. per annum until paid." In view of the fact of the payment of the $1,000, there can be but one meaning to the language quoted, "Whereas, there is now due and owing a payment on said mining claims," and that is that the mines had been sold, and that there was then due from the purchaser the certain sum of money mentioned in said writing. To hold that, after the payment of the $1,000 by Chambers to the plaintiff, the transaction still remained an option (we are assuming but not conceding that the original writing was only an option), would be to declare that the said sum so paid was the consideration for the right acquired by Chambers under the option; that is, the right to accept or reject an offer to sell property itself valued at only $7,500. Such a construction of the agreement, under the circumstances, would be unreasonable and absurd.

It is further contended that, under a proper construction of the last or "fourth writing," the note sued on was "accepted as a payment on the contract or option, and not as an extension of time," and that therefore the respondent is not "in a position to say anything because he is in no wise concerned with any agreement except the one as to the receiving of this note as payment." The claim is, in other words, that the note was intended as an absolute payment, and respondent, not being a party to the agreement, cannot set up the defense of failure of consideration, which defense would be available to the principal, or Chambers. We do not think the facts as exhibited by the record warrant any such conclusion. On the contrary, we think it is plain, from the facts before us, that the note was not intended as a payment, but that it was designed only as an evidence of the indebtedness, and therefore operated only as a postponement or suspension of the right of action on such debt to a future time; that is, until its maturity. The contention of appellant is founded on his construction of certain language contained in the agreement (the "fourth writing") that the note is accepted "in lieu of the sum of $2,500," etc. It is doubtful whether that language warrants the construction thus given it by appellant; but, if it may be said to be reasonably susceptible of such construction, we think that it is equally capable of the opposite interpretation that it was intended, and so given and accepted, for the purpose merely of deferring to the date of its maturity the right to bring suit upon the debt of which it constituted written evidence. But to impart to the note the effect contended for by appellant, there should be an express agreement that it was to be deemed and accepted as an absolute payment. It is well settled that the note of a debtor or of a third party, if not itself paid, does not constitute a payment unless received by the creditor under an express agreement to accept it as an absolute payment. "The presumption is not in favor of its being received as payment." Bonestell v. Bowie, 128 Cal. 515, 61 Pac. 78; Dingley v. McDonald, 124 Cal. 90, 56 Pac. 790; Savings Bank v. Central Market Co., 122 Cal. 33, 54 Pac. 273; Deleapiazza v. Foley, 112 Cal. 380, 386, 44 Pac. 727; Savings, etc., Soc. v. Burnett, 106 Cal. 514, 528, 39 Pac. 922; Steinhart v. National Bank, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132; Comptoir D'Escompte v. Dresbach, 78 Cal. 15, 20 Pac. 28; Welch v. Allington, 23 Cal. 322. There is no express agreement here that the note should be treated and accepted as a payment. The allegation in the answer that the note was given as a payment does not affect our views upon the subject. We do not know how the respondent was led to make such an allegation in his pleading, since, in his brief, he vigorously opposes the view which the language of the averment seems to imply. We do not feel bound by the construction of a document by a pleader which is plainly at variance with the language of the instrument itself, as well as with the extrinsic circumstances, as disclosed by the record, which surrounded and accompanied its execution. The allegation at best is a mere conclusion, and we are rather of the opinion that the pleader only intended to state, though, it may be admitted, by the employment of inapt language, what the fact is, that the note was given as an evidence of the indebtedness payable at the maturity of said note.

There seems to be no question raised here that a surety may defend upon the ground of an absence or failure of consideration of a promissory note to which he is a party, if the action thereon is by the original payee. The liability of a surety cannot be greater than that of the principal (Stockton, etc., Society v. Giddings, 96 Cal. 90, 30 Pac. 1016, 21 L. R. A. 406, 31 Am. St. Rep. 181), and, where there is a failure of consideration to support it, the note would be just as amenable to attack upon that ground by a surety as by the principal—where the suit is between the original parties, and no rights of an innocent holder are involved. But the respondent claims that he was a principal. While we cannot say that the evidence justifies that conclusion, it is nevertheless apparent therefrom that the respondent had an interest in the agreement between plaintiff and Chambers, independent of that involved in his mere liability upon the note. He testified that he became a party to the note because, among other reasons, he expected that Chambers would make money out of the property and "would reimburse me to a certain extent out of the mine. I started him in business when he had nothing, and, if he accumulated a competence, I expected to be reimbursed for what I had done for him when he was poor and needy." He also stated that he and plaintiff had "discussed the matter about accepting the note." By the statement that he expected to be "reimbursed to some extent out of the mine," the respondent evidently meant that Chambers intended to remunerate him for his acts of assistance (signing the note, etc.) as soon as he could make the money from the mines, and from this it is reasonably inferable that there was some understanding between Chambers and respondent to that effect. But whether there was such an understanding or not, or whether, as appears to be the fact, the respondent was thoroughly familiar with the antecedent transactions of plaintiff and Chambers as to the property involved, and upon the faith of such knowledge and his expectation of participating in the profits of the mines under the ownership and development by Chambers signed the note, it was, in any event, his unquestionable right in this action by the original payee to interpose the defense of want of consideration, even though he played no other roll than that of surety.

The evidence shows that the consideration for the note in dispute, for a time at least, failed absolutely, because after its maturity, and long before the commencement of this action, the plaintiff entered into a contract with the Great Western Gold Company, by the provisions of which the latter was to buy from the plaintiff the identical property which is the object of the agreement between plaintiff and Chambers. Plaintiff himself testified: "I received $1,000 for the same property from the Great Western Gold Company on the 16th day of October, 1903. Some time after this I received $500 besides the $1,000 from the Great Western Gold Company for the same property. I still hold the title and the possession of the Scottish Chief and Santa Clara mines, sometimes known as the Vandevere mines. I gave the Great Western Gold Company possession, I think, on the 16th day of October, 1903, for a time, and I have possession of it now." It is thus seen that appellant, a short time after the date of the maturity of the note here, placed himself in a position in which he could not have performed his part of the agreement with Chambers, even if he had desired to do so, unless he had been able to make such terms with the corporation as would have enabled him to convey the property to the defendants. The consideration for the note had failed by the act of the plaintiff himself. At the time of the commencement of this action his agreement with the corporation, it appears, ceased to be binding, and he again took possession of and assumed control over the property. We think that the significance of the circumstance of the contract of option between plaintiff and the Great Western Gold Company is in the fact that the plaintiff thus gave evidence of his intention of treating his contract with Chambers as no longer existing or binding. And if he did not so intend to treat it, why did he assume complete control over the property and attempt to dispose of it to other parties? If he intended to hold Chambers and the respondent to their contract, he should have first tendered them a deed to the property, or offered to convey to them such interest in it as would be commensurate with the money already paid and the sum due on the note. He admitted that at no time did he offer to execute a deed to the parties or to either of them. These views are, of course, based upon the theory that the transaction between the parties involved a contract of sale, and not an option, as contended by appellant. As we have before declared, we have no doubt that the agreement was one to sell on the part of the plaintiff, and to purchase on the part of Chambers. We think the case at bar comes within the principles laid down in the case of McCroskey v. Ladd, 96 Cal. 456 et seq., 31 Pac. 558, where the court says that an "action upon a note, being between the original parties thereto, is subject to an inquiry into its consideration, and is also subject to any equities existing between the parties which arise out of the execution of the note, or are connected therewith. The note was given for a portion of the purchase price of a tract of land to be thereafter conveyed by the plaintiff under his agreement with the defendants and their associates, was executed in pursuance of said agreement at the same time with the execution of the agreement, was a part of the same transaction, and is to be interpreted and regarded as a part of the agreement made between the parties at that date." The note here was, as were all the other writings of which we have made mention, an outgrowth of the transaction between the parties and a part and element thereof, and all said writings, including the note, are to be construed as one agreement. In the case from which we have just quoted the court further says: "The respective obligations of the parties to an agreement for the conveyance of land, when the purchase money is made payable in installments, are to be construed as independent obligations, or as dependent and concurrent, according to the terms in which the agreement is express. If an installment is made payable prior to the date at which the conveyance is to be made, the obligation to pay the installment and to make the conveyance will be regarded as independent obligations, and the seller can maintain an action for the recovery of the installment without the execution or tender of a conveyance; whereas, if the payment of the installment is to be made upon the execution of the conveyance, no recovery thereof can be had, except upon the averment and proof of such execution, or a tender thereof. If the agreement is silent upon this point, the obligations will be regarded as mutual and dependent, so that neither party can have a right of action against the other without a previous performance or offer to perform on his part; and if the time for the performance of the conditions on both sides has expired, it is incumbent on either party, before he can enforce a performance by the other, to do or offer to do all that by the agreement he is required to do." The agreement here is silent upon "the point" mentioned in the opinion. The time within which the conditions here were to be performed, in the absence of express language fixing a time, can only be held to be that which expired coincidently with the date of the maturity of the note.

Complaint is made of certain rulings of the court upon questions of admissibility of evidence, but they are not sufficiently important to demand special attention. The rulings, to which exceptions were reserved and claimed here to have been prejudicial to plaintiff, even if they be conceded to be erroneous (and we do not so hold them to be), could not, in our opinion, have resulted in injury to the appellant.

The findings are amply supported by the evidence, and the judgment is just, equitable, and conscionable. Under the facts, as they are recorded here, any other judgment would be the reverse.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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6 Cal. App. 197

### WILLS v. BOOTH et al. (Civ. 350.)

(Court of Appeal, Third District, California. Aug. 5, 1907.)

1. Executors and Administrators—Allowance to Surviving Wife—Notice.

Under Code Civ. Proc. § 1469, providing that if, on return of the inventory of the estate of a decedent, it appears therefrom that the value of the estate does not exceed $1,500, the court shall, by order, require all persons interested to appear to show cause why the whole of the estate shall not be assigned to decedent's widow, and that notice thereof shall be given as provided in sections 1633, 1635, and 1638, such notice need not be given by publication, those sections providing only for notice by posting, or if, on final hearing, the judge shall deem the notice insufficient, then that he may order such further notice as may seem to him proper.

2. Same—Actions Against.

The estate of decedent having been of less value than $1,500, and so, under Code Civ. Proc. § 1469, been assigned to his widow, action cannot be maintained against the administratrix on a note of decedent.

3. Same — Presentment of Claim — Complaint.

The complaint in action on a note of decedent against his administratrix must show that the claim, accompanied by a copy of the note, was presented to the administratrix, in accordance with Code Civ. Proc. §§ 1494, 1497, and was rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1808.]

4. Bills and Notes — Demand Note — Indorsement—Presentment for Payment.

A note, payable at a definite time, being indorsed by the payees after maturity, is then to be treated as one payable on demand, so that to make the indorsers liable thereon there must be a presentment and demand on the maker within the time prescribed by Civ. Code, § 3135, or else a satisfactory showing excusing the failure to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1022–1028.]

5. Same—Action Against Indorsers—Complaint — Excusing Nonpresentment for Payment.

The complaint against the indorsers of a note does not sufficiently show excuse for not presenting it for payment to the maker; it merely alleging on "information and belief," without giving the grounds therefor, that the maker had left the state, and that the note was presented for payment at the place of its date, when the note was silent as to the place of payment, and this was not shown to have been the maker's place of residence or business, and no diligence to find the same is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1497.]

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by William L. Wills against William Booth and Mary A. Burleson, administratrix of I. C. Burleson, deceased. From an adverse judgment, plaintiff appeals. Affirmed.

Coburn & Collier, for appellant. R. S. Taylor, for respondents.

HART, J. This is an action on a promissory note. A demurrer was sustained to the amended complaint, with leave granted to the plaintiff to file a second amended complaint within 10 days. The plaintiff failed and refused to further amend his complaint within the time allowed, and judgment was thereupon entered in favor of the defendants dismissing the action. From the judgment so entered, this appeal is taken.

The note in question was made and delivered by one A. M. Williams to the defendant Booth and I. C. Burleson: the latter deceased at the time of the commencement of this suit. The note was executed on the 1st day of July, 1902, for the sum of $5,000, payable six months after date, with interest at the rate of 6 per cent. per annum. On the 4th day of January, 1903, two days after its maturity, the note was indorsed by the payees to the plaintiff. Burleson died on the 18th of October, 1903, and on the 19th day of January, 1904, his widow, one of the defendants herein, was duly appointed administratrix of his estate by the superior court of Siskiyou county. "On the 20th day of February, 1904, the inventory and appraisement of said estate was filed in said court, in which all the property belonging to said estate was appraised at the sum of $1,400." Thereafter, and on the 5th day of April, 1904, a decree was made by the superior court distributing all of said estate to the widow. It is alleged in the complaint "that no notice to creditors of said deceased was ever ordered published, and no notice to such creditors was ever published." It is further alleged "that on or about the 8th day of June, 1903, the said A. W. Williams left the state of California, as plaintiff is informed and believes, and has never returned thereto, and since said date he has not had a place of business, as plaintiff is informed and believes." That on the 16th day of February, 1905, the plaintiff caused the said note to be presented at Hornbrook, Cal., the same being "the place where said note was dated and the place for the payment thereof; but the said A. W. Williams was not in said Hornbrook or in the state of California, nor had he been therein since on or about the 8th day of June, 1903, as aforesaid, as plaintiff is informed and believes." That thereupon, and on said 16th day of February, 1905, the plaintiff caused said note to be presented to said defendants, with a notice of the fact that Williams, aforesaid, was not in California, that the said note had not been paid, and "that plaintiff looked to said defendants for its payment." The demurrer was both general and special. The grounds of the special demurrer present one of the important questions submitted for decision, and are thus stated: "That said complaint does not show that demand was made upon the maker, Williams, upon the maturity of said note or attempted to be made at the last known place of residence or business of said debtor. That notice of the absence of said A. W. Williams, the maker of said note, from the state of California, at the date when demand for payment should have been made, was not given or attempted to be given to defendants, or either of them, within the time required by law. That no notice of the nonpayment of said note was given to defendants, or either of them, within the time allowed by law therefor."

We think the court properly sustained the demurrer as to both of the defendants. The pleaded facts show that the respondent Mary A. Burleson was the widow of I. C. Burleson, who, jointly with Booth, became an indorser of the note; that is, he was one of the original payees who indorsed the note to appellant. She was duly appointed administratrix of her deceased husband's estate, and in the due course of the proceedings of administration the court set apart and assigned to her all said estate. The inventory and appraisement showed that the value of all the property of said estate did not exceed the sum of $1,500, and it was therefore not only within the power but the duty, of the court, to assign the whole of said estate to her for her use and support. Section 1469, Code Civ. Proc.; Estate of Palomares, 63 Cal. 402; Estate of Atwood, 127 Cal. 430, 59 Pac. 771. In the last-mentioned case it is said: "After the estate is set apart, there shall be no further proceedings in the administration. Section 1469, supra. Evidently, notice to creditors is a proceeding in the administration, and therefore the statute is express that such notice must not be given after the estate is so set apart to the widow." The kind of notice required in such a case is prescribed by the section itself, authorizing and requiring the court to set apart the estate to the family. It is therein provided that: "Notice thereof shall be given and proceedings had in the same manner as provided in sections 1633, 1635 and 1638 of this Code." Those sections do not expressly provide for publication of notice in a newspaper, or other than by posting "in at least three public places in the county," or, "if, upon final hearing, * * * the court or judge thereof should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper."

The averments of the complaint show that the court acted within its jurisdiction in making the order or decree assigning the entire estate to the widow, and therefore no reason is shown why she, as administratrix, should have been made a party to this suit. The object of a suit against the representative of a deceased person is, of course, to bind the estate by any judgment which may thereby and therein be obtained, and that the same may be paid in the due course of administration. The widow in this case, in her individual capacity, was as much a stranger to the transaction as any other person who had nothing to do with making or indorsing the note. The estate, as shown by the averments of the complaint, was not one in which claims of creditors of the deceased could be filed and allowed, or otherwise acted upon. It was, as we have seen, an estate as to the disposition of which the court had but one thing to do—make a decree, after proper proceedings, assigning the whole thereof to the widow. And if the estate had been of greater value than one which may thus be set apart to the widow, it would have to appear from the averments of the complaint that a claim, accompanied by a copy of the note (section 1497, Code Civ. Proc.), had been presented to the administratrix, in accordance with section 1494 of the Code of Civil Procedure, and that the same had been rejected. The right to sue an executor or an administrator is a statutory one, and, if it does not appear from the complaint that the statutory requirements as to claims against the estate have been complied with, a cause of action is not stated. The complaint failed absolutely to state a cause of action against Mrs. Burleson.

We think that it is now the settled rule in this state that, where indorsers of a negotiable instrument are sought to be charged, it is necessary, first, that there should be a presentment and demand upon the maker within the time prescribed by the statute, or, in default thereof, a satisfactory showing excusing the failure to do so. Section 3135 of the Civil Code provides: "The apparent maturity of a promissory note payable at sight or on demand, is: (1) If it bears interest, one year after its date, or (2) if it does not bear interest, six months after its date." It is said that a negotiable instrument indorsed after maturity is regarded as equivalent to one payable on demand. Such a bill or note, though overdue, continues to be negotiable, and is in the nature of a new bill payable on demand. Daniel on Negotiable Instruments, §§ 611, 996; Beer v. Clifton, 98 Cal. 326, 33 Pac. 204, 20 L. R. A. 580, 35 Am. St. Rep. 172. The note sued on was indorsed to the plaintiff two days after the date of its maturity, and therefore, in the hands of the indorsee, became a note payable on demand, and under section 3135, supra, it was the duty of the plaintiff to have made a demand upon Williams, the maker, or have shown some reasonable excuse for not so doing, before he could charge the indorsers. The case of Machado v. Fernandez, 74 Cal. 362, 16 Pac. 19, seems to hold a contrary view. It is there said, after referring to the several sections of the Civil Code pertinent to the subject, that a distinction is made as to the liability of indorsers between notes payable on demand with interest and those payable on demand without interest, and that in the one case the indorser is released from liability if the note is not duly presented for payment within six months after its date, and that "in the other he is not released from liability by any mere delay in presenting it." But the Supreme Court in later cases has not adopted the rule as thus stated. "But this section," says the court in Cousins v. Partridge, 79 Cal. 229, 21 Pac. 745, speaking of section 3135 of the Code, "clearly applies to a case where a demand is necessary, and a demand is necessary only when it is sought to charge indorsers and others than the principal. Formerly, in order to hold indorsers on paper payable on demand, demand and notice had to be made and given within that very uncertain period called 'a reasonable time.' Now, section 3135 limits that time to a year or six months (according as the note does or does not bear interest), and after that time there cannot be a demand and notice which will bind an indorser." The rule as thus declared is followed in Jones v. Nicholl, 82 Cal. 33, 22 Pac. 878, the opinion being written by the writer of the opinion in Machado v. Fernandez, supra, and also in Beer v. Clifton, supra. It follows that if counsel's construction of the opinion in Machado v. Fernandez is correct, and it at least appears to be, the rule as therein declared has been overruled by the cases to which we have just directed attention. And any other construction of section 3135 of the Civil Code would render meaningless the section, although its purpose, so far as the second subdivision thereof would be affected by such a construction, is accomplished by section 3248 of the same Code.

The complaint here alleges, "upon information and belief," that Williams left the state on or about the 8th day of June, 1903, and that on the 16th day of February, 1905, the plaintiff caused the note to be presented at Hornbrook, Cal., "the same being the place where said note was dated and the place for the payment thereof"; but that the maker was not "in said Hornbrook or in the state of California." It is not stated that the note was presented or attempted to be presented before the 8th day of June, 1903, the time at which it is alleged that Williams left the state and five months after the plaintiff became the owner of the note. While it is dated at Hornbrook, by its terms it is not payable there, nor is there designated in it any particular place at which it is payable. There is no allegation that Hornbrook was at any time the place of residence of the maker, and there is no averment that any effort was made to find his place of residence, if he ever had any in California. A note not payable at any particular place is payable and should be presented for payment at the residence or place of business of the maker, or wherever he may be found, at the option of the presentor; and it is only where the maker has no place of business or residence within the state, or where his place of business or residence cannot be ascertained with reasonable diligence, that presentment for payment is excused. "The complaint is insufficient because it states no facts respecting the knowledge or ignorance of Dinkelspeil & Co., and their indorsers or agent, as to the actual place of residence or business of the maker of the note, and does not allege what was her last known place of residence or business, or that any inquiry or presentment was made thereat. Merely looking out for the payor at the place where the instrument is dated is not of itself due diligence, but presentment must be shown to have been made at the promisor's last known place of residence or business." Haber v. Brown, 101 Cal. 451, 35 Pac. 1035. Moreover, it was necessary to show more knowledge of the whereabouts of the maker than that involved in mere "information and belief." The complaint should have shown, if it were the fact, that inquiries as to his whereabouts were made of his personal acquaintances, or other persons in a position in which they were likely to know something of his movements. Information thus acquired would be, it is true, hearsay, but the defendants were entitled to know, we think, as bearing upon the question of diligence, what the plaintiff actually did in the matter of making efforts to make a demand upon the maker of the note. He was entitled to knowledge, through appropriate averments, of the sources of plaintiff's "information and belief" as to the whereabouts of the maker when the alleged efforts were made to make presentment and demand.

The complaint falls far short of stating a cause of action against either of the respondents.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

151 Cal. 655

## FARMERS' & MERCHANTS' BANK OF LOS ANGELES v. CITY OF LOS ANGELES. (L. A. 1,660.)

(Supreme Court of California. Aug. 13, 1907.)

MUNICIPAL CORPORATIONS—CLAIMS—PRESENTATION—RECOVERY OF TAXES—PLEADING.

Los Angeles City Charter, § 208, provides that all claims and demands whatever against the city, except interest on bonds and bonds of the funded debt, shall be paid only on demands as therein provided for. Section 209 requires that such demands be presented to the council and referred to its finance committee, which shall indorse its approval or rejection, when the council shall consider the demands and approve or reject in whole or in part. Section 216 declares that no payment can be made from the city treasury, or out of the public funds of the city, unless the same be specially authorized by law or the charter, or unless the demand which is paid be audited as in the charter provided, and section 222 provides that no suit shall be brought on any claim for money or damages against the city until a demand for the same has been presented, as provided, and rejected in whole or in part. *Held*, that a claim against the city to recover alleged illegal taxes, under Pol. Code, § 3819, authorizing the recovery of taxes paid under protest, by suit, or under the city's charter, was not maintainable without allegation and proof that it had been presented to the city for allowance and rejected in whole or in part.

McFarland, Henshaw, and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Farmers' & Merchants' Bank of Los Angeles against the city of Los Angeles. From a judgment in favor of plaintiff, defendant appeals. Reversed.

W. B. Mathews, City Atty., and Hartley Shaw, for appellant. Graves, O'Melveny & Shankland (Jeff. Paul Chandler, of counsel), for respondent.

PER CURIAM. This is an action brought by plaintiff, a banking corporation, to recover from the city of Los Angeles the sum of $4,235.96, alleged to have been paid by plaintiff under protest for illegal taxes for the fiscal year 1902–03. A general demurrer for want of facts sufficient to constitute a cause of action was interposed to the complaint and overruled. An answer denying certain allegations of the complaint having been filed, the cause was tried, and judgment went for plaintiff. Defendant appeals upon the judgment roll.

It is contended that the complaint is fatally defective because it fails to aver that before the commencement of the action plaintiff presented any claim or demand for the amount sought to be recovered, or any portion thereof, to the city council of defendant.

The complaint of plaintiff contained no allegation whatever as to the presentation of any such claim or demand to the city council, or anything to show that the matter was in any way brought to the attention of that body before suit, except in so far as it was presented to it sitting and acting as a board of equalization on an application for the reduction of the assessment. The freeholders' charter of the city contains the following provisions in the matter of claims and demands:

"Sec. 208. All claims and demands whatever against the city of Los Angeles, except interest on bonds and bonds of the funded debt, shall be paid only on demands as herein provided for.

"Sec. 209. Said demands, * * * shall be presented to the council on forms and blanks to be provided by the city clerk, and shall be referred to its committee on finance. The said committee shall, by indorsement thereon, approve or reject the same, in whole or in part. The council shall then consider the said demands and the action of said committee thereon, and shall, if the same be just and legal, approve the same; or may, if it so determine, approve in part or reject the whole. * * *

"Sec. 216. No payment can be made from the city treasury, or out of the public funds of said city, unless the same be specially authorized by law or this charter, nor unless the demand which is paid be audited as in this charter provided. * * *

"Sec. 222. No suit shall be brought upon any claim for money or damages against the city of Los Angeles, * * * until a demand for the same has been presented as herein provided, and rejected in whole or in part. * * *"

Under provisions of law of this character, it has always been held in this state that the presentation of a demand, in the manner provided, was a necessary prerequisite to the maintenance of a suit against a public corporation to recover money, and that a complaint containing no such allegation fails to state a cause of action. In McCann v. Sierra Co., 7 Cal. 121, it was held, in an action for damages for trespass, that under a law providing that "no person shall sue a county in any case, for any demand, unless he or she shall first present his or her claim to the board of supervisors for allowance, * * *" it was essential to plaintiff's recovery that the complaint contain an averment of presentation of the claim. The point was made in that case that the section only applied to actions ex contractu, but the court held it applicable in all cases, and held the intention of the Legislature to have been to prevent the revenue of the county from being consumed in litigation, by providing that an opportunity of amicable adjustment should be first afforded to the county, before it could be charged with the costs of a suit. In People v. Supervisors, 28 Cal. 429, it was declared that a claimant has no cause of action against a county for the recovery of money until he has presented his claim or demand to the board of supervisors for allowance. In Rhoda v. Alameda Co., 52 Cal. 350, an action for damages for injury to plaintiff's building, judgment went for plaintiff by default, and on appeal the judgment was reversed solely because there was, in the opinion of the court, no sufficient allegation of the presentation of a claim prior to suit. In Bigelow v. Los Angeles, 141 Cal. 503, 75 Pac. 111, it was declared that, in order that a suit might be treated as one for damages, it was absolutely necessary under the charter that a claim therefor should have been presented to the city council. In Alden v. Alameda Co., 43 Cal. 270, the action was on a judgment, and there was no allegation in the complaint of the presentation of a claim to the board of supervisors. A demurrer for want of facts was sustained, and this court held that the statute prohibiting suit "in any case or for any demand, without first presenting the claim to the board, was sufficiently comprehensive to include a cause of action founded on a judgment against the county." It was here again said that the provision was intended to prevent the county from being harassed by needless and expensive litigation. In Arbios v. County of San Bernardino, 110 Cal. 553, 42 Pac. 1080, it was again said that statutes requiring the presentation of claims prior to suit are framed with the purpose of avoiding useless expense in litigation, and to give to the county ample opportunity to avoid such expense. These cases show that it is the policy of the law declared in such provisions that the public corporation shall always be given an opportunity to pay before being subjected to an action upon any money demand. They further show that a strict compliance with such conditions has always been insisted on by this court, and that they apply to all classes of claims not expressly excepted in the law itself.

While it is true, so far as we have discovered, that the question has never been discussed in connection with a claim for the recovery of taxes paid under protest, we can perceive no material difference between such a claim and claims of the character considered in some of the decisions above cited. Such claims are often settled and paid when presented, and the presumption is that they always will be so paid, if they are just. The policy of the law applies as well to them as to other demands against a city, and the reasons for the rule when applied to such a claim are as cogent as when applied to any other claim. We find in the law no method by which the city can voluntarily refund taxes illegally collected, without the presentation of a claim therefor, and if these provisions of the charter are not applicable, it would follow that the city must in every case be subjected to the costs of a suit, even though the proper officers consider the claim a just and legal one, and are willing to pay the same.

It is doubtful whether section 3819, Pol. Code, relating to the recovery by suit of taxes paid under protest, is applicable to the city of Los Angeles. It is in terms limited to the matter of state and county taxes. Section 46 of the city charter, providing that "the mode and manner of collecting such municipal taxes, and enforcing such tax lien, and the proceedings thereafter, shall substantially be the same as the mode and manner at the time prescribed by law for the collection of state and county taxes in said county," does not necessarily make the provisions of section 3819, Pol. Code, applicable. Although this section, enacted several years after the adoption of the Los Angeles charter, was placed in the chapter entitled "Collection of property taxes," it, strictly speaking, has nothing to do with the mode and manner of collecting taxes or enforcing the tax lien or with the "proceedings thereafter," within the meaning of those words in the above provision. But, assuming that the charter provision should be read as making it applicable, it must be construed subject to the provisions of the charter as to claims and demands against the city. Such a construction would require presentation of the claims before suit. A provision practically the same as section 3819, Pol. Code, was contained in an ordinance adopted by the city council of Los Angeles. If we assume that the provision must be construed as authorizing suit without any prior presentation of the claim to the city council, the ordinance provision must necessarily be held void because in conflict with the superior charter provisions. We do not think, however, that it must be so construed. It may very reasonably be construed as simply giving a legal claim against the city, to be presented to the city council before suit in the same manner that all other claims are required to be presented.

It is contended that there was an involuntary trust against the city, rendering a demand unnecessary. We see no force in this contention. The money paid as taxes under protest became the property of the city, subject to no trust whatever. The taxpayer's right against the city in the matter was thenceforth only such as was conferred either by section 3819, Pol. Code, or the ordinance provision authorizing an action for the recovery of the amount of taxes paid upon a void assessment. In no sense of the words is this an action to enforce a trust.

The making of the application for the reduction of the assessment by plaintiff to the city council sitting as a board of equalization, prior to the payment by it of the money sought to be recovered, was, of course, not the presentation of any claim or demand so far as the alleged cause of action here involved was concerned. There is no force in the contention that the council could not have allowed the claim, because the action of the board of equalization in refusing to reduce the assessment was conclusive as to the validity of the assessment. As to matters concerning which the action of such a board is conclusive, there is no power of review anywhere, even in an action to recover the tax paid under protest, and plaintiff's contention in this regard would leave it without any remedy whatever. It cannot be held that the making of a proper demand here would have been a vain and useless thing, and therefore was not required. We are satisfied that the city council had jurisdiction to allow the claim if properly presented. The fact that the board of equalization had several months before refused to reduce the assessment does not conclusively establish that the city would not have allowed the claim; but, however that may be, the presentation of the claim or demand is, under the charter, a prerequisite to suit.

We can see no escape from the conclusion that the complaint, by reason of its failure to allege a presentation of a claim to the city council, must be held insufficient to support the judgment.

The judgment is reversed, and the cause remanded, with leave to plaintiff to amend its complaint within such time as may be allowed therefor by the trial court.

McFARLAND, J. (dissenting). I dissent and am of opinion that the judgment ought to be affirmed.

This is an action brought by plaintiff, a banking corporation, to recover from the city of Los Angeles the sum of $4,235.96 alleged to have been paid by plaintiff under protest for illegal taxes for the fiscal year 1902–3. Judgment went for plaintiff, and from the judgment defendant appeals.

Defendant demurred to the complaint upon the sole ground that it does not state facts sufficient to constitute a cause of action. It did not demur upon any special ground, nor did it interpose any pleading in the nature of a plea in abatement. The general demurrer was overruled, and defendant filed an an swer in which some of the material allegations of the complaint were denied. A jury was waived, and the court made findings covering all the issues. No motion for a new trial was made. There is no bill of exceptions or statement, and therefore there is no evidence before us, and no point as to any error committed at the trial. All the points made by appellant for a reversal arise upon the general demurrer; appellant contending that the complaint does not state a cause of action.

The material facts as alleged in the complaint and found by the court which are necessary to be here stated, and which must on this appeal be taken as true, are briefly these: In April, 1902, plaintiff gave to the city assessor of the city of Los Angeles a verified statement in due form of all the personal property which it owned, possessed, or controlled at 12 o'clock m. on the first Monday of March, 1902. This statement showed that all the money which plaintiff had on said first Monday was $200,492.70, and the court found that "said statement was true and correct, and the plaintiff did not have in its possession or under its control any other, further, or different sum of money." But plaintiff, in addition to its general banking business, had, on adjoining premises, a safe deposit department which was entirely distinct from its general banking business, and from other vaults in which it kept money received from its general depositors. That on said first Monday of March, 1902, the defendant by its treasurer had in vault No. 19 of said safe deposit department the sum of $352,997.30 of the moneys belonging to the city. That said moneys were a special deposit and were not in any way commingled with other deposits in plaintiff's bank, but were kept separate and distinct from all other moneys. And the court finds that "said city money, $352,997.30, was wholly and exclusively within the control of the said city of Los Angeles through its officer the said city treasurer, W. H. Workman." Nevertheless, the city assessor arbitrarily assessed the plaintiff, against the latter's will and protest, for the said $352,997.30, being the said city's money as aforesaid. The city tax on said sum of money was $4,235.96, the money involved in this action. The city council of defendant met as a board of equalization in August, 1902, and the plaintiff filed with them a verified petition for the correction of said assessment by reducing the amount of money assessed to plaintiff to the extent of said $352,997.30, and presented the facts relative thereto as above stated; but the board refused to make any reduction. Afterwards the tax collector of defendant demanded of plaintiff the payment of the said $4,235.96 and threatened to levy, etc.; and on November 18, 1902, a few days before said tax would have become delinquent, plaintiff paid said taxes to the tax collector, and at the same time left with him a written protest in due form, claiming that the assessment and levy made for said $352,997.30 was illegal and void, etc.

From the foregoing it is entirely clear that the plaintiff had, upon the real merits, a most just cause of action against the defendant. To allow the city to retain money paid by plaintiff as taxes on the city's own property would be to violate any admissible conception of what is right and just. Indeed, defendant makes no pretense of a defense on the merits, but defends only on the ground that the complaint is fatally defective.

The main contention of appellant on the general demurrer, and the only one that really calls for much discussion, is that the complaint is fatally defective because it fails to aver that before the commencement of the action respondent presented any claim or demand for the amount sought to be recovered to the city council of appellant, which demand, appellant contends, was made necessary by sections 208, 209, and 222 of the city charter. Section 208 is as follows: "All claims or demands whatever against the city of Los Angeles, except interest coupons on bonds and bonds of the funded debt, shall be paid only on demands as herein provided for." And section 209 provides that such demands shall be presented to the council and be referred to the committee on finance, which committee shall by indorsement thereon approve or reject the same in whole or in part, and the demand shall then go to the council for action. "The council shall then consider the said demands and the action of said committee thereon, and shall, if the same be just and legal, approve the same, or may, if it so determine, approve in part or reject the whole." Section 222 provides that: "No suit shall be brought on any claim for money or damages against the city of Los Angeles * * * until a demand for the same has been presented as herein provided and rejected in whole or in part." And there is in the complaint in the case at bar no averment of the formal demand made in compliance with said section. It is apparent that this defense, founded upon a want of averment of demand, is, in the extreme sense, technical. It seeks to avoid a just judgment by taking refuge behind a general provision of law not intended for such purpose. But while it is true that a technical defense cannot be ignored, and must be maintained, when it blocks the way of obtaining a judgment on a meritorious cause of action by an obstacle so complete that it cannot be surmounted, or circumvented, or in any manner evaded, still the general rule is, as stated by Baldwin, J., in Roland v. Kreyenhagen, 18 Cal. 457, that courts are justified in "regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial rights." A court will not maintain such a technicality unless there is no way of escaping it, unless it effectually closes every avenue through which the just judgment could be reached; and we do not think that the technical defense here under discussion is of that character.

Respondent makes numerous answers to appellant's contention, as, for instance, that the point of want of averment of demand cannot be reached by a general demurrer, but should have been presented by special demurrer or plea in abatement; that an involuntary trust was created against the city which rendered a demand unnecessary; that the verified petition by respondent before the city council sitting as a board of equalization was, in substance, a sufficient demand; that after the completion of the assessment book after equalization the respondent had no demand within the meaning of the said provision relating to presentation and demand; and that in the case at bar it amply appears that the demand here insisted on would have been a vain thing and therefore not required. We think it just to counsel for respondent to mention the foregoing points made by them in their elaborate brief; but we do not consider it necessary to pass upon these points, because we think that another contention made by them must be maintained, to wit that the contention of appellant as to the demand is governed by section 3819 of the Political Code, and by the ordinance of the city of Los Angeles designated as No. 3,448 new series. Section 46 of the city charter provides that "the mode and manner of collecting such municipal taxes, and enforcing such tax lien, and the *proceedings thereafter*, shall substantially be the same as the mode and manner *at the time* prescribed by law for the collection of state and county taxes in said county." (The italics are ours.) And at the time of the occurrences under which the present litigation arose, section 3819 of the Political Code, or such of it as is necessary to be here quoted, was as follows: "And at any time after the assessment book has been received by the tax collector, and the taxes have become payable, the owner of any property assessed therein, who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing. * * * And when so paid under protest, the payment shall in no case be regarded as voluntary payment, and such owner may at any time within six months after such payment bring an action against the county, in the superior court, to recover back the tax so paid under protest; and if it shall be adjudged that the assessment, or the part thereof referred to in the protest, was void on the ground specified in the protest, judgment shall be entered against such county therefor." While section 3819 of the Political Code was enacted subsequently to the adoption of the said section 46 of the charter, yet the latter evidently refers to the state law in force "at the time" of any payment of taxes under protest. And we are also satisfied that the language "mode and manner of collecting such municipal taxes," and "the proceedings thereafter," cover the whole scheme of taxation and include the refunding of taxes illegally collected. But substantially the same provision is found in section 55 of the said ordinance of the city, No. 2,848. That section is as follows: "At any time after the assessment book has been received by the city tax and license collector and the taxes have become payable, the owner of any property assessed therein who may claim that the assessment is void in whole or in part may pay the same to the city tax and license collector under protest, which protest shall be in writing and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded, and when so paid under protest the payment shall in no case be regarded as voluntary, and such owner may at any time within six months after such payment bring an action against the city in any court of competent jurisdiction to recover back the taxes so paid under protest, and if it shall be the judgment that the assessment on the part thereof referred to in the protest, was void on the ground specified in the protest, judgment shall be entered against the city therefor." Whether or not the right of a party to get back illegal taxes paid under protest could, in the absence of other legislation on the subject, be properly brought within the general category of "claims and demands," need not be here discussed. The ordinance above quoted, and section 3819, Pol. Code, deal expressly with the exceptional matter of taxes paid under protest, and afford an independent remedy. There is no provision for a demand; the only restriction being that the action must be commenced within six months "after such payment." The protest gives the defendant full notice of the character and amount of the claim. And a further demand would be of no benefit. This view is fully supported by authorities cited by respondent, and particularly by the case of Western Ranches v. Custer County, 89 Fed. 577. That was an action to recover taxes paid under protest, and "the defendant asks judgment upon the ground that the complaint does not state a cause of action, in this, that it does not appear that the plaintiff ever presented his claim to the board of county commissioners of Custer county for allowance, as required, it is claimed, by the statute law of Montana, before an action could be maintained upon the same." But a statute of Montana provided that in all cases of a levy of taxes which is deemed unlawful by the party whose property is taxed, such party may pay the same under protest, and may bring an action to recover back the amount so paid, and that, if it be determined that the tax so paid was illegal, may recover a judgment for the amount. The court held that this statute gave a special remedy as to taxes paid under protest, and that "a condition not named in the statute is not required," and the judge who delivered the opinion said: "For these reasons, I hold that there was no necessity for presenting this claim of plaintiff to the board of county commissioners of Custer county for allowance before plaintiff could maintain this action. The tax being an illegal one under the facts set forth in the answer, and paid under protest, the plaintiff was entitled to have the same refunded to him. The complaint under the statute cited above stated a cause of action, and it was not necessary that it should be shown that there was any demand upon the county commissioners for a refunding of the same."

The contention of the appellant that the passage of said ordinance by the city council relative to the repayment of taxes under protest was ultra vires and void is not maintainable. The city had full power over the assessment and collection of municipal taxes, and such power included the manner of collecting them under protest. The authority to refund is clearly an incident to the power to collect. The provision, as to paying under protest is a salutary one and beneficial to both parties. If the protested tax is finally held to be good, the municipality is not retarded in the collection of its revenue; and, if it is held to be illegal, the protestant has a remedy without running the hazard of losing his property by a refusal to pay in the first instance.

There is no merit in the contention that the taxes sought to be recovered were not paid under duress, and that the payment was therefore voluntary. The common-law rule as to distress of person or property does not apply to a statute expressly giving the right to pay under protest. Stewart v. County of Alameda, 142 Cal. 660, 662, 663, 76 Pac. 481, and cases there cited; Western Ranches v. Custer County, supra.

There are no other points calling for special notice.

The judgment appealed from should be affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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7 Cal. Unrep. 336

## HERBERT et al. v. SUPERIOR COURT.
(S. F. 4,810.)

(Supreme Court of California. May 21, 1907.)

1. COUNTIES—DIVISION—ELECTION.

The provision of the statute for submission to the voters of the district affected by the question of detachment from a county, requiring the election to be held within 60 days after the organization of the special commission, is directory merely, so that, if the election within that time is prevented by injunction, it may be held at a reasonable time after the injunction is removed.

2. CERTIORARI—REMEDY BY APPEAL.

The right of appeal from the granting of an injunction excludes the right to a writ of certiorari.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 5.]

3. PROHIBITION—REMEDY BY APPEAL.

Writ of prohibition will not be granted, where, by appeal, which can be advanced to a speedy hearing, the whole case can be taken up and reasonably decided on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 4-19.]

In Bank. Application by J. W. Herbert and others for writ of prohibition to the superior court, Fresno county; Hon. H. Z. Austin, Judge. Writ denied.

Hannah & Miller and C. G. Lamberson, for petitioners. Frank H. Short, for respondent.

BEATTY, C. J. The court has had this matter under advisement, and we are all of the opinion that the provision of the statute for submitting to the voters of the district affected by the question of detachment from Fresno county, requiring the election to be held within 60 days after the organization of the special commission, is directory merely; that it is not essential that the election should be held within 60 days; and that, if it is prevented by the injunction, it may be held afterwards, at any reasonable time after the injunction is removed. We are satisfied also that it was an error on the part of this court to issue the writ of certiorari in this case; the fact being that there is an appeal from the injunction, and the right to appeal excluding the right to a writ of certiorari.

As to the writ of prohibition, we think that is unnecessary and inadvisable under the circumstances, because by an appeal from the order granting an injunction, which would be advanced to a speedy hearing by the court on the application of either party, we can take up the whole case and decide it on its merits before any election is held, and thus prevent any complications which are apprehended by reason of the holding of an election while the question is undetermined as to whether the act is constitutional or not. For these reasons we have decided to set aside the writ of certiorari granted in the case and to deny the writ of prohibition, suggesting to the parties that they bring the matter up by an appeal as speedily as they like, when the court will advance it to an early hearing, that it may be decided at once upon the merits, and the election held as soon afterwards as the necessary arrangements can be made.

The order of the court is: The writ of certiorari be discharged, and writ of prohibition denied.

152 Cal. 1

## BASHORE v. SUPERIOR COURT OF TULARE COUNTY et al. (Sac. 1,511.)

(Supreme Court of California. Sept. 13, 1907.)

1. Appeal and Error—Estoppel to Allege Error—Acceptance of Terms.

Where the court, as a condition to granting plaintiff a continuance, imposed as conditions that plaintiff pay the sheriff's fees for summoning the jury, the per diem of 12 jurymen, and defendants' costs in preparing for trial, which conditions plaintiff accepted, except as to the per diem of jurors, he could not thereafter claim that the court had no authority to require payment of the sheriff's fees for summoning the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 961.]

2. Mandamus—Right to Writ—Discretion.

Plaintiff not having been required to pay such fees before the order granting the continuance was entered, and having thereafter paid only defendants' costs in preparing for trial, the Supreme Court, in the exercise of its discretion, would not grant mandamus to compel the trial judge to reset the case for hearing.

In Bank. Petition for mandamus by John Bashore against the superior court of Tulare county and Hon. W. B. Wallace, judge thereof. Writ denied.

Chas. G. Lamberson and Frank Lamberson, for petitioner. E. O. Larkin, for respondents.

SLOSS, J. Application for a writ of mandate requiring the superior court of Tulare county and the judge thereof to set a case for trial. An alternative writ having been granted, an answer was filed, and the proceeding is submitted upon the stipulation that the allegations of the answer are true.

It appears that an action, commenced by John Bashore, the petitioner herein, against B. B. Parker and Farmers' Union & Milling Company, a corporation, was pending in the superior court of Tulare county, and was set for trial for the 13th day of February, 1906. A jury trial having been demanded by plaintiff, a venire of 40 jurors was drawn for the trial of said cause, and 29 of the jurors were in attendance on the day set for the trial. On that day the plaintiff moved for a continuance, filing in support of his application an affidavit which was clearly insufficient, under section 595, Code Civ. Proc., as a showing requiring the court to grant the requested postponement. The judge of said superior court expressed his dissatisfaction with the showing made, and announced that he would order the trial of the case continued upon the conditions that plaintiff pay (1) defendants' costs incurred in preparing for the trial; (2) the expense of summoning the jury; and (3) the expense of one day's fees for 12 jurors. The clerk thereupon entered in the minutes of the court an order reading in part as follows: "It is ordered that the trial * * * be postponed indefinitely, upon the following conditions: That said plaintiff pay to the clerk of this court the sum of $28.10, being the sheriff's fees for summoning the jury in this case; the sum of $24 for per diem of twelve jurymen, and the sum of $87.55, costs of defendants in preparing for trial. The plaintiff accepted said conditions, except as to the payment of the per diem of jurors, to which said plaintiff excepted." The court did not require the actual payment of these sums before discharging the jury and ordering the continuance.

The answer of the respondents contains certain allegations (admitted by the petitioner to be true) which are relied on as showing an express acceptance by the petitioner of all the conditions imposed by the court. For the purposes of this opinion, we shall assume that the acceptance was merely as shown by the minute entry, i. e., of all the items except as to the payment of the per diem of jurors. The plaintiff paid the sum of $87.55, the costs of defendants in preparing for trial, but has never paid either of the other items directed to be paid by him, viz., $28.10, sheriff's fees for summoning the jury, and $24, per diem of 12 jurymen. Upon plaintiff's moving the court to again set the action for trial, the court refused to do so, on the ground of the failure to comply with the conditions upon which the continuance was granted. The purpose of this proceeding is to compel the superior court to set the case for trial, notwithstanding petitioner's failure to make payment of the items of $28.10 and $24.

The petitioner contends that these two items represent costs that he should not have been required to pay, and that, even if he was properly chargeable with them, the court by granting the postponement without actually requiring payment at the time had waived the conditions, or, at any rate, had lost the power to collect the amounts otherwise than by an execution. Code Civ. Proc. § 1007.

So far as concerns the item of $28.10, the sheriff's fees for summoning the jury, it is not open to petitioner on the record here presented to urge that the charge was not one that the court was authorized to impose. From the face of the order granting the continuance, it appears that the plaintiff accepted this condition as well as the one with which he has complied. Such acceptance was in effect an agreement to pay the sums upon obtaining the desired postponement. As to this item, he cannot, after agreeing that its payment be made a condition to the continuance, be heard to say that its imposition was beyond the power or discretion of the court.

And we think the other contention, viz., that after the continuance had once been granted without the payment of the costs imposed the duty to pay was waived or to be enforced in some way other than by refusing to set the case for trial, if sustainable at all, should not, under the circumstances here disclosed, be carried to the extent of compelling the court by mandamus to hear plaintiff's case. The issuance of a writ of mandate lies to a considerable extent in the discretion of the court. Wiedwald v. Dodson, 95 Cal. 450, 30 Pac. 580. It will not issue where it will work injustice, or produce confusion and disorder, or will operate harshly, or where it will not promote substantial justice. Board of Education v. Common Council, 128 Cal. 369, 60 Pac. 976. "A mandamus is only granted in the sound discretion of the court. This discretion is, of course, not a capricious or arbitrary exercise of the power of the court to refuse relief even in a proper case. Where, however, it appears that with reference to the very question at issue the conduct of the party applying for the writ has been such as to render it inequitable to grant him relief by mandamus the court may in the exercise of this discretion refuse the writ." People v. Jeroloman, 139 N. Y. 14, 34 N. E. 726. Here the issuance of the writ would not promote justice, but would operate to enable the petitioner to force a trial of his case at a time selected by him, while defying the court in its efforts to compel him to pay a sum which he had agreed to pay as a condition of its not being heard at an earlier time. A refusal of the writ will have no other effect than to compel the petitioner to pay what he had agreed to pay. It is eminently just and proper that he should do this. If the court, at the time when plaintiff applied for the continuance, had refused to grant it unless the required payments were then and there made, the plaintiff could not have obtained his continuance without meeting the conditions. Instead of exacting payment at the time, the court relied upon plaintiff's acceptance of the conditions and granted the continuance without enforcing immediate compliance. To issue the mandate sought by the petitioner would enable him to use the indulgence allowed him by the court as a means of escaping altogether his obligations voluntarily assumed.

Until the petitioner pays the item of $28.-10, which he agreed to pay, he is not in a position to ask this court to compel the trial court to hear his cause. We are not here deciding that noncompliance with a condition not assented to by a party moving for a continuance would deprive such party of the right to compel the court to set his case for trial. It is needless, therefore, to discuss the effect of plaintiff's failure to pay the item of $24 per diem for 12 jurors. It is enough, for the purposes of this proceeding, to say that this application does not commend itself to our discretion, made, as it is, by a plaintiff, who, after agreeing to some of the conditions on which a continuance was granted, refuses to comply even with those to which he had assented.

The proceeding is dismissed.

We concur: BEATTY, C. J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

151 Cal. 29

## REEVE v. COLUSA GAS & ELECTRIC CO.

(Sac. 1,128.)

(Supreme Court of California. April 4, 1907.)

COURTS—RULES OF DECISION—EFFECT OF REVERSAL.

Where the result of the vacation of an order granting a rehearing would be to bar all further consideration of the case by reason of the fact that the time for rehearing had passed, the ruling of the Supreme Court, wherein it was decided that a member of that court who had not participated in the determination of the appeal should participate in the determination of the petition for rehearing, rather than the justice of a District Court of Appeal who had acted in his stead on the determination of the appeal, under the direct provision of the amendment of 1904 to section 4 of article 6 of the Constitution, will be deemed the law of the case, and the order, on motion to dismiss, must stand without inquiry into the merits.

In Bank. Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by Frank Reeve against the Colusa Gas & Electric Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Motion to vacate order for rehearing denied.

Garret W. McEnerney, W. B. Treadwell, Seth Wellington, J. W. Goad, and William M. Pierson, for appellant. Garber, Creswell & Garber, J. L. Geary, Jr., and Milton Shepardson, for respondent.

HENSHAW, J. The respondent moves the court to set aside an order granting a rehearing, and for the issuance of a remittitur in accordance with the judgment of the court in bank, as heretofore made.

The case was first decided in department 2 upon an opinion reversing the judgment; Justices HENSHAW, McFARLAND, and LORIGAN joining in the decision. A rehearing was granted by the court in bank, vacating the department decision. The case was then placed on the calendar for hearing before the court in bank. In the meantime, Justice SLOSS had become a member of the court, as successor to Justice VAN DYKE, deceased, but, having an interest in the defendant corporation, and deeming himself disqualified, he had declined to sit in the case. At the time the case came on for hearing in bank, Justice McFARLAND was ill and unable to be present. In these circumstances, the court, in order to secure a full bench for the consideration of the case, availed itself of the provision of the amendment of 1904 to section 4 of article 6 of the Constitution, and, in accordance therewith, selected, from the justices of the District Court of Appeal, Justice COOPER to act in place of Justice SLOSS, and Justice HARRISON to act in place of Justice McFARLAND. The cause was then orally argued and submitted to the court in bank thus constituted, which, after due consideration, affirmed the judgment of the court below by a decision in which Justices SHAW, ANGELLOTTI, and HARRISON, and Chief Justice BEATTY concurred, and from which Justices HENSHAW, LORIGAN, and COOPER dissented. The appellant then filed a petition asking that this judgment be vacated, and that the case be again heard before the court in bank. At the time this petition came up for determination, Justice McFARLAND had recovered his health and was again able to act, and was present, ready, and willing to act upon the matter of granting or denying the rehearing. Justice HARRISON was also present, ready, and willing to act in the matter, and offered, if the court so desired, to act thereon as a member of the court in bank to which the cause had been argued and submitted. Thereupon it was decided by the justices of the Supreme Court, all being present, that Justice McFARLAND of the Supreme Court, and not Justice HARRISON of the District Court, should participate in the determination of the petition for rehearing, and that, as the disqualification of Justice SLOSS was of a continuing nature, Justice COOPER should continue to act in the case in his place, by virtue of his original selection. The court, as thus constituted, then took up the petition for rehearing for consideration, and it was granted by four of the justices, namely, Justices HENSHAW, LORIGAN, and McFARLAND of the Supreme Court, and Justice COOPER of the District Court. The respondent asks the court to set aside this order upon the ground that Justice McFARLAND should not have acted in the matter.

The constitutional provision authorizing the substitution of a justice of the District Court of Appeal in the place of a justice of the Supreme Court is as follows: "Whenever any justice of the Supreme Court is for any reason disqualified or unable to act in a cause pending before it, the remaining justices may select one of the justices of a District Court of Appeal to act pro tempore in place of the justice so disqualified or unable to act." The motion to vacate the order for rehearing is based on two grounds: First, that the order was improvidently made; second, that the power of Justice HARRISON to act in the case continued until the judgment upon that hearing became final, or until it was vacated by the granting of a rehearing within thirty days; that until that period had elapsed his power in the case, so long as he continued qualified, ready, and willing to act, was exclusive; and hence that the order for a rehearing was void because it was made by only three justices qualified and competent to act upon the matter. This involves an inquiry into the merits, which cannot be had. We are of opinion that the ruling of the court, wherein it was decided that Justice McFARLAND should participate, and not Justice HARRISON, was a formal determination which became the law of the case. Slight consideration will show the reason for the application of the rule, and that in this case, if ever in any, its invocation is most salutary. The time for rehearing has passed. If the order granting the rehearing should now be vacated, no further consideration of it could be had, and yet, if Justice HARRISON had participated in the consideration of the rehearing, it may not be said that his judgment would have been adverse to granting it. The result would be that the litigant who obtained a rehearing would not only be denied the right to Justice McFARLAND'S participation in the matter, but would equally be denied the right of Justice HARRISON'S participation. It would result therefore in a final judgment being given against him, notwithstanding the fact that, if Justice HARRISON had been allowed to participate, he also might have voted for a rehearing.

For these reasons we are of the opinion that the order heretofore made must stand, without inquiry into or determination of the merits of the application.

The motion to vacate is therefore denied.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.

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152 Cal. 5

## ROTHSCHILD v. BANTEL, Treasurer of the City and County of San Francisco.

(S. F. 4,828.)

(Supreme Court of California. Sept. 14, 1907.)

MUNICIPAL CORPORATIONS—CUSTODY OF MONEY—LEGISLATIVE CONTROL—CONSTITUTIONAL PROVISIONS.

Immunity from legislative interference with provisions in a freeholders' charter of a municipality relative to municipal affairs, granted by Const. art. 11, § 6, as amended in 1896, is not taken away, as respects the custody of money of the municipality, by Const. art. 11, § 16½, adopted November 6, 1906, and providing that all moneys of a municipality may be deposited in a bank, "in such manner and under such conditions as may be provided by law"; this being intended merely to remove the then existing constitutional prohibition against such a deposit, even where a charter authorized it, and to authorize it if it was authorized by the charter, the "organic law" (Const. art. 11, § 8) of the municipality, and not to authorize it where it was merely authorized by a general law of the state, but prohibited by the charter of the municipality.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Joseph Rothschild against C. A. Bantel, as treasurer of the city and county of San Francisco. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

William A. Kelly and Theo. J. Roche, for appellant. William G. Burke, City Atty., and A. S. Newburgh, Asst. City Atty., for respondent.

ANGELLOTTI, J. This is an action brought by a resident and taxpayer of the city and county of San Francisco against the treasurer thereof to obtain a decree enjoining him from depositing money of the municipality in his custody with banks and banking corporations doing business in said city and county. A general demurrer to the complaint was sustained, and, plaintiff having declined to amend, judgment was given for defendant. This is an appeal by plaintiff from such judgment.

That a taxpayer may maintain an action to prevent such a deposit where the same is forbidden by law was held by this court in Yarnell v. City of Los Angeles et al., 87 Cal. 603, 25 Pac. 767, which was a similar action. It is not claimed that the complaint does not state a cause of action if the proposed act of the treasurer was opposed to the law relative to the keeping of municipal money applicable to the city and county of San Francisco.

Respondent bases his claim that his proposed action is authorized by law upon the provisions of an act of the Legislature of the state approved March 23, 1907 (St. 1907, p. 974, c. 522), providing for and regulating the deposit of county and municipal moneys in banks and banking corporations. This act provides that "all moneys belonging to any county or municipality within the state, may be deposited by any officer of such county or municipality having the legal custody of such county or municipal funds in any licensed national bank, or banks within this state, or in any bank, banks, or corporations authorized and licensed to do a banking business, and organized under the laws of this state," upon certain security furnished by the depositary in bonds of the United States, this state, or any county, municipality, or school district within the state, of a market value at least 10 per cent., in excess of the deposit, approved by the officer making the deposit and the district attorney. Under the act interest is to be paid by the depositary for the use of the money. The other provisions of the act are immaterial to the question before us. Such proposed disposition by the respondent of municipal money is, however, in terms prohibited by the provisions of the freeholders' charter of said city and county. That charter, adopted in the year 1899, provides: "The treasurer shall receive and safely keep all moneys which shall be paid into the treasury. *He shall not lend, exchange, use, nor deposit the same, or any part thereof, to or with any bank, banker or person; nor pay out any part of such moneys, nor allow the same to pass out of his personal custody*, except upon demands authorized by law or this charter, and after they shall have been approved by the auditor. * * *" Section 2, c. 3, art. 4 of the charter (St. 1899, p. 272, c. 2). (The italics are ours.) Section 3 of the same chapter provides with elaborate detail, for a joint custody safe, in which shall be kept the moneys of the city and county, behind two combination locks, neither of which alone will open the same, the treasurer alone to have knowledge of one combination, and the auditor alone to have knowledge of the other. In this safe are to be kept all money of the city and county except such as may be required each day for the payment of demands against the treasurer, the estimated amount required daily for this purpose to be taken from the joint custody safe and kept in another safe. These charter provisions prohibiting certain uses of the municipal money, requiring the officers of the city and county to keep the same in their possession, and prescribing the manner in which they shall keep them, unquestionably relate purely to municipal affairs. This is not disputed by respondent. It is unnecessary to cite authorities to the well-settled proposition that under the "municipal affairs" amendment to section 6, art. 11, of the Constitution, adopted in the year 1896, provisions in a freeholders' charter of a municipality as to municipal affairs are paramount to any law enacted by the state Legislature, and that the Legislature is without power to enact any law infringing thereon. This general proposition is also admitted by respondent.

It is, of course, true, as urged by respondent, that the people of the state who by a provision of the Constitution have granted to freeholders' charter cities this immunity from legislative interference with charter provisions relative to municipal affairs may, in like manner, take away the same in whole or in part, and leave with the state Legislature the power to enact laws which would have the effect of suspending the force of any or all charter provisions. It is claimed by respondent that they have done this as to matters covered by the charter provisions hereinbefore referred to, and that consequently the Legislature was authorized to enact a law applicable to the city and county of San Francisco so far as this particular municipal affair is concerned. The constitutional provision relied on as accomplishing this result is section 16½ of article 11, adopted November 6, 1906. It declares that "all money belonging to the state, or to any county or municipality within this state, may be deposited in any national bank or banks, within this state, or in any bank or banks organized under the laws of this state, *in such manner and under such conditions as may be provided by law*," under certain conditions as to amount and kind of security, amount of deposits, interest, etc. (The italics are ours.) It is in the italicized words that respondent finds the conferring of authority upon the state Legislature to enact a law authorizing officers of the municipality of the city and county of San Francisco to make the contemplated deposits of municipal moneys in the face of the express prohibitions in that regard contained in the charter.

We are satisfied that the constitutional provision referred to cannot reasonably be construed as accomplishing any such result The sole object of the enactment is apparent from its language, considered in connection with the then condition of the law upon the subject. It had been established by the decision of this court in Yarnell v. City of Los Angeles, supra, that the deposit of public moneys of the city with any bank or private corporation, even when the freeholders' charter of the city in terms purported to authorize the same, was prohibited by certain provisions of the state Constitution. Under the views expressed in the opinion as to the effect of the then existing constitutional provisions, it was impossible, in the absence of an amendment to the Constitution in that regard, to make valid provision either in any general law of the state or in a freeholders' charter for any such deposit of public moneys. It was intended by the constitutional enactment in question simply to remove the constitutional prohibition then existing, and authorize such provision to be made by the proper authority, subject to certain expressed limitations. The portion of section 16½ that declares that public money may be deposited in certain banks is strictly permissive in character, and, standing alone, would afford no pretense for a claim that a city having the right to make its own provisions as to municipal affairs cannot provide that its own officers, shall retain the custody of its own moneys, and that the same shall not be deposited in any bank or loaned. The words, "in such manner and under such conditions as may be provided by law," following this provision, are simply a limitation upon the permission before given; the effect thereof being that such deposits may be made only in the manner and under the conditions provided by such laws as may properly be enacted in regard thereto. As to the state, any county, or any municipality organized under the general municipal corporation act, such laws providing for the deposit and the manner and conditions thereof may undoubtedly be enacted by the Legislature of the state. But, when we come to the matter of the safe keeping of the moneys of a municipality having a freeholders' charter, such charter, "the organic law" of the city (section 8, art. 11, Const.), so far as it speaks upon the matter at all, is, subject to the Constitution, the paramount law, and, except as provided in the Constitution, nothing contrary thereto can be "provided by law." In such a case the charter provision is the "law" referred to in the constitutional provision. The provision is not that the deposit may be made in such manner and under such conditions as may be provided by the Legislature, or by any particular kind of law, but is simply "as may be provided by law." The policy of the state as to the supremacy of the provisions of a freeholders' charter in municipal affairs is too well established to warrant the drawing of the inference from the language under consideration of any intention to authorize the state Legislature to make provision, contrary to provisions of the charter in that behalf, as to the manner in which the city and county of San Francisco shall hold and manage its own moneys. Under the Constitution, as it now stands, that municipality undoubtedly has the right, if it so desires, to avail itself of the permission given by the state Constitution to deposit its moneys in banks, under the conditions and limitations expressed in the Constitution, but, as long as the provisions of the charter remain as they are, it is the expressed will of the people thereof that no such deposit shall be made, and that the officers of the municipality shall retain such money in their custody.

It follows from what has been said that the charter provisions control as to the matter under discussion, and forbid the proposed disposition of the municipal moneys.

The judgment of the superior court is reversed, and the cause remanded.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

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6 Cal. App. 215

## MURPHY v. BANTEL, Treasurer, et al.

(Civ. 437.)

(Court of Appeal, First District, California. Aug. 13, 1907.)

PROHIBITION—ADEQUACY OF OTHER REMEDY.

Code Civ. Proc. § 1102, defines the writ of prohibition as a writ to arrest the proceedings of any tribunal, corporation, board, or person, when in excess of their jurisdiction. Section 1103 provides that the writ may be so issued in all cases where there is not a plain and adequate remedy at law. *Held*, on petition for a writ to prohibit the payment of a bill incurred by the elisor of the superior court and approved by the judge, that, even if the payment of such bill by the treasurer after its approval by the judge would be in excess of his jurisdiction, yet the remedy was not by writ of prohibition, but by injunction

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 4.]

Petition by J. P. Murphy for a writ of prohibition against Charles A. Bantel, treasurer of the city and county of San Francisco, and others. Writ denied.

L. W. Lovey, for petitioner. W. H. H. Hart, for respondents.

COOPER, P. J. The petitioner as a taxpayer asks for a writ of prohibition directed to Charles A. Bantel, as treasurer of the city and county of San Francisco, to prohibit him from paying a bill incurred by one W. J. Biggy, elisor of the superior court, amounting to the sum of $1,092, for the care, custody, and maintenance of one Abraham Ruef for the month of July, 1907, which bill has been approved by Hon. Frank H. Dunne, one of the judges of the superior court of the city and county of San Francisco, and ordered paid by said judge.

The writ of prohibition arrests the proceedings of any tribunal, corporation, board, or person when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person, and there is no plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. §§ 1102, 1103. The said Bantel, as treasurer of the city and county of San Francisco, would not be proceeding in excess of his jurisdiction in paying a bill which has been incurred or approved by the judge of the superior court of the city and county of San Francisco. The writ of prohibition will not lie in such case, even if it be conceded that the bill is illegal or not authorized by law. In such case the taxpayer has a remedy by proceeding in the superior court under the process of injunction to restrain the payment. This remedy is one of frequent occurrence in our courts; but we know of no practice authorizing any court to prohibit the payment of a claim, except by injunction, even although the claim may be illegal.

The writ is denied.

We concur: HALL, J.; KERRIGAN, J.

6 Cal. App. 211

## DINAN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 425.)

(Court of Appeal, First District, California. Aug. 13, 1907.)

MUNICIPAL CORPORATIONS — OFFICERS — REMOVAL FROM OFFICE—CHARTER AND CODE PROVISIONS.

The provisions of Pen. Code, §§ 758–769, for removal from office of any municipal officer for misconduct in office, by presentment by the grand jury and proceedings before a court with trial by jury, in case of a denial of the charges, are, so far as concerns a member of the police department of the city and county of San Francisco, superseded by the charter thereof, providing for such a removal only after a trial before the police commissioners; Const. art. 11, § 8, providing that the charter, on the adoption thereof by the Legislature, shall supersede all laws inconsistent with it, and article 20, § 16, as amended, providing that in case of an officer or employé of a municipality governed under a charter the provisions of the charter with reference to dismissal from office of any such officer or employé shall control.

Application of J. F. Dinan for writ of prohibition to the superior court of the state of California in and for the city and county of San Francisco and another. Writ granted.

Robert B. McMillan and Nathan C. Coghlan, for petitioner. Robert W. Harrison, for respondents.

COOPER, P. J. This is an application for a writ of prohibition against the superior court of the city and county of San Francisco and Hon. J. M. Seawell, one of the judges thereof, to arrest the trial of the defendant as being in excess of the jurisdiction of the superior court.

The petitioner sets forth in his petition that the city and county of San Francisco is a municipal corporation governed by a freeholders' charter, which was ratified and approved by the Legislature of the state January 26, 1899; that he is and was at all times mentioned in the petition the duly appointed and acting chief of police of said city and county, pursuant to the provisions of the said charter; that in June, 1907, the grand jury of the said city and county of San Francisco presented an accusation in writing against petitioner, in which it is alleged that he has been guilty of willful and corrupt misconduct in office in connection with certain matters and things stated in the petition. The accusation concludes with a prayer that petitioner be removed from the said office of chief of police of said city and county in accordance with the provisions of sections 758 to 772 of the Penal Code of the state. It is further alleged that the said superior court and said Hon. J. M. Seawell, one of the judges thereof, are threatening to, and will unless restrained by this court, proceed to the trial of the petitioner upon said accusation, and that he has no plain, speedy, and adequate remedy in the ordinary course of law. The defendant demurred to the petition, and on argument declined to answer, so the facts stated in the petition will be regarded as true in discussing the case. The question for determination therefore is as to the power of the superior court to remove the petitioner from office under the provisions of the Penal Code; the charter of the city and county of San Francisco having made provision for such removal.

The sections of the Penal Code by which it is claimed the proceedings are justified are the following:

"Sec. 758. An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed.

"Sec. 759. The accusation must state the offense charged, in ordinary and concise language, without repetition."

"Sec. 766. If the defendant pleads guilty, or refuses to answer the accusation, the court must render judgment of conviction against him. If he denies the matter charged, the court must immediately, or at such time as it may appoint, proceed to try the accusation.

"Sec. 767. The trial must be by a jury, and conducted in all respects in the same manner as the trial of an indictment for a misdemeanor."

"Sec. 769. Upon a conviction the court must, at such time as it may appoint, pronounce judgment that the defendant be removed from office; but, to warrant a removal, the judgment must be entered upon the minutes, and the causes of removal must be assigned therein."

The accusation is authorized by the language of the Code against any municipal officer for willful or corrupt misconduct in office. The above quoted sections of the Penal Code have been in force substantially as at present since the enactment of the

Codes in 1872, and, if said sections were the only provisions of law applicable to the case, there would be no difficulty in upholding the proceedings. We must, however, examine other provisions of law in order to determine whether or not this proceeding under the general provisions of the Penal Code can be upheld.

The charter of the city and county of San Francisco, ratified by the qualified voters of the city and county at a special election held on the 26th day of May, 1898, was adopted by the Legislature of the state on January 26, 1899. It is a statute, framed by a board of freeholders, ratified by the voters of the city and county, and finally passed upon and ratified by the people of the state through the Legislature. People v. Williamson, 135 Cal. 418, 67 Pac. 504. It contains a delegation of powers, and the powers so delegated are taken from the people of the state and vested in the municipality. The Constitution provides in express terms (article 11, § 8) that, upon the adoption of such charter by the Legislature, it "shall become the organic law thereof, and supersede any existing charter (whether framed under the provisions of this section of the Constitution or not) and all amendments thereof, and all laws inconsistent with such charter." The charter thus became the organic law of the city and county of San Francisco in regard to all municipal affairs, and superseded all laws inconsistent with it. It superseded the provisions of the Penal Code herein cited if such provisions are inconsistent with the provisions of the charter on the same subject. Let us then examine the charter as to the particular question here—the removal of the petitioner as chief of police.

It provides that the police department shall consist of a board of police commissioners, a chief of police, a police force, and such clerks and employés as shall be necessary. The department shall be under the management of a board of police commissioners, consisting of four members, who shall be appointed by the mayor. The chief of police shall be appointed by the board of police commissioners, and hold office for the term of four years, receiving an annual salary of $4,000. He has control, management, and direction of all members of the department, is the chief executive officer, and is chargeable with and responsible for the execution of all laws and ordinances. His duties are set forth in the charter. He is an officer provided for in the charter, selected and appointed as therein provided, with a definite term of office and a fixed salary. The board of police commissioners are given the express power (article 8, c. 3, § 1) "to appoint, promote, suspend, disrate or dismiss any member of the department in the manner hereinafter provided." It is thereinafter provided (chapter 7, §§ 2, 3) as follows:

"Sec. 2. Any member of the department guilty of any offense, or violation of rules and regulations, shall be liable to be punished by reprimand, or by fine to be fixed by the commissioners, or by dismissal from the department; but no fine shall ever be imposed at any one time for any offense exceeding one month's salary.

"Sec. 3. No member of the department shall be subject to dismissal for any cause; or to punishment for any breach of duty or misconduct therein, except after a fair and impartial trial before the commissioners upon a verified complaint filed with the board, setting forth specifically the acts complained of, and after such reasonable notice to him of the time and place of hearing as the board may by rule prescribe. The accused shall be entitled upon such hearing to appear personally and by counsel; to have a public trial, and to secure and enforce free of expense to him the attendance of all witnesses necessary for his defense."

Petitioner is a member of the department. The mandate of the charter is that he shall not be subject to dismissal for any cause "except upon a fair and impartial trial before the commissioners upon a verified complaint filed with the board, setting forth specifically the acts complained of, and after such reasonable notice to him of the time and place of hearing as the board may by rule prescribe." The people of the city and county of San Francisco, by their charter, have provided for the office of chief of police and the method of his appointment. They have also provided a tribunal to hear charges against him, to try him, and to dismiss him. They have not only done this; but they have said that he shall not be dismissed in any other way. The method provided is exclusive. The people had the right under their charter to provide what officers the municipality shall have, their qualifications, their terms of office, and the methods of their removal. The chief of police is only a municipal officer. The duties of his office pertain to the city. His removal is a matter that concerns the city and no one else, except indirectly. The sections of the Penal Code above referred to are inconsistent with the provisions of the charter quoted. They provide for a trial in a different forum and by a different method. If the petitioner can be removed in the manner contemplated in this proceeding, the provisions of the charter must be set aside. The charter provides that the petitioner shall not be subject to dismissal, except by a trial in a certain manner. If the Penal Code can be invoked, he can be removed and dismissed in a different manner and before a different tribunal. Suppose that the petitioner should be tried upon the same charges both before the commissioners and the superior court, and the commissioners should find the charge untrue, while the court, under the Penal Code provisions, should find it true, and render a judgment of removal, could the judgment of the superior court be enforced? If so, the findings and determination of the police commissioners, the body provided by the charter for the purpose of trying charges against one of the city's own officers, must be set at naught. We do not think such is the law. Of course, if the chief of police should commit an offense against the laws of the state, he would be subject to trial under such laws, and so of every other officer of the city; but the provisions of the Penal Code invoked here deal only with the removal from office for misconduct in office. The removal from office of petitioner concerns only the municipality, and he must be removed as provided for in the charter, if removed at all. The method prescribed by the charter is the method provided by the Legislature. It has been the policy of the state, and the tendency of the late decisions and constitutional amendments, to broaden the scope of municipal corporations governed by charters as to their own affairs, to allow them to govern themselves, and to prescribe their own rules and regulations as to affairs which are purely municipal. The city, by adopting its charter, asked to be allowed to appoint, in its own manner, its chief of police, and to remove him in its own way. It was given such power by the Legislature, and the power so delegated no longer remains in the people of the state. Only at the last general election section 16 of article 20 of the Constitution was amended to read as follows: "Sec. 16. When the term of any officer or commissioner is not provided for in this Constitution, the term of such officer or commissioner may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years; provided, however, that in the case of any officer or employé of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employé shall control." The amendment consisted of the proviso. The petitioner is an officer of the municipality, governed under a legally adopted charter; and the express mandate of the Constitution is that the provisions of the charter as to dismissal from office shall control. To control means to direct, regulate, or govern. Standard Dictionary. It does not express the idea of repealing, extinguishing, or doing away with. Byrne v. Drain, 127 Cal. 663, 60 Pac. 433. The provisions of the charter in regard to the dismissal from office would not control if the petitioner can be removed in the proceeding pending in the superior court. On the other hand, the provisions of the Penal Code would control in direct opposition to the constitutional amendment.

The views herein expressed have been sanctioned in principle by the Supreme Court in several cases. In Croly v. City of Sacramento, 119 Cal. 229, 51 Pac. 323, it was held that the provision of the charter of the city of Sacramento, conferring power upon the board of trustees to try a municipal officer for incompetency and neglect of duty, were valid. The court said: "It cannot be questioned that the appointment of a superintendent of streets is a matter purely municipal, and which may properly be left to the municipality to be exercised in the manner provided in its charter, and it would seem to follow as a logical sequence that the power to remove an officer so appointed is equally a matter of purely municipal concern." In Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923, the court, in discussing the reasons for the amendment to section 6 of article 11 of the Constitution by the insertion of the words "except in municipal affairs," said: "It was to prevent existing provisions of charters from being frittered away by general laws. It was to enable municipalities to conduct their own business and to control their own affairs to the fullest possible extent in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs. * * * This amendment then was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws, and this internal regulation and control by municipalities comprises those 'municipal affairs' spoken of in the Constitution." In a concurring opinion by Mr. Justice Harrison in the same case, it is said: "A city cannot claim to be exempt from general laws relating to municipal affairs if there is no provision relating to such affairs in the charter under which it is acting, whether such charter is one framed by itself, or was given to it by the Legislature. If, in framing its charter, its board of freeholders should make no provision for a public library, or for the improvement of its streets, the general laws upon those subjects would be operative within that city." In the case at bar the charter does make provision for the dismissal of the chief of police, and, ex industria, says, he shall be dismissed in no other manner. In Byrne v. Drain, 127 Cal. 663, 60 Pac. 433, it was held that an assessment under the general law was void where the charter of the city of Los Angeles provided a method of making such assessment. The court in determining the matter said that the primary question was whether "at the time of the institution and prosecution of these proceedings the provisions of the city charter or the provisions of the statutes of 1889 constituted the controlling law. If the latter control, then the proceedings are admittedly valid; if the former, then the proceedings are void upon their face." In People v. Williamson, 135 Cal. 415, 67 Pac. 504, it was held that, where the provisions of a charter are purely municipal in their character, any Code provisions inconsistent therewith are to that extent superseded by the charter. The court said: "The charter supersedes all laws inconsistent therewith." In Elder v. McDougald, 145 Cal. 740, 79 Pac. 429, it was held that under section 8½ of article 11 of the Constitution, placing police courts under charter control, and authorizing the charter to fix the compensation of attaches, the power given by the charter of the city and county of San Francisco to the police judges to appoint stenographic reporters (whose compensation and duties are prescribed by the charter) is exclusive, and supersedes the provisions of section 869 of the Penal Code, so that a police judge, acting as a committing magistrate, has no power under that section to appoint another stenographic reporter and fix his compensation as a charge upon the municipal treasury. The opinion is an instructive one, and gives, as a reason for the conclusion reached, that, "under section 8 of the Constitution, it is declared that the provisions of a charter authorized by that Constitution shall supersede all laws inconsistent with it." From the above authorities it seems clear that all general laws inconsistent or in conflict with a charter provision must give way to the charter.

It was held by this court in the late case of Ex parte Sweetman, 4 Cal. App. 601, 90 Pac. 1069, that a conflict exists between an ordinance of a municipality and the general law in all cases where the same acts that are punishable under the ordinance are punishable under the general law. The only case relied upon by respondents—and which at first blush seems to lend countenance to their contention—is Coffey v. Superior Court, 147 Cal. 525, 82 Pac. 75. That case was in relation to an accusation in writing by the grand jury against the chief of police of the city of Sacramento under the Penal Code. It was decided before the amendment to section 16 of article 20 of the Constitution, and appears to have been decided upon the peculiar provisions of the charter of the city of Sacramento. The court said that the scheme for the removal of delinquent officials appeared to be incomplete, and that it was made the duty of the mayor, upon having knowledge of willful neglect of duty or official misconduct, to lay the matter before the board of trustees, the city attorney, or the district attorney, "in order that the public interests may be protected and the person in default be proceeded against according to law." The opinion states: "There is nowhere in the charter any provision which in terms confers exclusive jurisdiction upon the board of trustees to proceed against and remove municipal officers, nor is there apparent in any of the charter provisions an intention that its provisions should supersede the provisions of the general law as found in the sections of the Penal Code relative to the removal of delinquent officials from office." In the case at bar we have the mandatory provision of the charter that petitioner shall not be subject to removal except after a fair and impartial trial "before the commissioners," and the constitutional provision that the provisions of the charter shall control with reference to the dismissal from office. The provisions of the charter cannot control if the proceedings in the superior court can be allowed to control. It is our duty to enforce the charter and its provisions if we can do so. It is a special grant of power, for a particular municipality, and pertaining to a particular subject.

Let the writ be made peremptory, and the superior court of the city and county of San Francisco, and Hon. J. M. Seawell, one of the judges thereof, be absolutely restrained from any further proceedings in said matter.

We concur: KERRIGAN, J.; HALL, J.

6 Cal. App. 231

## PEOPLE v. CARPENTER. (Cr. 60.)

(Court of Appeal, Second District, California. Aug. 17, 1907.)

FALSE PRETENSES — INFORMATION — SUFFICIENCY.

An information alleging that defendant, with intent to defraud another, falsely represented that he was the owner of a patent device, that he needed a certain sum to settle expenses with his attorneys and obtain his patent, that he had an opportunity after securing the same to at once obtain a certain sum for the right to sell in a certain state, and charging that defendant exhibited a pretended telegram offering that sum, and that such other believed the false representations and was thereby induced to loan such sum to defendant, was insufficient; there being no allegation of any fact tending to show wherein the representations were false or fraudulent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 37.]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

A. B. Carpenter was convicted of obtaining money by false pretenses, and from the judgment, and an order denying a new trial, he appeals. Reversed and remanded, with instructions.

Lafayette Gill, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appeal by defendant from a judgment of conviction and from an order denying a new trial.

An information was regularly filed by the district attorney of Riverside county charging defendant with the crime of obtaining money by false pretenses. This information alleged that defendant "with intent to defraud one C. S. Gove of his property, unlawfully, knowingly, designedly, falsely, and feloniously did represent and pretend to the said C. S. Gove that he was then and there the owner of a certain patent device to light gasoline stoves, duly issued by the government of the United States of America, and then and there in the hands of his attorneys at Los Angeles, Cal., and that he then and there needed the sum of $150 in money to settle expenses with his attorneys aforesaid and procure his said patent, and that on getting possession thereof he had an opportunity to at once obtain the sum of $2,500 for the right to sell the said patent in the state of California, and did then and there exhibit and read to said Gove a pretended telegram to him, said defendant, so as aforesaid, offering the said sum of $2,500 for the said right to sell said patent in said state, and said Gove, being deceived thereby, and believing said false representations to be true, was induced by reason of said false pretenses and representations so made as aforesaid by the said defendant to loan said defendant, and did then and there deliver to said defendant, relying solely on the truth of said false pretenses, the sum of $150 in lawful money of the United States of America, which said money was so obtained by said defendant, A. B. Carpenter, unlawfully, knowingly, and designedly to defraud said C. S. Gove out of the money aforesaid, and all of said representations were made knowingly, designedly, fraudulently, and feloniously by defendant with intent to cheat and defraud said Gove out of all said money, and by which means said Gove was defrauded as aforesaid." To this information a demurrer was filed, which, among other things, challenged the information as not containing a statement of the facts constituting the offense charged in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended; that said facts stated in said information do not constitute a public offense. This demurrer was overruled by the court, and defendant's trial and conviction followed. A motion for a new trial was interposed, based solely upon the misconduct of the jury who tried the case, in this: that the jury received evidence out of court in reference to the merits of the case other than that resulting from a view of the premises. A bill of exceptions is found in the record, embodying, however, only the affidavits and testimony received by the court on the hearing of the motion for a new trial with reference to the receipt of testimony by the jury out of court.

We are of opinion that the information is defective. "To constitute the offense charged, four things must concur, and four distinct averments must be proved: (1) There must be an intent to defraud; (2) there must be actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud must be accomplished by means of the false pretenses made use of for the purpose, viz., they must be the cause which induced the owner to part with his property." People v. Wasservogle, 77 Cal. 173, 19 Pac. 270. The facts going to show that an actual fraud was committed in this case do not appear in the information. There is no allegation of any fact tending to show wherein the statements and representations were false or fraudulent. "The falsity or fraudulent character of this claim, if it was in fact false or fraudulent, arose from some fact or facts not alleged, and concerning which the indictment furnished absolutely no information. * * * Nothing but the conclusion that it was both false and fraudulent is alleged." People v. Mahony, 145 Cal. 106, 78 Pac. 354. It is nowhere alleged that any of the representations made were untrue and in fact false. It is not sufficient to allege the fraudulent character of representations, but the fact must be alleged from which it may be determined whether or not the conclusion of their false and fraudulent character is correct. Aside from the legal conclusions, there is nothing in this indictment which negatives the presumption of innocence. Omitting these conclusions, the allegations of the information can be true and the defendant still be innocent. People v. Griffith, 122 Cal. 214, 54 Pac. 725. In our opinion the information was insufficient, and the court erred in overruling the demurrer thereto.

Judgment reversed, and cause remanded, with instructions to sustain the demurrer to the information.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 229

## PEOPLE v. DAVIS. (Cr. 56.)

(Court of Appeal, Second District, California. Aug. 17, 1907.)

1. CRIMINAL LAW — EVIDENCE — CONTEMPORANEOUS DECLARATIONS.

In a prosecution for an attempt to rape, it was not error to permit prosecutrix to state defendant's declarations to her at the time with reference to his conduct with other girls whom he knew.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 809, 810.]

2. WITNESSES — TESTIMONY WITHOUT QUESTIONS.

In a prosecution for assault with intent to rape, it was not error to direct prosecutrix, a girl under 16 years of age at the time the offense was alleged to have been committed, to tell in her own way all that happened at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 816.]

3. LEWDNESS—NATURE OF OFFENSE—LASCIVIOUS CONDUCT.

Where, in a prosecution for an attempt to rape a girl under age, defendant's acts proved tended to establish such an offense, they did not also show a violation of Pen. Code, § 288, prohibiting acts of lascivious character with a child not amounting to a crime defined by other sections of the Code.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

N. P. Davis was convicted of an attempt to rape and of an attempt to have sexual intercourse with a girl under 16 years of age, not his wife, and he appeals. Affirmed.

J. C. Crouch, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appeal by defendant from a judgment and an order denying a new trial. The information filed in this case charged the defendant with attempting to commit rape by an unlawful and felonious attempt to have sexual intercourse with a girl under the age of 16 years; she not being then and there his wife. The evidence presented by the record fully justified the verdict of guilty.

The only error assigned by counsel in his brief is in relation to the admission in evidence of certain statements made by defendant to the prosecuting witness a few minutes before the performance of the criminal act. This testimony was in response to a direction of the trial court made to the witness to "tell in your own way all that happened there." She thereupon testified as follows: "He was talking about other girls that he knew. He said he knew lots of other girls. And one night I was there when there was a little girl about seven years old and a large girl. He said he knew them a long time, and he said that they used to go over on the hill—and I don't know where the hill is—over by Fourth, and he said they used to get beer and drink and have lots of fun like that, he said. He talked about them and everything, about drinking beer." We perceive no error either in the direction of the court to the witness, or in the action of the court in refusing to strike out these statements, and cannot conceive how any prejudice possibly resulted to defendant by the action of the court.

Upon oral argument, it is urged that the crime proven was a violation of section 288 of the Penal Code, and not that charged in the information. With this we do not agree. The acts committed by defendant amounted to an attempt to commit rape, and section 288 has reference only to acts of a lascivious character which do not amount to a crime as defined by other sections of the Penal Code.

Judgment and order affirmed.

We concur: SHAW, J.; TAGGART, J.

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6 Cal. App. 233

## Ex parte ELAM. (Cr. 61.)

(Court of Appeal, Second District, California. Aug. 17, 1907.)

1. Constitutional Law — Due Process of Law — Depriving One of Property — Restricting Use of Artesian Wells.

A landowner has no right to extract subterranean water in excess of a reasonable and beneficial use on the land from which it is extracted; and so is not deprived of property without due process by Act March 6, 1907 (St. 1907, p. 122, c. 101), declaring an artesian well not provided with appliances for preventing the flow of water therefrom to be a nuisance, and one who maintains it or permits water to unnecessarily flow from such well, or to go to waste, to be guilty of misdemeanor, defining an artesian well to be an artificial opening in the ground through which water naturally flows from subterranean sources to the surface of the ground, and defining waste to be permitting the flow from an artesian well to run into a bay, pond, or channel, unless used thereafter for the beneficial purposes of irrigation or domestic use, or onto land, unless it be used for irrigating it or for domestic use, or the propagation of fish.

2. Same—Right to Acquire, Hold, and Dispose of Property.

So such act does not contravene Const. art. 1, § 1, declaring it an inalienable right of all men to acquire, possess, and protect property.

3. Same—Special Privileges.

Act March 6, 1907 (St. 1907, p. 122, c. 101), making it a misdemeanor to waste, or use for other than certain purposes, water from an artesian well, does not, because making no such provision as to waters pumped from subterranean sources, contravene Const. art. 1, § 21, forbidding the granting of special privileges to any citizen or class of citizens.

4. Same—Special Laws.

Nor is Const. art. 4, § 25, subd. 33, prohibiting special laws, contravened by such act, because applying only to waters from artesian wells; that is, those having a natural flow.

5. Same—Uniform Operation of Laws.

Neither is such act for the same reason violative of Const. art. 1, § 11, requiring all laws of a general nature to have a uniform operation.

6. Same—Discriminatory Laws.

Such act does not discriminate in violation of the Constitution because allowing the use of waters from artesian wells for the maintenance of ponds for the propagation of fish, as distinguished from their maintenance for other purposes.

In the matter of the application of J. L. Elam for writ of habeas corpus. Writ denied.

G. P. Adams, for petitioner. J. D. Fredericks, Dist. Atty., and H. S. G. McCartney, Deputy Dist. Atty., for respondent.

ALLEN, P. J. This is an application for a writ of habeas corpus presented by petitioner, who alleges that he is restrained of his liberty under a commitment issued upon default in payment of a fine assessed against him for a violation of the act of the Legislature approved March 6, 1907 (St. 1907, p. 122, c. 101), entitled "An act to prevent the waste and flow of water from artesian wells, and prescribing penalties therefor, and defining waste and artesian wells."

It is petitioner's contention that this statute is violative of the Constitution of the United States and of the Constitution of the state of California, and in conflict with the general laws. Section 1 of the act under consideration provides that an artesian well which is not capped or provided with mechanical appliances for arresting the flow of water therefrom is a nuisance, and the owner of the land upon which the same is situated is declared guilty of maintaining a nuisance if he suffers it to remain so uncapped or unprovided with mechanical appliances for arresting the flow, and any person maintaining such nuisance, or causing or permitting water to unnecessarily flow from such well, or to go to waste, is guilty of a misdemeanor. By section 2 an artesian well is defined to be an artificial hole made in the ground through which water naturally flows from subterranean sources to the surface of the ground. By section 3 waste is defined to be the causing, suffering, or permitting the flow from an artesian well to run into any bay, pond, or channel, unless used thereafter for the beneficial purposes of irrigation of land or domestic use, or into any street, road, or highway, or upon public land, unless it be used for the irrigation thereof or for domestic use or the propagation of fish. It is further provided that, when water is run upon land for irrigation purposes, if more than 10 per cent. thereof be allowed to escape therefrom, the same shall constitute waste. Section 5 provides a penalty for the violation of any of the provisions of the act.

The first point made by petitioner—which is that the act is violative of the fourteenth amendment of the Constitution of the United States, which provides that no state shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," and of article 1, § 1, of the Constitution of this state, which provides that "all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property," and of section 13, art. 1, which provides that no person shall be "deprived of life, liberty, or property without due process of law"—seems to have been met and demonstrated to be untenable by the Supreme Court of the United States in the case of Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729. By that case it is established that water, oil, gas, and all fugitive substances held in their natural subterranean reservoirs are exceptions to the general rule establishing absolute ownership in the proprietor of the surface of all that lies underneath; that these minerals, being migratory in their nature, having no fixed situs, are a part of the soil only so long as they are on or in it, but after they escape and go to other lands the title of the former owner is gone; that it follows therefore that no one owner of the surface of the earth within the area beneath which these minerals move can exercise his right to extract from the common reservoir in which the supply is held without diminishing the source of supply as to which all other owners of the surface must exercise their rights; that, in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all, and of the public at large, the state could lawfully exercise the power to regulate the right of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein they were deposited, as well as the public, had an interest. "No devesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character." This water, the ownership of which until actual possession is acquired being in the public, or at least that portion of the public who may own the surface of the soil within the artesian belt, is subject to a reasonable use only by those interested therein. This reasonable use is determined in Katz v. Walkinshaw, 141 Cal. 134, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, to be the use of such amount of the subterranean water "as may be necessary for some useful purpose in connection with the land from which it is taken." The conditions existing in this state with reference to the necessity for the conservation of irrigating waters are most clearly set out in the case last cited, and the reasons for the rule restricting the use clearly shown. Whenever a landowner exceeds this reasonable use, he is appropriating to himself that which belongs to others who are entitled to a like use, and to that extent is obstructing the free use of property so as to interfere with its comfortable enjoyment, and which, by sections 3479 and 3480 of the Civil Code, is declared to be a public nuisance. Whatever right one has, even in his own, is subject to that established principle that his use shall not be injurious to the rights of others, or of the general public. This act therefore relates to waters, the right to the use of which is common to a large portion of the community, and affects the general public right. Legislation in relation thereto affects the public welfare, and the right to legislate in regard to its use and conservation is referable to the police power of the state, which is declared in Ex parte Whitwell, 98 Cal. 78, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, to be "the power to make laws to secure the comfort, convenience, peace and health of the community." "The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health, or the public morals." Ex parte Drexel, 147 Cal. 766, 82 Pac. 429, 2 L. R. A. (N. S.) 588. It is settled law that all property is held subject to the exercise of police power, and that provisions of the Constitution declaring that property shall not be taken without due process of law have no application in such cases. Odd Fellows' Cem. Ass'n v. San Francisco, 140 Cal. 230, 73 Pac. 987.

It is further contended by petitioner that the act violates section 21, art. 1, of the state

Constitution, which provides that "no special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens"; and he endeavors to demonstrate this proposition by the assumption that the surface owners are not prohibited by this act from extracting from this common source of supply any quantity thereof by means of pumps, that no attempt is made to restrict the use after the same is so pumped, and that the waste of such water so pumped is not violative of the act, and illustrates the claimed distinction by the statement that certain gun clubs within the arid region are pumping large quantities of this subterranean water, by means of which duck ponds are filled and maintained, while other gun clubs whose ponds are fed by artesian wells are restricted in the use of the flow therefrom. It may be conceded that the courts have recognized the right of gun clubs to practically create a monopoly in wild game over large areas of land, and have protected them in a so-called private proprietorship and limited dominion over such portions of the common property of the people of the state as they may induce to stay upon such preserves by feeding them and maintaining ponds therein. It may also be conceded that an exclusive right to hunt upon such preserves has also been held to be a species of property, and injunctions have been issued to prevent interference with the full exercise of such rights. Kellogg v. Kings, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74. But, while the maintenance of such duck ponds no doubt contributes greatly to the enjoyment of the owner of the hunting privilege, it will scarcely be contended that this is a use of the water which is beneficial to the land. Neither does it follow that because the courts have recognized such exclusive hunting privileges they must support the owners thereof in an encroachment upon another more necessary common right of the public, that of the conservation of the subterranean waters of the state for domestic uses and purposes of irrigation. We are not to be understood in thus meeting the reasons of petitioner's argument as admitting that there is anything in the language of the act in question that would affect a gun club any more than an individual, association, or incorporation. That one may show matters dehors an ordinance which is referable to the police power that such ordinance by reason of particular facts and circumstances is unreasonable and oppressive as to him is determined in Re Smith, 143 Cal. 370, 77 Pac. 180. No reason suggests itself why such right may not be recognized when the state has sought to exercise the same power; and, while courts may to a degree supervise such power, "they will not interfere except where the case be plain that needless oppression is worked and constitutional rights invaded." In re Smith, supra. Nothing appears upon the face of the act, or in the record on this application, from which it can be said there is any discrimination as to the class of persons who may violate the provisions of the law. No special immunities or privileges are granted to any club, clubs, person, or persons. That some clubs may maintain their ponds by pumping, while others, more fortunate, have theirs maintained by artesian wells or running streams, or tide water from the ocean, in no way affects the question. As well might it be said that Legislative action affecting tide lands created special privileges or immunities because the duck ponds of the clubs relying upon tide waters might be affected thereby.

As we have before attempted to show, no surface owner possesses the right to extract the subterranean water in excess of a reasonable and beneficial use upon the land from which it is extracted. Any additional extraction is not in the exercise of a right, if by such exercise the rights of others are injuriously affected. Nor can an appropriator take more water than he can beneficially use. Hence it follows that no discrimination is made between parties entitled to the exercise of a common right. Under the act in question, all may exercise their full legal right with reference to this water. As to the right to use any portion of that which belongs to the public, legislative control is applicable, and if, as a matter of fact, public rights are abused by the improper extraction of this public water by means of pumps, it is presumable that the Legislature in the exercise of its proper functions will in due time arrest such waste. The game of the state belongs to the people in their collective capacity in a more general way than does the subterranean water within an artesian belt, yet no one will question the right of the state to restrict the manner in which fish may be taken from the water, whereby it is made a public offense to use a seine, while those who adopt the hook and line may take without offense. There is no special privilege or immunity granted to the man with the hook and line. The right to take at all, or in any particular season, either of game or any other thing public in its character, comes from the state and is subject to its regulation and control, and it is for the Legislature to say what reasonable restrictions are necessary for the protection of this public property. Ex parte Kenneke, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177.

It is further contended that this act is violative of subdivision 33, § 25, art. 4, of the state Constitution, which provides that "the Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * in all other cases where a general law can be made applicable"; and also violates section 11, art. 1, which provides that "all laws of a general nature shall have a uniform operation."

Assuming all that the petitioner claims for the act as to its establishment of a class, nevertheless "the true practical limitation of the legislative power to classify is that the classification shall be based upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them." Nichols v. Walter, 37 Minn. 272, 33 N. W. 802. "A law which operates only upon a class of individuals is none the less a general law if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself, in the matter covered by the general law, and which is germane to the purpose of the law." People v. Central Pac. R. Co., 105 Cal. 576, 38 Pac. 905. It is obvious that different legislation is required peculiar to those whose lands are so situated with reference to the artesian supply that a natural flow results from a penetration into the subterranean reservoir. The distinction between wells having a natural flow and those not so constituted as natural, and reasonably indicates the necessity or propriety of legislation restricting the former class. The right to so legislate when the reason exists is determined in Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 604, People v. Central Pac. R. Co., 105 Cal. 576, 38 Pac. 905, and People v. Mullender, 132 Cal. 221, 64 Pac. 299. This act operates uniformly upon every one owning lands upon which is located an artesian well of the kind and character specified in the act. "Section 11, art. 1, of the state Constitution, requiring all laws of a general nature to have a uniform operation, is satisfied when the law operates uniformly upon all persons standing in the same category, and upon rights and things standing in the same relation." Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600.

It is further contended that a discrimination exists because of the provision which permits the maintenance of ponds for the propagation of fish, as distinguished from the maintenance of ponds for other purposes. The propagation of fish has always been recognized as a legitimate pursuit and as an effort to increase the food supply of the world, and the use of water therefor a beneficial use, which, like the use for irrigation or domestic purposes, is declared by the act to be the highest use to which this natural element may be applied. The Legislature has the right to determine what uses are superior in kind and to protect the same, and it is within its province to determine that certain uses of this public property are of a higher character and superior in right to other uses. This right is subject only to the constitutional limitations against discriminations. Having so determined, and no just criticism being applicable thereto, the value of such uses must be held to be established. We are not called upon in this case to determine the legislative right to regulate or protect the extraction of this subterranean water for transportation or sale by those owners of the surface whereon the use of water is not required for those higher uses, nor of prescriptive rights asserted or claimed in such instances, but simply to hold that for the uses which have been determined subordinate the great subterranean water supply may not be applied to the detriment of the higher uses, and that legislation directed to the conversation of such water, as in this act, is not prohibited by any constitutional provision. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." In re Spencer, 149 Cal. 400, 86 Pac. 896; Sinking Fund Cases, 99 U. S. 718, 25 L. Ed. 496.

Writ denied.

We concur: SHAW, J.; TAGGART, J.

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6 Cal. App. 225

TAYLOR et al. v. BURKS et al. (Civ. 456.)

(Court of Appeal, Second District, California. Aug. 16, 1907.)

MANDAMUS—PETITION—PARTIES.

Code Civ. Proc. § 1085, provides that mandamus will issue to any board to compel performance of an act which the law specially enjoins. Section 1096 provides that service of the writ on a majority of the members of any board is service on the board. Section 1097 provides that punishment may be inflicted personally on any member of the board refusing to obey the writ, etc. Section 1109 makes the ordinary rules in civil actions applicable to pleadings in mandamus, except as to matters otherwise provided for. Henning's Gen. Law, p. 989, § 1, provides that a municipal corporation of the sixth class may disincorporate under the act, and that the council or other legislative body of such corporation shall, on receiving a petition therefor, submit the question. *Held*, that a proceeding by mandamus to compel the calling of an election to vote on the disincorporation of a city must be brought against the board of trustees of the city, and not against the members of such board individually.

Petition by T. R. Taylor and others for mandamus against Dana Burks and others. Demurrers to petition sustained.

John D. Pope, for petitioners. W. H. Anderson and Anderson & Anderson, for defendants.

TAGGART, J. Application for writ of mandate to compel defendants, as members of board of trustees of city of Ocean Park, to call an election to vote upon the disincorporation of that city, and to fix a date for such election within a reasonable time.

The petition sets out that the city of Ocean Park is a municipal corporation of the sixth class, governed by a board of trustees composed of five persons; that the defendants are three of such trustees, and that the other two, as petitioners are informed and believe, have tendered their resignation as members of said board; that petitioners, as electors, owners of property, and taxpayers in said city of Ocean Park, on the 24th day of June, 1907, filed with said board of trustees a petition signed by a majority of the qualified electors of said city, requesting said board of trustees to submit to the electors of said city the question whether said city should disincorporate; that no action was taken on said petition until July 22, 1907, at which time said board of trustees, by the affirmative vote of all of the defendants, called said election and ordered the same to be held April 13, 1908, which date is the same day fixed by law for the regular election of trustees in cities of the sixth class. For return to the order to show cause, the defendants demur severally to the petition and file a joint answer. In support of the demurrers, it is contended that the proceeding is improperly brought, in this: that it runs against the defendants as individuals, and not officially, and that the board of trustees as such is the only party competent to act in the premises, and that it is the action of the board of trustees that is required in making the order desired. The prayer of the petition is that the defendants be "commanded to rescind the action of the board," fixing April 13, 1908, for the date of the election, and "to order an election." Neither of these things can be done by the individual members of the board.

The act which a court may, by writ of mandate, compel a tribunal, corporation, board, or person to perform, is one which the law specially enjoins, as a duty resulting from an office, trust, or station. Code Civ. Proc. § 1085. The statute under which the proceedings to disincorporate are taken (Henning's Gen. Law, p. 989) reads (§ 1): "A municipal corporation of the sixth class may disincorporate after proceedings had as required in this act. The council, the board of trustees, or other legislative body of such corporation shall, upon receiving a petition therefor * * * submit the question," etc. While the petition alleges upon information and belief that the other two members of the board tendered their resignations at the same time the action was taken as to calling the election, it nowhere appears that such resignations were accepted, or that the other two did not participate in the action taken, or that they are not now actual active members of the board. Jurisdiction of the board of trustees may be acquired by the service of the writ upon a majority of the members of the board (section 1096, Code Civ. Proc.), and punishment may be inflicted personally upon any member of the board refusing or neglecting to obey the writ or order of the court (section 1097, Code Civ. Proc.), but these very statutory provisions and distinctions appear to accentuate the necessity of the proceeding being against the board. This is entirely in accord with the weight of the authorities displayed under the subhead "Board or Members," title "Mandamus," 13 Ency. of Pl. & Pr. p. 650, cited by petitioners. We gather the gist of this matter as declared by the text-writer in the Encyclopedia to be that primarily the proceeding should be against the board, and the individual members need not be named, but the better practice is in most cases to name the individual members, although not necessary to do so; that there are exceptional cases in which the disobedience of the board is due to the action of certain individual members of the board, in which case such members must be expressly made defendants, the reason therefor appearing in the petition for the writ.

In Barber v. Mulford, 117 Cal. 358, 49 Pac. 207, the practice is stated to be as follows: "While with us the more general practice in mandamus has been to proceed against the officials only, who as representatives of a body politic have refused performance of some duty owed to the plaintiff or relator, yet there seems no good reason why their principal, the legal entity which is commonly the real party to be affected by the writ, may not be joined as a defendant in the proceeding. Though seldom a necessary party, it cannot in a case like the present be called an improper one." In that case the body had acted allowing the claim, but an order had been drawn on the wrong officer. It was the duty of the president and secretary of the board to draw the order. The board was made a respondent in the mandamus proceeding, and it was held to be a proper, though not necessary, party. As said in the opinion: "No question is made as to the legality of the plaintiff's demand audited by the board, or as to the propriety of the action of that body in allowing the same." It will thus be seen from the facts of that case that there is nothing in Barber v. Mulford in conflict with the rule above quoted from the Encyclopedia, and it also will be noted that the term used is "officials," as distinguished from individuals or persons. In some cases it is held that the name of the official alone is necessary, and the name of the incumbent of the office is not required to be given. The ordinary rules in civil actions are applicable to pleadings in mandamus proceedings, except in respect to matters otherwise provided in the chapter under that head. Section 1109, Code Civ. Proc.; People v. Board, 27 Cal. 655; Jones v. Board, 141 Cal. 96, 74 Pac. 696.

While the petition is insufficient for the reasons given, we cannot forbear saying, in response to the argument of respondents presented as a justification for the fixing of the date of the election at so remote a time, that this appeals to us as a much better reason to be offered to the voters of the city of Ocean Park why they should not vote for disincorporation at present than to this court as an excuse why a writ of mandate should not issue directing the board of trustees to perform a plain express duty provided by statute. The method of delay, whether by dilatory action in the board or setting the election for a remote date, under the rule declared in Glencoe v. People, 78 Ill. 382, appears to be immaterial. We take it that the law declared in that case is applicable here.

That the matter may be heard effectively upon its merits, it is deemed best that the demurrers be sustained for the reasons above indicated. Demurrers sustained.

We concur: ALLEN, P. J.; SHAW, J.

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3 Cal. App. 662

## LANTZ v. FISHBURN et al. (Civ. 196.)

(Court of Appeal, Second District, California. May 29, 1906. Rehearing Denied by Supreme Court July 23, 1906.)

1. Municipal Corporations — Street Improvements — Assessments—Enforcement —Sale of Land—Title of Purchaser.

One alleging title to lots under sales by the city treasurer on default in payment of an installment due on bonds issued on a street improvement assessment and deeds issued thereon, in pursuance of St. 1893, p. 33, c. 21, prescribing a system of street improvement bonds, etc., must affirmatively establish a strict compliance with the statutory provisions.

2. Same—Sale of Land for Nonpayment of Assessment.

Act Feb. 27, 1893, § 5 (St. 1893, p. 36, c. 21), provides that the city treasurer may sell land to pay delinquent assessment bonds, as provided for the collection of delinquent taxes. *Held*, that where the place of sale of lots by the city treasurer on default in payment of an installment on a bond issued on a street improvement assessment was given in the notice of sale as "at the easterly door of the county courthouse," and it did not appear that this was "the front of the courthouse," or that any resolution of the board of supervisors had been passed prescribing "the front door of the courthouse" as the place of sale, as required by Pol. Code, § 3768, then in force, the sale was invalid.

3. Same.

Act Feb. 27, 1893, § 5 (St. 1893, p. 36, c. 21), provides that the city treasurer may sell land to pay delinquent assessment bonds, as provided for the collection of delinquent taxes. *Held*, that where the notice of redemption from a sale of a lot by the city treasurer on default in payment of an installment on a bond issued on a street improvement assessment, required by Pol. Code, § 3785, as it stood prior to the amendment of 1895, did not conform to the requirements of the law, and a duplicate of the notice was not filed with the county recorder, as required by that section, as amended by St. 1891, p. 134, c. 121, a deed founded on such proceedings was invalid.

4. Same.

Act Feb. 27, 1893, § 5 (St. 1893, p. 36, c. 21), provides that the city treasurer may sell land to pay delinquent assessment bonds, as provided for the collection of delinquent taxes. Pol. Code, § 3776, prior to the amendment of 1895, required the certificate of sale to state the time when the purchaser should be entitled to a deed. Section 3785, prior to the amendment of 1895, provided that the purchaser of property sold for delinquent taxes must, 30 days previous to the expiration of the time for redemption, or before he applied for a deed, serve on the owner of the property purchased a notice stating when the right of redemption would expire or the purchaser would apply for a deed, and that the owner should have the right of redemption indefinitely until such notice should have been given and deed applied for. *Held*, that a certificate of sale of a lot by a city treasurer on default in payment of an installment on a bond issued on a street improvement assessment, that the purchaser would be entitled to a deed on a day named on giving notice of application therefor, but, failing to recite that the right of redemption would have then expired, was fatally defective.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by H. P. Lantz, as administrator of George Locke, deceased, against J. E. Fishburn and others. From a judgment for plaintiff, and an order denying their motion for a new trial, defendants appeal. Reversed and remanded.

J. L. Murphey, for appellants. Charles Lantz, for respondent.

SMITH, J. This is a suit to quiet title, resulting in a judgment for the plaintiff. The defendants appeal from the judgment, and from an order denying their motion for a new trial.

The complaint is in the usual form, alleging title in plaintiff's testator, Geo. Locke, at the time of his death, and subsequent title in his estate. The original title of plaintiff's testator is admitted. But defendants in their answer allege title in the defendant Rheinschild, deraigning title (in the second defense set up in the answer) under sales of the two lots in controversy by the city treasurer upon default in payment of the first installment due on bonds issued upon a street assessment for the improvement of Bridge street in the city of Los Angeles, and deeds thereon issued. They also set up in a third defense, as a claim against the land, a bond issued upon a street assessment of the same lots for the improvement of the crossing of Echandia street with Bridge street; and, in a fourth defense, an alleged estoppel in pais is pleaded.

It appears from the findings that the specifications of the work under both assessments were the same as those involved in Stansbury v. White, 121 Cal. 433, 53 Pac. 940, Chase v. Treasurer, 122 Cal. 540, 55 Pac. 414, and Chase v. Scheerer, 136 Cal. 248, 68 Pac. 768, in which cases the assessments—and in the last two cases the bonds thereon issued—were on that account held to be void. Accordingly, in the briefs originally filed, it was assumed by the attorneys of both parties, on the authority of those decisions, that the assessments and bonds herein involved were void, and the argument was confined exclusively to the plea of estoppel. On this issue the findings of the court are adverse to the appellants, and are, we think, justified by the evidence; nor do we think the facts alleged, or those shown by the evidence, sufficient to constitute an estoppel. But in an amended brief filed by the appellants our attention has been called to the decision in the late case of Chase v. Trout, 146 Cal. 350, 80 Pac. 81, which. it is claimed, conclusively establishes the validity of the bonds here involved. In that case the specifications involved were substantially similar to those involved in the cases cited, and it was held that by effect of the curative provision of section 4 of the "act to provide a system of street improvement bonds," etc. (St. 1893, p. 36, c. 21, § 4, last sentence), the bonds there in question were valid; and this decision must be taken as the final expression of the Supreme Court upon the points there involved, and upon the same points where involved in the present case. It must be assumed, therefore, that the validity of the bonds in this case was not affected by the defects in the specifications as supposed by the counsel on both sides. But it still remains for us to inquire whether there were other defects in the proceedings of a nature to affect the validity of the bonds, or the validity of the deeds issued on the Bridge street assessment.

On the latter point, it is clear that the terms of the curative provision in question have no application, and that, assuming the bonds to be valid, the validity of the deeds must depend upon the conformity or nonconformity of the proceedings of the treasurer with the provisions of the law as prescribed in section 5 of the act cited (St. 1893, p. 36, c. 21), and in section 3765 et seq. of the Political Code, therein referred to; and on this point it is to be regarded as settled law that, to give validity to the deed, it devolved upon the defendants to prove affirmatively a strict compliance with the statutory provisions. Shipman v. Forbes 97 Cal. 574, 32 Pac. 599; Gwynn v. Dierssen, 101 Cal. 565, 566, 36 Pac. 103; Merced Co. v. Helm, 102 Cal. 159, 36 Pac. 399; Miller v. Williams, 135 Cal. 183, 67 Pac. 788; Baird v. Monroe (Cal. App.).[1] This, with regard to several of the proceedings necessary to give validity to the sale, the appellants failed to do; and as to some it affirmatively appears that the law was disregarded. Thus the place of sale given in the notice of sale was "at the easterly door of the county courthouse in Los Angeles county." But it does not appear that this was "the front of the courthouse," or that any resolution of the board of supervisors had been passed prescribing "the front door of the courthouse" as the place of sale, as required by the provisions of section 3768 of the Political Code, then in force. Again, from the finding of the court it appears, with regard to one of the lots, that the notice of redemption required by section 3785 of the Political Code—as it stood prior to the amendment of 1895—did not conform to the requirements of the law; nor, in the case of either lot, was a duplicate of the notice filed in the office of the county recorder, as required by the provision cited as amended in 1891. St. Cal. 1891, p. 134, c. 121; Kirk v. Rhoads, 46 Cal. 403; Ramish v. Hartwell, 126 Cal. 446, 447, 58 Pac. 920. Again, by section 3776 of the Code, it is required that the certificate of sale must state "the time when the purchaser shall be entitled to a deed." But the recital upon this point in each of the certificates states the time to be "on the 21st day of June, 1901, upon giving notice of application therefor," though by the provisions of section 3785 it is expressly provided that "the owner of the property shall have the right of redemption indefinitely until such notice [i. e., the notice prescribed] shall have been given and said deed applied for." The term of redemption should therefore have been described as the concurrent happening of this event, and of the expiration of the year. The law requires, not merely that the fact of notice of redemption shall appear, but also that a recital of the fact shall be contained in the certificate, and upon the failure of either of these requirements the certificate and the deed thereon issued are void. Cases cited in Baird v. Monroe (Cal. App.) supra. We are of the opinion, therefore, that the sales under which the defendants claim title were void, and that the finding that the plaintiff is the owner in fee simple of the land cannot be disturbed.

But it is found, also, and adjudged, that the bonds themselves set up in the defendants' answer are void; and it remains to consider how far these findings and the corresponding judgment can be sustained, and in this regard the case is as follows: The proceedings for the assessment of Bridge street and the issue of bonds thereon are set forth in detail in the second defense of the answer; and this is the case also with regard to the proceedings for the assessment of Echandia street and the bonds thereon issued, which are set forth seriatim in the third defense. Upon the issues thus raised, the court finds that all the allegations of the answer as to the proceedings, from the passage of the ordinance of intention down to and including the ordinance of intention to issue serial bonds, and the failure of the owners of three-fourths of the frontage to elect to take the work, are true; and it is also found that the bonds were issued as alleged, but "are wholly void," etc. All the other allegations and denials contained in defendants' answer are found not to be true; and it is thus in effect found that none of the proceedings required by law in the improvement of a street, and the assessment of property therefor, from the making of the contract to the return of the warrant, inclusive—including the actual performance of the work—were in fact taken. All that appears from the findings therefore is that, after the usual precedent proceedings, the contract for doing the work was awarded to the defendant Rheinschild, and that thereupon, without any intervening proceedings or acts on his part, or on that of the council, the bonds in question were issued to him. The question is thus obviously suggested whether, under the decision in Chase v. Trout, the bonds themselves are to be regarded as conclusive evidence, not only "of the regularity," but also of the actual performance "of all the proceedings" required by the street work act subsequent to the ordinance of intention. To this question there would seem to be but one answer. If there was in fact no contract, no work done, and no assessment, warrant or demand of payment, there was no tax due or lien therefor for which bonds could be issued, and for the Legislature to declare that the issue of a paper in the form of a bond should be conclusive evidence that these essential proceedings had been taken would seem to be beyond its competency; nor do we find anything in the decision in Chase v. Trout inconsistent with such a conclusion. But, however this may be, it appears from the evidence in the bill of exceptions—which was received without objection and not contradicted—that there was in the case of each improvement, a contract, an actual performance of the work, an assessment, with warrant, etc., and demand of payment, and return, and other matters negatived by the general finding of the court; and, indeed, there seems to have been no dispute as to the existence of these facts. We are therefore almost forced to the conclusion that the general finding of the court that all allegations of the complaint, other than those expressly found to be true, were untrue, was the result of inadvertency, and that it did not intend so to find; and, however this may be, the finding is clearly unsupported by the evidence.

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[1] See note at end of case.

It follows that a new trial must be had, but, with regard to the further proceedings in the case, there are other points to be adverted to. Whatever may be the effect of the provision of section 4 of the bond act, making the bonds referred to "conclusive evidence of the regularity of * * * proceedings," it applies only to the proceedings "previous to the making of the certified list of all assessments unpaid, etc., and of the validity of said lien up to the date of said list." But it is only upon the receipt of this certified list from the street superintendent that the treasurer can issue the bonds; and we cannot make out from the finding of the court whether it intended to find that the list was not made as alleged, or the contrary. It is also provided in section 4 of the act that if notice from the owner of the land, accompanied with the affidavit and certificate prescribed, be given to the treasurer that "he desires no bond to be issued," then "no such bond shall be issued"; and it is alleged in the answer, with regard to each of the assessments, that such notice was not given. On this point the general findings of the court may be construed as negativing this allegation, but there is no specific finding, and we are not satisfied that the court intended so to find. Upon another trial the findings should be made more definite on these and other points.

The judgment and order appealed from are reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

We concur: GRAY, P. J.; ALLEN, J.

NOTE.—The following opinion of the Court of Appeal, by Smith, J., was reversed by Supreme Court, in 89 Pac. 352:

The suit was brought to quiet title to a tract of land described in the complaint as: "Lot five (5) in block 'K' of the Pellissier tract, in the city of and county of Los Angeles, state of California, as per map recorded in book 15, page 70, miscellaneous records of said county." The judgment was for the defendant; and the plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

It appears from the stipulations and facts shown by the record that the plaintiff's testator was owner of the land in controversy and died seised of the same, and that the plaintiff is now entitled to maintain his action, unless his testator's title was divested by the deeds appearing in the record, which are a tax deed from the tax collector to the state of California of date July 6, 1900, for the taxes of the year 1894, followed by a deed of date July 20, 1901, from the tax collector purporting to have been made upon the authorization of the controller, to one Monroe, whose title is vested in the respondent, and a deed of date July 24, 1903, from the street superintendent of the city of Los Angeles on a street assessment to the respondent himself. The latter deed, it is claimed by the appellant, shows on its face that it was made in a proceeding under the general street law of March 6, 1889, and not under the charter, under which the proceeding should have been taken (Byrne v. Drain, 127 Cal. 663, 60 Pac. 433); and, the point not being contested by the respondent, it will be assumed to be well taken. As to the tax deed, it is claimed by the appellant that it is void on its face for the following reasons: (1) It does not recite "the time when the right of redemption had expired," or, "the amount for which the property was sold"; and (2) that the original assessment was void. As to the first point of appellant, the recitals referred to were required by section 3785 of the Political Code as amended March 28, 1895 (St. 1895, p. 328, c. 218), which is the law governing the case, and we are of the opinion that the deed fails to comply with the statute in this respect. As to the time of redemption the deed refers to a certificate of sale bearing date July 3, 1895, and stating that, unless the real estate was redeemed within five years from the date of the sale, the purchaser would be entitled to a deed on the 5th day of July, 1900. This is all that is said in the deed, and we think it was an insufficient compliance with the statute (Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 761); and the more especially because at the time of the sale there was no law providing for the issuance of a certificate. This, indeed, had been provided for by sections 3776 and 3777 of the Political Code, but these sections had been repealed February 25, 1895 (St. 1895, p. 19, c. 11); and, though there was at the same session an attempted amendment of the repealed sections (St. 1895, pp. 327, 328, c. 218), this, under the express provisions of the Political Code, was of no effect (Pol. Code, § 330; Fletcher v. Prather, 102 Cal. 413, 36 Pac. 658). Nor was this defect remedied by the curative act of 1903. St. 1903, p. 63, c. 59; Harper v. Rowe, 53 Cal. 233, 237. As to "the amount for which the property was sold,' all that is said in the deed is—after a statement of the amount of taxes, $2.92—that the land was sold "to pay said taxes"; but it is not said that that was the amount for which it was sold, which was the requirement of the law. Simmons v. McCarthy, supra. In the deed, and in the assessment therein referred to, the land is simply described as being situate in the county of Los Angeles, state of California, "in Pellissier Tr., lot 5, blk K," which was obviously insufficient. Pol. Code, § 3650; Knott v. Peden, 84 Cal. 299, 24 Pac. 160; Labs v. Cooper, 107 Cal. 656, 40 Pac. 1042; Miller v. Williams, 135 Cal. 183, 67 Pac. 788.

Some of the above cases are criticized in the opinion of the lower court, and it is apparently admitted that the decision of the court "is in advance of many adjudicated cases"; the views of the court being based apparently upon the more liberal character of the existing system under which the delinquent lands are conveyed to the state and every opportunity for redemption granted to the delinquent owner. Hence it is concluded that the reason for the rule has ceased, and with it the rule itself. We agree with the court in its views as to the liberal character of the existing system (which, in our opinion, cannot be too highly commended); but we do not think that this furnishes any ground for abandoning the well-settled principle governing the exercise of statutory powers for conveyance of lands against the will of the owners. That principle is that, in the exercise of such powers, the statutory provisions must be strictly observed; and, though this principle has, in our opinion, rightly been carried to extreme lengths, and to what may be thought, by those who do not look to the grounds upon which the decisions rest, to lengths even absurd, yet we know of no class of decisions that more favorably exhibit that regard to rights of property which has always characterized our law and distinguished our courts, and, indeed, it may readily be conceived what havoc and devastation to property rights would have occurred but for this conservative conduct of the courts.

There is another question, however, presented by the record, which it will be necessary to dispose of. The plaintiff, we think, is entitled to judgment according to the prayer of his complaint, but only upon the condition of paying to the defendant the amount paid by him in the purchase of the land, or so much as may be found by the court to be due the state to entitle the plaintiff to redemption. Couts v. Cornell (Cal.) 82 Pac. 194, and cases cited. The cases cited are, indeed, such as were formerly recognized as cases in equity; but it has been held that an action to quiet title under section 738, Code Civ. Proc., is of the nature of a bill in equity, and the equitable maxim has been applied, that he who seeks equity must do equity. Polack v. Gurnee, 66 Cal. 266, 269, 5 Pac. 229, 610; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; De Cazara v. Orena, 80 Cal. 132, 134, 22 Pac. 74; Benson v. Shotwell, 87 Cal. 53, 60, 25 Pac. 249; Brandt v. Thompson, 91 Cal. 458, 462, 27 Pac. 763. We, however, do not base our opinion exclusively upon these decisions, but upon the broader ground that, under the Code provisions, the distinction between legal and equitable forms of action has, except for certain special purposes, been abolished, and that under our practice the maxim, where the case requires it, will apply equally to legal as to equitable actions. Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423. This, it seems, has been held by the English courts since the passage of the judiciary act, but whether under the express provisions of that act, or upon other grounds, we do not know. Snell's Equity, 1 et seq. But we think the same result must follow under the provisions of our Code.

The judgment and order appealed from are reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

We concur: GRAY, P. J.; ALLEN, J.

152 Cal. 31

## MANNIX v. TRYON et al. (Sac. 1,507.)

(Supreme Court of California. Sept. 19, 1907.)

1. Appeal—Notice—Adverse Parties — Who Are—Statutory Provisions.

Under Code Civ. Proc. § 940, providing for the service of notice of appeal on the adverse party, persons whose interest in the subject-matter is determined by the judgment appealed from, and which interest will be injuriously affected by its reversal, are adverse parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2137, 2138.]

2. Courts—Jurisdiction—Mechanics' Liens—Amount in Controversy.

When the superior court acquires jurisdiction by the filing of a suit to enforce a lien of mechanics' and others, under the statute relating to such liens, it has jurisdiction to render judgment for the amount claimed, though less than $300 and though the right to a lien is denied.

3. Appeal—Notice—Adverse Parties.

Code Civ. Proc. § 940, require the service of a notice of appeal on the adverse party. Section 1193 provides that, where a lien is filed on an indebtedness due from the original contractor to the lien claimant, the original contractor shall defend at his own expense; that during the action the owner may withhold from the contractor the amount for which the lien is filed; that on judgment against the owner or his property he shall be entitled to deduct the amount thereof from any sum due the contractor; and that, if the judgment exceed the amount due, he may recover the excess from the contractor. In an action to enforce a mechanics' lien, a personal judgment for $178 was rendered against defendant contractor, a lien on the lot of the owner being decreed, with a provision for the sale thereof, and a deficiency judgment against the contractor if the proceeds of the sale were insufficient to pay the judgment. *Held* that, on appeal by the owner, the contractor was not an adverse party on whom a notice of appeal should have been served.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2138.]

4. Contracts—Subcontractors.

A subcontractor is not bound by the terms of the original contract where the same are not embodied in the contract between him and the original contractor.

5. Same—Warranties.

Under Civ. Code § 1770, providing that one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose, a contractor who uses the materials called for by the specifications in plastering the walls of a building, and does the work according to the contract, is not liable under an implied warranty that the walls should be white.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by D. J. Mannix against William M. Tryon and another. From the judgment, defendant Tryon appeals. Modified, and, as modified, affirmed.

See 84 Pac. 278.

A. L. Shinn and R. L. Shinn, for appellant.
R. Platnauer, for respondent.

LORIGAN, J. This is an action to foreclose a mechanic's lien. The defendant Tryon, owner of a lot in the city of Sacramento, contracted with the defendant Harris to erect a three-story building according to certain plans and specifications. The plaintiff, as a subcontractor, entered into a contract with the original contractor, Harris, to do the plastering and hard finish work according to said specifications, and, claiming to have performed it, and that a balance of $178 was due him therefor, filed a lien and commenced this action against the original contractor and the owner of the lot to enforce its payment. A personal judgment was rendered in favor of plaintiff against the original contractor, Harris, for the amount claimed, and it was then further decreed in the judgment that a lien on the lot of the defendant Tryon existed in favor of plaintiff for said amount, provided for a sale of the lot and the application of the proceeds to the payment of the judgment, and, in the event that the proceeds were insufficient for that purpose, that there be "docketed a judgment against the defendant J. E. Harris for the amount of such deficiency which may remain unpaid on the judgment of plaintiff, and that plaintiff have execution against the defendant for the amount thereof." The defendant Tryon appealed from the judgment, a bill of exceptions accompanying his appeal therefrom, and served his notice of appeal on the plaintiff alone. The notice of appeal given by defendant Tryon was only intended to embrace an appeal from the judgment in so far as it affected him by decreeing a lien upon his property, providing for the sale thereof and application of the proceeds to the satisfaction of the claim of plaintiff. The original contractor, Harris, against whom the personal judgment was entered, took no appeal, nor was any notice of appeal served on him by the appellant Tryon. The District Court of Appeal for the Third Appellate District, before which this matter came up originally, dismissed the appeal on motion of respondent, on the ground that Harris, the original contractor, was an adverse party within the meaning of section 940 of the Code of Civil Procedure, and should have been served with notice of appeal; that he was interested in maintaining the judgment of lien; that a reversal of the judgment in that respect would be against his interest; and, not having been served with such notice, the court was without jurisdiction to determine the appeal on its merits. A petition by appellant for a further hearing and determination of the cause before this court was granted, and upon the hearing here the motion to dismiss the appeal is renewed and submitted with the submission of the cause upon its merits.

The rule, of course, is that, in order to confer jurisdiction upon an appellate court to entertain an appeal, all adverse parties—parties to the controversy whose interests would be injuriously affected by a reversal of the judgment—must be brought before the court. Persons whose interest in the subject-matter is determined by the judgment appealed from, and which interest will be injuriously affected by its reversal, are adverse parties within the meaning of section 940 of the Code of Civil Procedure upon whom notice of appeal must be served. It is said "an adverse party to an appeal means the party whose interest in relation to the subject of the appeal is in conflict with a reversal of the order or the decree appealed from, or the modification sought by the appeal." Randall v. Hunter, 69 Cal. 80, 10 Pac. 130; Green v. Burge, 105 Cal. 52, 38 Pac. 539, 45 Am. St. Rep. 25; Pacific Mut. Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758; Mohr v. Byrne, 132 Cal. 250, 64 Pac. 257.

If this is the relation which the original contractor, Harris, bears to the appeal, if his interest in the judgment appealed from is such that its reversal will injuriously affect him, then as an adverse party he should have been served with the notice of appeal. Respondent insists that such is his relation to it, his contention being that it is to the interest of the original contractor that the judgment of the trial court establishing the lien should stand, because, by enforcing the lien against appellant's property, a sufficient sum might be realized through a sale of it to fully discharge the indebtedness due to plaintiff and relieve the original contractor from all obligation to plaintiff; that to reverse the judgment so as to defeat the lien would deprive the original contractor of such advantage under the judgment establishing it, and leave him subject to have the personal judgment recovered against him enforced under execution. In this view, it is insisted by respondent that, as the original contractor will be injuriously affected in his interest if it is reversed, it was essential that notice of appeal be served upon him.

The position of appellant is that a reversal of the judgment so far as the lien is concerned, which alone is involved on this appeal, cannot injuriously affect the original contractor; it being asserted that, if the lien be eliminated from the judgment by a reversal, the effect would be, although no appeal was taken by the original contractor therefrom, to destroy the personal judgment against him; that within the doctrine of Miller v. Carlisle, 127 Cal. 327, 59 Pac. 785, the jurisdiction of the superior court to entertain this action as the claim was for less than $300, depended solely on the assertion of the right of lien and its establishment by that court, and, if it should be determined upon this appeal that there was no lien, then as the amount of the claim asserted was less than $300 the superior court had no jurisdiction to enter a personal judgment against the original contractor for $178; that the personal judgment is void and falls with the reversal of the judgment establishing the lien on which jurisdiction of the superior court in the cause alone depended. And it is further insisted by appellant that even if, as claimed by respondent, the personal judgment against the contractor is a valid one which would be unaffected by this appeal, the contractor could not be prejudiced by a reversal of the judgment establishing the lien; that the liability of the contractor for the full amount of the claim is fixed by it, and such liability would not be affected whether that portion of the judgment establishing the lien be reversed or affirmed.

It is only proper in connection with this statement of appellant's position to say that when his briefs were filed and the case of Miller v. Carlisle was cited and relied on in support of that position, the case of Becker v. Superior Court (Cal.) 90 Pac. 689, had not been decided. In this latter case a conclusion was reached that the rule stated in Miller v. Carlisle was not the correct one, but, on the contrary, the true doctrine is that when the superior court acquires jurisdiction by the filing of a suit to enforce a lien of mechanics and others, under the statute relating to such liens, it has jurisdiction to render a personal judgment for the amount claimed, although the right to a lien is denied and the amount claimed is less than $300. We mention this in justice to appellant, while at the same time a reference to this latter case of Becker v. Superior Court shows that the personal judgment entered against the original contractor in this case is a valid, subsisting judgment, which, as it is not appealed from, stands unaffected or unaffectable by any action which this court may take on the appeal of appellant involving the validity of the lien. Under this personal judgment, the primary obligation to pay the amount due plaintiff is fixed upon the original contractor; such primary obligation being secured by a lien enforced against the property of the owner. This being the condition and effect of that judgment, it will be seen upon a little reflection, and consideration of the record before us on its merits, that it can be of no moment to the contractor whether upon this appeal of Tryon, the owner, it be determined the lien is valid or invalid—whether the judgment as to it be affirmed or reversed. We say, upon the record before us, because it is upon an examination of that record in connection with the rights of owners charged with a lien as against original contractors under the mechanic's lien law, that we feel satisfied warrants a conclusion that no right of the original contractor here can be affected adversely or at all by a reversal of the judgment as to the lien. It, of course, appears from the record before us that the primary obligation to pay the indebtedness for which the judgment was obtained was upon the original contractor. He was personally responsible to the subcontractor for the payment of the claim under his contract with him. The law merely gave the subcontractor, in default of payment by the contractor, a right of lien against the owner's property enforceable by foreclosure to secure the payment which the contractor was primarily obligated to make. But the law also (section 1193, Code Civ. Proc.) provides that, where a lien is filed against the property of the owner on an indebtedness due from the original contractor to the lien claimant, the original contractor shall defend against any action brought thereon at his own expense; that during the pendency of the action the owner may withhold from the contractor the amount of money for which such lien is filed; that, in case of judgment against the owner or his property upon the lien, he shall be entitled to deduct from any amount due the contractor the amount of such judgment and costs, and, if the amount thereof shall exceed the amount due by the owner to the contractor, or if he has settled with the contractor in full, he shall be entitled to recover back from the contractor any amount paid by him in excess of the contract price and for which the contractor was originally the party liable.

It appears from the record here that there is in the hands of the appellant, owner of the lot, over $1,900 due from him to the original contractor. Under these circumstances, while it may be said theoretically and on the face of the judgment itself that the contractor would be benefited by having the judgment of lien stand and satisfaction of the claim of plaintiff had by a sale of the owner's property, yet, practically and by virtue of the section of the Code referred to, no advantage or benefit accrues to him at all thereby. In any event—reversal or affirmance—his primary liability for payment of the claim to plaintiff remains unaffected under the personal judgment obtained against him. Under any theory he can only claim that he would be injuriously affected by a reversal because under the judgment as it stands he is benefited by the enforcement of the lien. But, under the section of the Code referred to and upon the record, this theory is illusive. If the judgment establishing a lien stands and is enforced by a sale of the property, or is discharged by the owner through payment of the judgment, the owner is entitled to reimburse himself from the moneys in his hands due the contractor, which in this particular case the record shows are ample for that purpose. All this being true, it is obvious that in this particular case on a consideration of the motion on the merits of the appeal neither an affirmance nor a reversal of the judgment so far as it establishes a lien against appellant's property could be of any advantage to the original contractor. If it were reversed, he would be still liable under the personal judgment against him, which is unaffected by this appeal, and under which the primary liability on his part to plaintiff is fixed, and, if it were affirmed, the owner would have the right, which in this case could be effectively exercised of reimbursing himself or discharging the judgment as a lien against his property from moneys in his hands due the original contractor, or could pay the judgment in discharge of the lien to the subcontractor directly. Under this view, it appears to us that it is a matter entirely immaterial to the original contractor whether it be decided on appeal that the portion of the judgment decreeing a lien be valid or invalid. No substantial right of the original contractor under the judgment of lien is affected. Hence he was not a party interested in maintaining it, and not an adverse party upon whom a notice of appeal should have been served.

The District Court of Appeal in dismissing this appeal when the matter was before it based its decision on Lancaster v. Maxwell, 103 Cal. 67, 36 Pac. 951, which it cited as justifying its action. In that case, however, it does not appear that any personal judgment was rendered against the original contractor fixing a primary liability on his part to the subcontractor for the entire amount of his claim. The personal judgment there rendered was for such a deficiency as appeared after the sale of the property, and this fact seems to have controlled the decision. In the case at bar the personal judgment is for the entire amount of the claim, separate and distinct from any deficiency judgment which it is provided shall be docketed against the original contractor. Nothing is said in the portion of the judgment providing for such docketing that it shall be docketed as a personal judgment. This would be its effect, not, however, by virtue of the provision for docketing, but because independent of it there was a personal judgment expressly given against the original contractor in another part of the judgment. If, in the case at bar, the judgment, so far as it established a lien, were reversed and the deficiency judgment provided to be docketed against the original contractor were to fall with it, this would nevertheless leave the personal judgment against the original contractor entered against him elsewhere unaffected and subject to enforcement upon execution. Aside from this, in the Maxwell Case, the effect of section 1193 of the Code of Civil Procedure upon the rights of the owner of the premises affected by the lien against the original contractor did not seem to have been presented for consideration, nor the record examined upon the merits of the appeal to ascertain whether applying this section to the matters disclosed by it, and properly to be considered on the motion, any injury to the original contractor could possibly result from a reversal of the judgment establishing the lien. The consideration of these matters differentiates this case from the Maxwell Case sufficiently to make the ruling there inapplicable here, even if that ruling should be deemed correct in principle upon the record to which it is applied, which, we think, is extremely doubtful. The motion to dismiss the appeal is therefore denied.

Now, as to a consideration of the appeal on its merits. Aside from the question of attorney's fees, the principal contention of appellant is that the findings made by the court in support of the judgment in favor of the plaintiff are not sustained by the evidence. As we have heretofore stated, appellant entered into a contract with J. E. Harris to erect a building for him for the sum of $7,600, according to certain plans and specifications, and the respondent as subcontractor contracted with the latter to do the plastering and hard finish work according to specifications providing therefor for the sum of $750. As the work progressed, he was paid the amount of his contract price, except $178, for which the lien herein was filed and to recover which the suit was brought. The court found that plaintiff completed his contract according to its terms, and it is claimed that this finding is not supported by the evidence because there were certain discolorations on the plastering appearing after the completion of the work. The contract between the owner and the original contractor for the construction of the building contained specifications relative to the plastering thereof, and the contract between plaintiff and said original contractor embraced these latter specifications. The specifications set forth in detail the character and quality of the material to be furnished for the mortar and hard finish to be used in the work, the manner in which they should be compounded and applied and the work done, and the evidence shows that in discharging his contract plaintiff used exactly the materials that were required by the specifications and performed the work in a workmanlike manner, but that upon its completion portions of the surface of the walls showed a yellowish tint appearing in some places in streaks and in others in spots of a cloudlike form. How these discolorations were caused is not disclosed by the evidence. In fact, the testimony showed that the cause of them was unknown. Such discolorations might occur, the evidence shows, from various extraneous causes having no relation to the character of the materials used or the workmanship employed, and might occur where the best material and workmanship, as in the case at bar, were used and employed and still be inexplicable. The usual result, however, of the use of good materials properly applied is to produce a white coat or surface on the walls, and it is insisted by appellant that because that was not the result of the work of plaintiff his contract was not properly performed; that it was the duty of plaintiff to show that such discolorations were occasioned by some cause for which he was not responsible. In that connection it is insisted that there was both an express and implied warranty accompanying his contract that the rooms should be finished so that the walls would be white. The express warranty is based upon a provision of the main contract between the owner and the original contractor that the latter was to deliver appellant the building properly and entirely finished and "in an undamaged state." It is sufficient, however, on this point to say that the subcontractor was not a party to this main contract, its provisions were not incorporated in his contract with the original contractor, and he is not bound by its terms. His contract was with the original contractor alone, and related solely to doing the plastering and hard finishing according to the requirements of the specifications in the main contract, and he is only bound by the terms of his agreement in that respect, and it is not claimed that the agreement between plaintiff and the original contractor contained any requirement or warranty that the walls should be of any particular color.

But it is said there was an implied warranty that they should be white; that as the usual result from the use of the materials specified and their application would be to produce a white surface, this result was contemplated and impliedly warranted, and it is insisted that this contention is supported by sections 1769 and 1770 of the Civil Code. The only one of these sections which could possibly have any relevancy is section 1770. That section provides that "one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose." But it is obvious that this section has no application to the matter under consideration. As its language imports, the section only applies where an article is manufactured for a particular purpose. It contemplates that the manufacturer has selected the materials and determined the workmanship whereby the finished article is supplied for the particular purpose designed. It does not apply where the article to be furnished is to be supplied under a contract requiring that it be made according to a certain plan or certain specifications. Now, in the case at bar, we have seen that there was no express agreement that the plaintiff should plaster and hard finish the appellant's house so as to leave the walls white. There was no agreement that any particular result should follow. He did not agree generally to plaster the dwelling, which would leave to him the selection of the materials and the method of doing the work. His agreement was to do it in a way that the owner and the original contractor had designed, according to the specifications which they had agreed on. He had no discretion in the matter. When he followed strictly those specifications, used exactly the materials they called for in the composition of the mortar and hard finish, and applied them in a workmanlike manner, he did all his contract called for. He did not contract for results, but only to do the work in a specified way. If the usual result of white walls and ceilings did not follow, he was not responsible for it, unless there was some default on his part in furnishing the materials called for in the specifications or in doing the work with them. The court found, and the evidence fully sustained the finding, that the plaintiff had not been remiss in either particular. Under these circumstances, as he made no express warranty as to results and plastered and hard finished the rooms with the materials specified in the contract and did the work skillfully, he did all that he had contracted to do. He did not expressly warrant any particular color, the specifications did not call for any, and, the work being done in a workmanlike manner with the materials designated in the specifications to be used, the plaintiff is not responsible under any implied warranty for the result. Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 Pac. 496; McKnight-Flintic Stone Co. v. Mayor, 160 N. Y. 72–84, 54 N. E. 661.

There is nothing in the other points made by appellant, save as to the allowance to plaintiff of $40 attorney's fees in the foreclosure of the lien. Since the appeal herein was taken, it has been decided by this court that the statute allowing attorney's fees in an action to enforce a mechanic's lien is unconstitutional. Builders' Supply Depot et al. v. O'Connor et al. (Cal. Sup.) 88 Pac. 982. This, however, only requires a modification of the judgment.

In that respect it is ordered that the judgment be modified by striking out therefrom the allowance of attorney's fees, and, as so modified, the judgment is affirmed.

We concur: ANGELLOTTI, J.; McFARLAND, J.; SLOSS, J.; HENSHAW, J.; SHAW, J.

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## HALSEY v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 4,853.)

(Supreme Court of California. Sept. 23, 1907.)

1. GRAND JURY—TERM OF SERVICE.

When, in obedience to Const. art. 1, § 8, and Code Civ. Proc. § 241, requiring the impaneling of a grand jury once each year, a new grand jury is impaneled, the life of the former grand jury ends.

2. SAME.

Pen. Code, § 906, providing for the discharge of a grand jury by the final adjournment of the court, adopted as a part of the Code in 1872, when terms of court existed, is not effectual in discharging a grand jury after the Constitution of 1879, under which there are no terms, and the superior court is always open for business.

3. COURTS—RULES OF DECISION.

A decision construing a statute, which has been followed for over 20 years, will not be overruled, unless clearly erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 311.]

4. GRAND JURY—TERM OF SERVICE—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 210, declaring that the persons whose names are returned, as provided in preceding sections for selecting jurors, shall be "regular jurors, and shall serve for one year," refers only to the persons set apart as a body, from which a jury, grand or petit, may be drawn, and in that capacity they serve for one year, the term of service being the time during which they may be drawn for actual jury service, and has no reference to the life of a grand jury drawn from their number.

5. SAME.

Code Civ. Proc. § 210, providing that regular jurors shall serve for one year, and until other persons are selected and returned, when considered in connection with sections 214, relating to the drawing of jurors for courts of record, and section 241, providing for the impaneling of grand juries, and Pen. Code, §§ 906, 1140, declaring that a grand jury shall be discharged by the final adjournment of the court, and providing for the discharge of a jury unable to agree, has nothing to do with the life of a jury, grand or petit, and under it a grand jury does not end because the clerk, in conformity with Code Civ. Proc. § 209, writes down the names in the list furnished in accordance with section 204, and deposits the same in the grand jury box, where no proceedings have been had under section 241 for impaneling any of the grand jurors from such list.

6. SAME.

The object of Code Civ. Proc. § 210, providing that regular jurors shall serve for a year, and until other persons are selected, is not to prevent the keeping in existence any particular grand jury for an indefinite time, that being the purpose of Pen. Code, § 906, enacted at the same time, which expressly limits the life of a grand jury to the term of court for which it is impaneled.

McFarland, J., dissenting.

In Bank. Application for writ of prohibition by Theodore V. Halsey against the superior court of the city and county of San Francisco to restrain the court from proceeding with the trial of petitioner under an alleged indictment. Denied.

Bert Schlesinger, William P. Humphreys, and D. M. Delmas, for petitioner. W. H Langdon, Dist. Atty., and William Hoff Cook, Asst. Dist. Atty. (Francis J. Heney and Charles W. Cobb, of counsel), for respondent.

PER CURIAM. The petitioner seeks a writ of prohibition to restrain the superior court of the city and county of San Francisco from proceeding with his trial under a paper purporting to be an indictment, charging him with having committed a felony, which paper was presented and filed in said court as an indictment by a body of men assuming to act and acting as a grand jury of such city and county. It is claimed by petitioner that at the time of the finding and presentation of this indictment (March 20, 1907) this body of men did not constitute a grand jury at all, and that consequently the indictment is a nullity and the superior court is without power to try him on the charge therein made. Upon the oral argument it was admitted, for all the purposes of this proceeding, that this body of men was regularly and legally drawn from the names in the grand jury box for the year 1906, and regularly impaneled and organized as the grand jury of said city and county on the 9th day of November, 1906, and has never been discharged by any order of the court, but ever since such impanelment and organization has continued to act as the grand jury of the city and county, and has always been recognized by the superior court as such grand jury. Petitioner's claim here is that this grand jury was discharged by operation of law not later than February 12, 1907, and that, by reason thereof, the members have ever since constituted not a grand jury, but an illegal and unauthorized body of men, without power to perform any function of a grand jury.

The facts relied on as accomplishing this discharge of the grand jury by operation of law are as follows: On January 27, 1907, in conformity with section 204, Code Civ. Proc., the judges of said superior court made an order designating the estimated number of grand jurors, and also the number of trial jurors, that would, in the opinion of the court, be required for the transaction of the business of the court and the trial of causes therein during the ensuing year, which number of grand jurors was 144. Immediately after said order designating the estimated number of grand jurors had been made, said court selected and listed the grand jurors required by said order to serve as grand jurors in said superior court duing the ensuing year, or until a new list should be provided, which list of persons so selected was at once placed in the possession of the county clerk, and said clerk, on receiving said list, filed the same in his office. On February 12, 1907, in conformity with section 209, Code Civ. Proc., said county clerk wrote down the names contained on said list on separate pieces of paper, of the same size and appearance, and deposited the same in the grand jury box of said city and county. No proceedings have been had under section 241, Code of Civil Procedure, in drawing, impaneling, or summoning any of the grand jurors from said list of grand jurors so selected in January, 1907, by the said court as aforesaid.

The claim of petitioner in this regard is necessarily based on the language of section 210 of the Code of Civil Procedure, for there is no other provision of our law, constitutional or statutory, that affords any basis for such a claim. Our Constitution simply provides that "a grand jury shall be drawn and summoned at least once a year in each county." Article 1, § 8. Our Code of Civil Procedure provides (section 241) that every superior court, whenever in the opinion of the court the public interest requires it, must proceed to impanel a grand jury, and "in all counties there shall be at least one grand jury drawn and impaneled in each year." Nowhere, unless it be in said section 210, Code Civ. Proc., is there any express limitation on the life of the grand jury so impaneled in pursuance of the authorization and requirement of the law, or any implied limitation except such as may be implied from the requirement that at least one grand jury must be impaneled in each year. When, in obedience to this mandate, a new grand jury is impaneled, the life of the former grand jury must necessarily end. Section 906 of the Penal Code, adopted as part of the original Code in 1872 and never amended, provides that, on the completion of the business before them, the grand jury must be discharged by the court, "but, whether the business is completed or not, they are discharged by the final adjournment of the court." This section was adopted at a time when we had terms of court. As, under the Constitution of 1879, we now have no such terms of court, and the superior court is always open for business, there is no such thing as a final adjournment of the court, and the quoted portion of the section is no longer effectual. It, however, assists somewhat in ascertaining the proper construction of section 210, Code Civ. Proc., as we shall hereafter note. Section 210, Code Civ. Proc., is contained in the article relating to the "selecting and returning jurors for courts of record" (article 3, c. 1, tit. 3), the article having to do with the selection and placing in the general jury box of the county by the proper officers of the names of persons who may be drawn as required for actual service as jurors, both grand and trial, in the court. The preceding sections of the article having provided for the fixing by the court in January of each year of the estimated number of the grand and trial jurors that will be required for the transaction of the business of the court and the trial of causes therein during the ensuing year, the immediate selection of that number by the officers designated for that purpose, the placing of the lists of such persons in the possession of the county clerk, the filing of the same by that officer, the writing by him of the names on separate pieces of paper, and the deposit of such papers in the "grand jury box" and "trial jury box," respectively (sections 204 to 209), section 210 provides: "The persons whose names are so returned shall be known as regular jurors, and shall serve for one year, and until other persons are selected and returned." Section 211 provides that "the names of persons drawn for a grand jury shall be drawn from the grand jury box and the names of persons for a trial jury from the trial jury box, and if, at the end of the year, there shall be the names of persons in either of the said jury boxes who may not have been drawn during the year to serve, and have not served as jurors, the names of such persons may be placed on the list of jurors drawn for the succeeding year." Subsequent articles provide for the method of drawing from these boxes and summoning jurors, both grand and trial, for actual service in the court as they may be required and ordered by the court. The claim of petitioner is that, under section 210, the grand jury drawn and impaneled in the year 1906 from the persons selected, listed, and returned as grand jurors for that year, was discharged by operation of law upon the selection, listing, and returning of the 144 grand jurors for the year 1907.

This is not a new contention in this court. Section 210, Code Civ. Proc., has existed in practically its present form ever since the adoption of the Codes in 1872, and there has been no change in any other statutory provision applicable to jurors or juries that is material to the controversy here. The precise question here presented as to the effect of the provisions of section 210 upon a grand jury regularly impaneled from the list of the preceding year, was considered by this court in bank in the year 1886 in the cases of In re Gannon, 69 Cal. 541, 11 Pac. 240, and Kelly v. Wilson (Cal.) 11 Pac. 244. In the Gannon Case the court, in reply to the claim that the grand jury had ceased to exist for the reasons stated, and was not a legal body, said: "But, while the statutory law fixes the time within the year for the court to order the selection and return of grand jurors liable to serve in the capacity of a grand jury, and limits the time in which they shall serve for the purpose of the drawing and impanelment of a grand jury, it prescribes no specific time for the drawing of the grand jury, or for its official existence after it has been drawn and impaneled. These the law seems to have left to the judicial discretion of the court, for it provides that 'every superior court, whenever, in the opinion of the court, the public interest must require it, may make an order directing a jury to be drawn' (Code Civ. Proc. § 241); and, when the proceedings put in motion by an order made for the purpose result in the drawing and impanelment of a grand jury, it is, as an organized body, in the exercise of its functions and in its official existence, subject to the control of a court that is 'always open,' and may at any time, in the exercise of its jurisdiction, order it to be discharged. Pen. Code, § 906. A grand jury cannot dissolve itself (Clem v. State, 33 Ind. 414); and as the grand jury whose authority is challenged was not impaneled for any particular time prescribed by law, and has not been discharged by the court in which it is acting, it still exists as an original body, with power to perform its duties." Six of the seven justices concurred in this opinion. Kelly v. Wilson, supra, which was a proceeding in prohibition by an indicted person to restrain the superior court from trying him, under precisely similar facts to those existing here, was decided on the authority of the Gannon Case. It is strongly urged that the language above quoted was not necessary to the decision in the Gannon Case. This is true in the sense that the case could have been disposed of on other grounds stated in the opinion. It is to be observed, however, that the case of Kelly v. Wilson, in which a decision upon this question was absolutely essential to a denial of the writ sought, was presented by the same counsel appearing in the Gannon Case, and was decided on the same day as the Gannon Case. It is thus apparent that the two cases were under submission at the same time and were considered together, and practically constituted but one case in which the question before us was necessary to a decision. It thus appears that the court in these cases construed section 210, Code Civ. Proc., as only limiting the time in which the persons selected shall serve for the purpose of the drawing and impaneling of a jury, and as having nothing whatever to do with the life of a jury, either grand or trial, once regularly drawn and impaneled. No different construction has been given the section by any later case. People v. Leonard, 106 Cal. 302, 39 Pac. 617, certainly cannot be held to have so done. While the court in that case did observe that it did not even appear that the new jurors had been selected and returned, and that, if they had not been, it was clearly proper to continue the jury of the preceding year until such event happened, it also apparently adopted the reasoning of the Gannon Case as one of the grounds of its decision. The above cited decisions as to the proper construction of the section under consideration, rendered 21 years ago, and, it is fair to assume, ever since followed by the courts of the state, certainly should not be overruled unless they are clearly erroneous. No such situation is here presented. On the contrary, it is our opinion that the construction given the section by our predecessors was the correct one.

Neither section 210 nor any other section contained in the article of which it is a part assumes to deal with any impaneled jury, grand or trial. As to these, elaborate provision is elsewhere made. These sections relate exclusively to the setting apart of a sufficient number of persons eligible for jury duty from whom may be drawn and brought into court from time to time so many as are required to render actual jury service in court. Section 210 refers only to the persons so set apart, and to them solely in that capacity; i. e., in the capacity of persons set apart as a body from which a jury may be drawn when wanted. In that capacity all the persons so set apart are, by express provision of the section, known as "regular jurors," although many of them may never be drawn and summoned to attend upon the court at all. In that capacity alone they "serve for one year and until other persons are selected and returned" to take their places. When, serving in that capacity, some of them are drawn and summoned into court and impaneled on a jury, they there render an entirely different and additional service, which is regulated both as to manner of service and time of discharge by the provisions of the law relating to impaneled juries. Section 210 refers only to the two special classes from which jurors are to be taken, and it is only as members of those special classes one for grand juries and the other for trial juries, that these so-called regular jurors are required to serve by that section. The term of service there mentioned is the term during which they serve in that capacity, the term during which they may be drawn or selected for actual jury service. This is the only possible reasonable construction of the language of section 210 as to the term of service, in the connection in which it is used. The meaning thus given to the word "serve" is an entirely permissible one, and the fact that the same word is obviously used in a different sense in other connections is not important.

An examination of other provisions of law enacted at the same time as section 210, Code Civ. Proc., demonstrates that the Legislature could not have intended the section to operate as a discharge of any impaneled jury. As we have seen, the section applies to both grand and trial jurors, and the claim of petitioner leads to the result that the selection and return to the county clerk of the list of jurors for the succeeding year and the placing of those names in the general jury box ipso facto discharges from service and dissolves any impaneled jury, grand or trial, that may then be in attendance on the court, members of which were drawn from the lists of the preceding year. It is inconceivable that there was any such intention as to trial juries. It would be a most absurd provision that a jury engaged in the actual trial of a cause, and perhaps just about to render a verdict after a long and expensive trial, should be deprived of power to act further in the case solely by reason of the fact that a new list of available jurors for the ensuing year had been returned to the county clerk, and the names had been deposited in a trial jury box. Such a provision could accomplish no good, and would be productive of great injury. The intention of the Legislature as to such juries is clearly shown by the other section of the Code adopted at the same time, specially relating to juries. It is apparent therefrom that a jury impaneled to try a case was to conclude that case, if possible. As to criminal cases, after providing for the discharge of the impaneled jury in certain contingencies only, such as sickness of a juror, etc., it was provided in section 1140 of the Penal Code that, except as otherwise provided, a jury "cannot be discharged after the cause is submitted to them until they have agreed on their verdict and rendered it in open court," except by consent of the parties or by the court when the jury is unable to agree. Practically the same was true as to civil cases. We cannot reconcile these provisions with section 210 of the Code of Civil Procedure if that section is to be construed as urged by petitioner.

The intention as to grand juries is equally clear. Express provision as to the time during which an impaneled grand jury shall continue in existence was made in the Penal Code. Unless sooner discharged by the court, they were discharged only by the final adjournment of the court for the term. Section

906. The grand jury was at that time a part of our old county court system. The law provided for the impanelment of a grand jury at the opening of each regular term of the county court, unless otherwise directed by the judge (section 241, Code Civ. Proc.), and, where such impanelment was to be had, the judge was required to make an order for the drawing from the "regular jurors" of a sufficient number of grand jurors from which the grand jury might be selected. Section 214, Code Civ. Proc. This drawing was required to be made at least seven days before the opening of the term. The terms of the county court were fixed by the same Code (section 88, Code Civ. Proc.), and in more than half of the counties, including San Francisco, a term commenced on the first Monday of January in each year. By the provisions of a general act, approved March 1, 1872, each term of court continued until the next regular term, a period varying in length from two to four months, unless the business of the court was sooner disposed of. The selections of persons to serve as "regular jurors" for grand jury purposes were then required to be made by the board of supervisors of each county at their first regular meeting in each year, which was ordinarily the first Monday in January. It is apparent from this that the grand jury impaneled at the opening of the term of each county court commencing on the first Monday of January would be taken from the list of the preceding year, and that within a very few days after such impanelment the new selections of "regular jurors" for the ensuing year would be made and returned. Under petitioner's construction, the selection and return of the new jurors would have discharged the grand jury impaneled only a few days before, and just commencing the business for which it had been brought together, and this in the face of a provision in the Penal Code which clearly implies that such jury should continue until it completed the business before it and was discharged by the court, or until the final adjournment of the court for the term. Of course, no such absurdity was intended. Force and effect can be given to the various provisions enacted in 1872 relative to juries, as distinguished from jurors, only by construing section 210, Code Civ. Proc., as it was construed in the Gannon and Kelly Cases. So construed all the provisions are harmonious and the result sensible. See, also, State ex rel. Clark v. Second Judicial District Court, 31 Mont. 428, 78 Pac. 769. It has been suggested that the object of section 210 of the Code of Civil Procedure was to prevent the keeping in existence any particular grand jury for an indefinite time. It is obvious that this could not have been the purpose of the section, in view of the provisions of section 906 of the Penal Code enacted at the same time, which expressly limited the life of the grand jury to the term of the court for which it was impaneled, a period of from two to four months. We are satisfied that the latter section of the Penal Code was intended to cover the whole subject of the discharge of a grand jury.

While we have not discussed all the arguments made by learned counsel in support of the contention of petitioner, we have considered them all, and find therein no reason to doubt the correctness of the decisions in the Gannon and Kelly Cases.

The application for a writ of prohibition is denied.

McFARLAND, J. (dissenting). I dissent, and think that the writ of prohibition asked for should be granted. I base this conclusion on the ground that at the time of the presentation of the indictment against the petitioner the body of men who undertook to indict him was not a grand jury, and that the purported indictment was a nullity and gave no jurisdiction to the superior court to try the petitioner.

A man cannot be legally placed on trial for a felony at the will of any person, or body of persons, who may choose to make an accusation against him. The accusation must be made in manner as provided by law, and, if there is no such accusation, there is no jurisdiction in any court to try the accused. In this state there are only two legal ways of putting a man upon trial for a felony—one by information after open examination and commitment by a magistrate, which need not be here considered, the other, the one claimed to have been followed in this case, by indictment by a grand jury. The court is about to proceed to try petitioner upon a paper writing in the form of an indictment for a felony, filed in the court, and presented by a body of men claiming to be a grand jury. Petitioner alleges that this body was not a grand jury at the time the said paper writing was presented; and if this be so, as I am clear it is, then there is no jurisdiction in the subordinate court to proceed with the trial and the writ of prohibition should issue. Respondent concedes that, if this be so, the remedy by prohibition is proper. The ordeal of being compelled to submit to a trial upon an indictment for an alleged felony is a most onerous one. The accused must prepare for a trial. He must endure all the temporary obloquy of such a charge. Though innocent, he must take the chances of being convicted upon insufficient evidence, which may easily happen when there is a great public feeling against him, or against a class to which he is supposed to belong, and juries are liable to be insensibly influenced by popular clamor. Moreover, though acquitted, he can never wholly escape the shadow of the cloud which an indictment and trial have cast over him. His enemies may always intimate that he was acquitted merely because the evidence was not quite strong enough to show him guilty beyond a reasonable doubt. It is therefore not only the right of the accused person to resist a trial when not prosecuted according to law, but it is his duty to himself, to those dependent on him, and to his friends to do so.

The provisions of the Code upon which the question in this case arises are, so far as material, briefly as follows: Section 204, Code Civ. Proc., provides that in January "in each year" a majority of the judges of the superior court of San Francisco shall make an order designating the estimated number of grand jurors that will in their opinion be required for the transaction of the business of the court "during the ensuing year." Immediately after making such order they "shall select and list" the grand jurors required by said order to serve as grand jurors in said superior court during the ensuing year, or until new lists shall be provided, and lists of "persons so selected" shall immediately be placed in the possession of the county clerk. Section 209, Code Civ. Proc., provides that, upon receiving such list, the county clerk shall file the same in his office, write the names of the persons selected on separate pieces of paper of same size and appearance, and fold each piece so as to conceal the name thereon, and shall deposit these pieces of paper with the names on them in a box to be called the "grand jury box." From the persons whose names are thus in the box a grand jury must be drawn and impaneled whenever a grand jury is needed for the transaction of the business of the court. Section 210 provides (and this is the most important provision bearing on the question here involved) as follows: "The persons whose names are so returned shall be known as regular jurors, and shall serve one year and until other persons are selected and returned." The facts bearing upon the question presented in the case at bar are these: In January, 1906, the judges of said superior court made an order that 144 grand jurors would be required for the transaction of the business of the court during the ensuing year. They selected 144 persons and gave a list thereof to the clerk, who filed the same in his office, and put the names of such persons each on a separate and similar piece of paper in the grand jury box as required by the provisions of the Code hereinbefore referred to. From this box a grand jury was drawn and impaneled during the year 1906. In January, 1907, the judges again made an order that 144 grand jurors would be required to transact the business of the court for the ensuing year. They selected that number of persons for grand jurors and gave a list of them to the clerk, who filed the same and put the names on separate piece of paper in the grand jury box, as provided by the Code. This was all done not later than February 14, 1907, and, if thereafter during the ensuing year it became necessary to have a grand jury for the transaction of the business of the court, these persons who were thus selected in January, 1907, and whose names were in the grand jury box for that year were the proper persons from whom to draw and impanel such grand jury. No jury, however, was impaneled from such persons; but the persons who constituted the said former grand jury of 1906 assumed to continue to act as grand jury after January and are still assuming so to act, and on May 24th, about four months after said new list had been provided, they presented to the superior court a paper writing which in form is an indictment of petitioner for felony. It is upon this paper writing that the respondent court is about to proceed to try petitioner. There is no other accusation against him. Under the Code provisions and the facts as above stated the invalidity of said paper writing as an indictment is so plain, clear, and obvious to my mind that the subject does not present to me even a debatable question.

Under the Code the persons selected in January of each year are to act for one year and "until" other persons are selected the next year. This means that they shall act only until the happening of the event mentioned, and not afterwards. The word "until" as used in section 210 is a word of limitation, and designates the end of the thing referred to. The meaning of this word when used as in the Code is aptly stated by the Court of Appeals of Missouri in Maginn v. Lancaster, 100 Mo. App. 116, 73 S. W. 372, as follows: "The word 'until' is a word of limitation, used ordinarily to restrict what immediately precedes it to what immediately follows it. Its office is to point out some point of time, or the happening of some event, when what precedes it shall cease to exist, or have any further force or effect." But there is no need to elaborate this proposition further, because, as I understand it, there is no serious contention that the word "until" in section 210 is not a word of limitation as to the persons and things to which it refers, but it is contended that it does not apply to the persons who constituted the grand jury of 1906 and who claim to still constitute a legal grand jury, notwithstanding the provisions of the Code and the fact that in January, 1907, "other persons" were selected. In support of the point last above mentioned, it is contended that the provision in section 210, that after the selection of "other persons" the former persons shall not serve, does not mean that they shall not serve when impaneled in a grand jury, but that it refers only to those whose names are in the jury box liable to be called upon to form a grand jury, but who have not been so called. I see no rational ground for such contention. The language of the Code certainly does not contain any such out of the way limitation of the word. It simply uses the plain word "serve" in its ordinary sense. There is no limitation of its meaning—no intimation of an intent to employ a well-known English word in a sense different from that which is commonly attached to it. We are therefore to give the word its ordinary meaning, just as we give to other common words their ordinary meaning, considered, of course, in the relation which the word bears to the context. Now, what is the plain meaning of the word "serve" as applied to the persons selected as regular grand jurors under the Code? The general meaning of the word "serve" is to "perform service," and it is difficult to see how a person whose only relation to a grand jury consists of his name being in a box—frequently without his knowledge—can possibly serve in the sense of performing service. It seems to me that he can properly be said to "serve" as a grand juror only when he is in a position to do something as such juror—only after his impanelment into a grand jury has given him the power to perform some act in the capacity of grand juror. But, suppose it be considered not improper to say that he serves when he is merely in the negative position of being liable to be called upon to act as a grand juror—upon what species of reasoning can it be held that he ceases to serve as soon as he is impaneled into a grand jury. When he is acting as a member of an impaneled grand jury, is he not serving? To say that before he becomes a member of an impaneled grand jury and while he does not do and cannot possibly do any act of service he is nevertheless serving, but that when he becomes part of a grand jury and can and does render service he does not "serve" is substantially to say that when he does not serve he "serves," and that when he does serve he does not serve. The word "serve" as used in section 210 clearly includes every act and every situation to which the word "serve" as a grand juror can in any sense apply. There is certainly no language in the Code that intimates that a grand juror is not serving when he is acting as part of an impaneled grand jury. On the other hand, it appears from section 211 that serving on such a jury is the only way in which he can "serve," for it provides that, if at the end of the year there shall be persons selected as grand jurors "who may not have been drawn during the year to serve," and have not served as jurors, "such persons may be placed on the list of jurors drawn from the succeeding year." I cannot imagine how, in the face of this provision, it can be gravely asserted that to "serve" as used in section 210 does not mean to serve as a grand juror. Clearly section 210 limits the term of service of a person selected as a grand juror, limits it for all purposes, limits it as to all kinds of service as a grand juror; and, after the happening of the event referred to in said section, he is no longer qualified as such juror. This plain and obvious meaning of the Code is, in some of the respondent's briefs, sought to be explained away by the assertion that, while the term of a grand juror is limited, there is no limitation of the term of a grand jury. But how can there be a legal grand jury which is composed of persons who are not qualified to act as grand jurors, and why speculate about the impossible term of an imaginary grand jury which has no existence?

It is also sought to escape the plain, obvious meaning of the Code as above stated by invoking the rule of stare decisis. This attempt is based on the case of In re Gannon, 69 Cal. 541, 11 Pac. 240. The opinion in that case no doubt expresses views favorable to respondent's contention, but, so far as it does so, the opinion is, I think, clearly erroneous. But that case does not support the doctrine of stare decisis for several reasons. In the first place, the rule of stare decisis has seldom or never been successfully invoked in a criminal case involving liberty. It applies to civil actions where a rule of property or commercial business has been established. In the second place, the question here under discussion was not necessarily involved in the Gannon Case. That case was an attempt, on habeas corpus, to be discharged from a judgment of imprisonment rendered by a superior court for contempt committed by the petitioner in refusing to testify as a witness before an acting grand jury claimed by him to be an illegal body; but the court held that the illegality of a grand jury could not be thus collaterally attacked. The court said: "The authority of such a body, whether it be de facto or de jure, cannot be legally assailed or called in question by a witness summoned before it. The authority of such a body, exercising its powers as instrumental to the court of which it is a part, must be respected and obeyed." That was an adjudication of the case on that point; and whatever else was said in the opinion was obiter. The position taken in the Gannon Case, which is here relied on, was also assumed to be correct in the case of Kelly v. Wilson, which has not been reported, but may be found in 11 Pac. 244. That case, however, was decided at the same time as the Gannon Case, and was based entirely upon the authority of the Gannon Case, and therefore adds nothing to that authority. Afterwards the only case in which the Gannon Case was brought before this court is the case of People v. Leonard, 106 Cal. 302, 39 Pac. 617; and in the latter case the part of the opinion in the Gannon Case here relied on was questioned, and substantially disapproved. In the Leonard Case the question was whether a valid indictment could be presented by a grand jury of a former year attempting to hold over after the list of other persons had been selected for the succeeding year. If the court had been satisfied with the opinion in the Gannon Case on that point, it clearly would have acted on the authority of that case. It, however, proceeded to inquire into the very question disposed of in the opinion in the Gannon Case, and held the indictment good because it did not appear that a new list had been prepared for the coming year. The court says: "It does not appear from the record, and is not probable, that, in fact, the jurors for 1894 had been 'selected and returned' at the date of the finding of the indictment. If they had not been, it was clearly proper to continue the jury of 1893 until such event happened." This language leaves an inference as broad as the trail of an army that, if the record had shown that a new list had been made, the indictment would have been held invalid. While this may not, perhaps, be said to be an express overruling of that part of the opinion in the Gannon Case here relied on, it certainly undermined and shattered it so much as to leave it without value as a basis for the extreme doctrine of stare decisis here invoked.

I see, therefore, in all that is argued by respondent, no successful method of evading the obvious meaning of the Code provisions on the subject of grand jurors; and why should not that obvious meaning be accepted, instead of trying to find some hidden and labored reason for evading it? The kind of construction contended for by respondent would be too strained to warrant even a ruling in support of marriage, or legitimacy of children, or any other status expressly favored by the law. But when such construction is invoked in a criminal case, and against the liberty of the citizen, it is, in my opinion, beyond the reach of the farthest and thinnest shadow of any legitimate principle of interpretation. The history of free government presents no spectacle more noble than that of an accused American citizen successfully demanding that he be proceeded against according to "the law of the land." The right to make such demand is the beneficent result of centuries of struggles by English-speaking people for personal liberty, and to sustain the contention of respondents in the case at bar is, in my opinion, to clearly deny that right, and to mar the most important and sacred feature of American law.

When a list of persons have been selected in January to serve as grand jurors for the ensuing year, why should not a grand jury when afterwards required be drawn and impaneled from such list? In the case at bar it may be assumed that this course was not taken through inadvertence, and not from any unworthy motive. But the power to thus juggle with grand juries—to retain the old jury indefinitely or to impanel one from the new list, just as certain ruling interests may be subserved by the one course or the other—is a most dangerous power and should not be countenanced for an instant, unless clearly given by the law, and the law gives no such power. It would be better for a score of accused persons to be temporarily discharged than that one accused person should be denied due process of law. The public will suffer nothing by a compliance with the Code provisions about grand jurors. A grand jury can be immediately drawn from the box of 1907 and legally impaneled, and such jury, if there really is a prima facie case of guilt against the petitioner, can at once legally indict him, and he then can be properly placed upon his trial.

## GLASS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. ABBOTT v. SAME. SCHMIDT v. SAME.

(S. F. 4,863, 4,858, 4,855.)

(Supreme Court of California. Sept. 23, 1907.)

In Bank. Separate applications for writs of prohibition by Louis Glass, by William M. Abbott, and by Rudolph Schmidt against the superior court of the city and county of San Francisco. Denied.

D. M. Delmas, T. C. Coogan, and H. C. McPike (D. M. Delmas, of counsel), for petitioner Louis Glass. A. A. Moore, Stanley Moore, Earl Rogers, and Alex. C. King (John Garber and Garret McEnerney, of counsel), for petitioner W. M. Abbott. Edward F. Moran, Cleveland L. Dam, and George Appel (John C. Quinlan, of counsel), for petitioner R. Schmidt. W. H. Langdon, Dist. Atty., and Wm. Hoff Cook, Asst. Dist. Atty. (Hiram W. Johnson, of counsel), for respondent.

PER CURIAM. These are applications for writs of prohibition. The facts in each of the cases are, in all material respects, the same as those in the case of Halsey v. Superior Court, etc. (S. F. No. 4,853) 91 Pac. 987, this day decided.

Upon the authority of that case, the application for a writ in each of the above-entitled causes is denied.

152 Cal. 23

## MANN v. MANN et al. (Sac. 1,406.)

(Supreme Court of California. Sept. 19, 1907.)

1. Frauds, Statute of—Boundaries—Establishment—Oral Agreement.

An oral agreement of adjoining landowners to exchange certain parcels separated from their respective main bodies by a road, and that the road should be the boundary line, is not effective when there was no dispute as to the real boundary, which is known.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 112.]

2. Adverse Possession — Requisites — Payment of Taxes—Identity of Property.

Under Code Civ. Proc. § 325, providing that adverse possession shall not be established unless the parties have paid all the taxes, payment of the taxes according to the original description will not sustain adverse possession in a defendant who has fenced and had actual possession of the tract under an oral agreement with an adjacent landowner to exchange certain triangular parcels separate from their original main bodies by a diagonal road, when there is no dispute as to the true original boundary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 518.]

3. Appeal—Harmless Error—Admission of Evidence—Facts Otherwise Established.

Where plaintiff in an action to recover possession of land shows a clear title under an absolute conveyance, which is not overcome by defendant, any error in the admission of the testimony as to a right previously acquired by plaintiff under another agreement is harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4035.]

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Daniel L. Mann against Catherine Mann and Esther Durgan. From a judgment for plaintiff and an order denying a motion for new trial, defendants appeal. Affirmed.

J. P. O'Brien, for appellants. F. P. Otis and F. W. Street, for respondent.

SLOSS, J. This action was brought to recover possession of a parcel of land situate in Tuolumne county. The plaintiff recovered judgment declaring that he was the owner and entitled to possession of the premises. The defendants appeal from the judgment, and from an order denying their motion for a new trial.

The land in question is a portion of the N. E. ¼ of the S. W. ¼ of section 15, township 1 N., range 14 E. On February 1, 1882, a United States patent was issued to Thomas Sayre for certain land which included said N. E. ¼ of the S. W. ¼ of section 15. Adjoining this 40-acre tract on the south lies lot 2 of said section 15, for which on May 20, 1882, a patent was issued by the government of the United States to Sarah A. Mann. The defendants are the successors in interest of Sarah A. Mann, while plaintiff claims to be the successor in interest of Thomas Sayre. For many years prior to the issuance of either of the patents above mentioned, a county road, known as the Woods Crossing and Campo Seco road, had run, and still runs, diagonally through lot No. 2 and through the N. E. ¼ of the S. W. ¼ of section 15, leaving a triangular piece of lot 2 lying to the north of the road and a piece of the N. E. ¼ of the S. W. ¼ of section 15, similar in shape, south of said county road. The latter is the parcel in controversy. The respective patentees of these adjoining tracts had been in occupation of the same before they received their patents. About the year 1873 the Sayre tract was inclosed with a fence. The Mann tract was inclosed with a fence in the year 1884. In inclosing each of these tracts the owners built their respective fences upon the lines of the county road; that is to say, Thomas Sayre built his fence along the northerly line of the Woods Crossing and Campo Seco road, thus inclosing the portion of lot 2 lying to the north of that road, and the occupant of the Mann tract built a fence along the southerly line of the road, inclosing a portion of the N. E. ¼ of the S. W. ¼ of section 15 within said fence. Thomas Sayre and his successors have, during all of the intervening years, included within their inclosure, and occupied and used, the portion of lot 2 which lies north of the county road, and the defendants and their predecessors have, during all of these years, included within their inclosure, and occupied and used, the portion of the N. E. ¼ of the S. W. ¼ of section 15 which lies south of the road. On August 29, 1903, Ann O'Donnell, who had succeeded to the interest of Thomas Sayre in the N. E. ¼ of the S. W. ¼ of section 15, conveyed to the plaintiff the strip of land in controversy. By showing that the property in dispute was a part of the N. E. ¼ of the S. W. ¼ of section 15, patented to Thomas Sayre, and that he was the grantee of the successor in interest of Sayre, the plaintiff made out a prima facie case of title in himself.

The defendants pleaded, in their answer, that they were the owners of lot 2 in section 15, and that for more than 25 years the Woods Crossing and Campo Seco road had been recognized and acquiesced in by the defendants, their grantors, and predecessors in interest, and by their coterminous owners, and by all other persons, as being the common dividing line between the Mann tract (including lot 2) and the lands of the adjoining owners; that about 25 years ago the said county road was fixed upon and established by the defendants' grantors and predecessors in interest and by their coterminous owners as being the common boundary line between the said Mann tract and the lands of the contiguous owners thereof; that said lands were inclosed and fenced according to said boundary line so fixed and established, and that said inclosures and fences have ever since been maintained upon said common dividing line; that the lands involved in this controversy are included within the inclosures and fences of the Mann tract and made a part thereof.

In the cross-complaint substantially the same facts are alleged, together with the further fact that during all of said times the defendants and their grantors have occupied said lands and premises and claimed the same as their own, and during all of said time have paid all taxes which were levied and assessed upon said premises. The cross-complaint prays that the defendants' title be quieted against any claim of the plaintiff. The findings of the court were against the affirmative defense set up and against the allegations of the cross-complaint. The court found that the dividing line between the N. E. ¼ of the S. W. ¼ of section 12, and lot 2 in said section 15, is a certain line as surveyed in 1884 or 1885 and established by iron pins driven in the ground. It found, further, that the county road above referred to has never been recognized or acquiesced in by the coterminous owners as being the common dividing line between the lands owned by defendants and the lands of the adjoining owners; that in the year 1884 a fence inclosing the property in dispute had been erected, but said fence did not fix or establish the boundary line between said lot 2 and said N. E. ¼ of the S. W. ¼ of said section 15. There is also a finding against the plea of adverse possession.

The main contention of the appellants is that these findings are contrary to the evidence. It is urged that the testimony of several witnesses shows without conflict that prior to the erection of the fences two agreements had been made between Sarah A. Mann, the owner of lot 2, and the then owners of the adjoining premises, whereby the said county road was agreed upon as the boundary of the respective parcels of land. The defendants rely upon the rule, declared by repeated decisions of this court, that "where coterminous proprietors of land in good faith agree upon, fix, and establish a boundary line between their respective tracts of land, in which they acquiesce, and under which they occupy, for a period equal to that fixed by the statute of limitations, the line as thus established is binding upon them." Cooper v. Vierra, 59 Cal. 283; White v. Spreckels, 75 Cal. 616, 17 Pac. 715; Helm v. Wilson, 76 Cal. 485, 18 Pac. 604; Dierssen v. Nelson, 138 Cal. 398, 71 Pac. 456. But this rule is subject to the limitation that the agreement must be for the purpose of settling some uncertainty or dispute as to the real boundary. This qualification was fully explained in Lewis v. Ogram, 149 Cal. 505, 87 Pac. 60, where Shaw, J., in speaking of an agreement which purported to fix a boundary between adjoining parcels of land, said: "Such an agreement necessarily is not valid for any other purpose than that of settling an uncertainty in regard to the common boundary. If adjoining owners agree on a division line, knowing that it is not the true line, and with the purpose of thereby transferring from one of them to the other a body of land which they know his true line does not embrace, the agreement will not be enforced. Such a transaction would not constitute an adjustment of uncertainties or doubts as to the line, but would be an attempt to convey or release land from one to the other. Land cannot be conveyed by the device of moving fences or changing the marks or monuments which define its limits. If an agreement having for its real object the transfer of the land, but relating by its terms solely to the boundary line and made with knowledge that the true line is elsewhere than at the place fixed, is oral, it would be void, being an attempt to transfer land without writing. If it is in writing, it would be ineffectual to pass title, for it would lack the apt words of conveyance that are necessary to accomplish a transfer of real property. The authorities are to the effect that these agreements, when deemed valid, are of such a nature that they do not operate upon the title at all."

The testimony which is relied upon by defendants as showing that the county road had been agreed upon as the boundary line between lot 2 and the land lying to the north thereof shows clearly that the parties in making such agreements were not endeavoring to settle any dispute or doubt as to what the actual boundary was, but were, in fact, undertaking to exchange a piece of land lying south of the road and which was a part of the N. E. ¼ of the S. W. ¼ of section 15 for a tract of about equal size which lay north of the road, and was, in fact, a part of lot 2. It was known to the parties at the time they made the alleged agreements that the true boundary line between the two adjoining tracts of land was not the county road, and the object sought to be accomplished was not to ascertain and fix the boundary, but to make transfers of the two parcels so that all of the land owned by each party should be on one side of the road. The witness Metzgar, the first witness called by the defendants to prove such an agreement, testified that in 1873 he had been in possession of the property subsequently patented to Sayre; that at that time he had built a fence along the line of the Campo Seco and Woods Crossing road pursuant to an understanding with Mrs. Mann, the occupant of the Mann tract. "The understanding we had was we thought owning equal portions of the land to put the fence there. She owned a little more than I did on one side of the road, and I on the other. We agreed to run the line there, and when we got the title to deed back to the other." And on cross-examination, being asked, "That is she was to convey what lay north of the road and you were to convey to her what lay south of the road?" he answered, "That is the agreement we had all around with quite a number of neighbors; had the same agreement." The witness James Bogan testified that at the time the Sayre tract had been sold in 1884 the representative of the vendor had said "that there was a small portion of the Mann tract north of the Campo Seco road, and a small portion of the Sayre tract south of the Campo Seco road, and that the fences were to remain as they were because they had traced them off; that there was an agreement between Mrs. Mann and Sayre." The defendant Esther Durgan testified that she had been present on many occasions when conversations occurred between her mother, Sarah A. Mann, and Thomas Sayre. The conversations occurred between 1868 and 1871. They were "in regard to an exchange of a piece of land in Mr. Sayre's property and the piece of land in my mother's property, and they agreed to exchange properties. It was said that the fence should be constructed on the line along the side of the road instead of across the road with the other fences." Taking the testimony of these witnesses as uncontradicted, the utmost that is established is that the parties, knowing that a portion of the land of each was separated from the main body of the tract to which it belonged by the county road, orally agreed to exchange the parcels so separated, and that they built fences and went into possession of the pieces as if these exchanges had been effected by proper conveyance. Such agreement, under the rule declared in Lewis v. Ogram, supra, could have no effect as an agreement for the location of a disputed boundary line. As was said in that case: "It had no relation whatever to the true line, nor to any doubt concerning the location of the boundary, and hence it does not come within the rule which makes an agreed line binding between the parties, not as a contract to convey, but as an attempt in good faith to make certain that which before was in doubt." Notwithstanding the alleged agreements, therefore, the land here in controversy still remained a portion of the N. E. ¼ of the S. W. ¼ of section 15, just as the piece for which it was to have been exchanged remained a portion of lot 2.

Nor did the defendants establish their plea of adverse possession. Granting, as they contend, that the evidence shows that they were in the actual occupation of the disputed premises since the construction of the fence in 1884, claiming them as their own, there was no evidence that the defendants or their grantors had for the statutory period paid the taxes which had been levied upon the land, as required by section 325 of the Code of Civil Procedure. The only evidence in this regard was that they had paid the taxes upon lot 2. But, as we have seen, the premises in question were not a portion of lot 2, but were a part of the N. E. ¼ of the S. W. ¼ of section 15, and the taxes on this subdivision were paid by Sayre's successors. The statutory requisite to the acquisition of a title by adverse possession had therefore not been fulfilled.

The plaintiff, who had been in possession of the Mann tract as a life tenant, testified that during his occupancy he had made an agreement with one O'Donnell, then the owner of the Sayre tract, by which he was "to exchange the piece on the south side, when he [I] could get title to it for this corner." The defendants objected to this testimony, "on the ground that the writing is the best evidence," and now assign the overruling of the objection as error. If we assume that the objection was properly framed and should have been sustained, the admission of the evidence was in no way harmful to the appellants. The plaintiff showed a clear title in himself by the production of the deed from Ann O'Donnell. No attempt was made to meet this case otherwise than by defendants' claims (1) that the property in question had become a part of the Mann tract by the agreement as to boundaries; and (2) that the defendants had a good title by adverse possession. Neither of these claims was established by the evidence. It is immaterial, therefore, that the plaintiff was allowed to prove matter, which, as he claimed, had a tendency to show that he had acquired the Sayre title before the conveyance from Ann O'Donnell.

From what has been said it follows that the findings that the county road had not been fixed by the coterminous owners as being the dividing line of the adjoining tracts and that the defendants did not have title by adverse possession were fully sustained by the evidence. It follows, further, that the court properly determined that the plaintiff was the owner of the premises in question.

It may be added that the question whether the defendants, on pleadings framed for that purpose, would be entitled to a decree specifically enforcing the alleged agreements of exchange, is not here involved. The answer and cross-complaint, asserting title to the disputed premises to be in the defendants, do not contain the allegations required in a bill for such relief, nor do they seek it.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

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## PEOPLE v. CRAIG. (Cr. 1,402.)

(Supreme Court of California. Sept. 19, 1907.)

1. Criminal Law—Appeal—Bill of Exceptions.

On appeal from an order denying a motion for new trial, the bill of exceptions must show that such a motion was made.

2. Same—Harmless Error—Order of Introducing Evidence.

The defense to a prosecution for assault being that defendant merely made a justified resistance of an illegal attempted arrest, it is no ground for complaint that the prosecution put in as part of the main case, rather than in rebuttal, evidence to show justification in making the arrest without a warrant.

3. Same—Evidence of Other Crime.

On a prosecution for assault, the defense being justification in resisting an attempt to arrest because made without a warrant, evidence to show justification under Pen. Code §§ 836–840, in so making the arrest, is admissible, if competent, though it tend to show commission by defendant of an offense distinct from the assault.

4. Arrest—Necessity of Warrant—Offense in Presence of Officer.

Vagrancy, as defined in Pen. Code, § 647, subd. 6, declaring guilty of vagrancy every idle, lewd, or dissolute person, or associate of known thieves, or every person who wanders about the streets, at late or unusual hours of the night, without any visible or lawful business, though it cannot be committed by a single act observable at one time, is a misdemeanor that can be committed "in the presence" of an officer, so as to justify him, under sections 836–840, in arresting him without a warrant.

5. Assault — Defenses — Resisting Unlawful Arrest—Evidence.

In a prosecution for assault, the defense being that it was merely resistance to an illegal arrest, testimony of the officer that for three months prior to the attempted arrest he had seen defendant at all hours of the night, from 9 p. m. to 3 a. m., in and about the saloons in the disreputable part of the city, that he had no visible or lawful business, and that he had associated with a reputed prostitute, is relevant to prove the officer was personally cognizant of the facts constituting defendant a vagrant, within Pen. Code, § 647, subds. 5, 6, so as to justify him, under sections 836-840, in arresting defendant without a warrant.

6. Arrest—Necessity of Warrant—Offense in Presence of Officer.

An arrest of defendant without a warrant for the offense of vagrancy, committed in the presence of the officer, is justified, though the fact of his being a vagrant has been known for some time, and the real motive of the arrest is a report brought to the officer that defendant had assaulted and beaten a man.

7. Criminal Law — Irresponsive Answer — Motion to Strike.

Where part only of the answer to a question is irresponsive, a motion to strike out, on the ground of it being irresponsive, should specify and be confined to the objectionable part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1643.]

8. Same — Harmless Error — Striking Out Testimony.

Where, under the other evidence, there could have been no other conclusion than that of guilt, refusal to strike out irresponsive testimony was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137, 3138.]

9. Assault — Resisting Arrest — Justification—Evidence.

In a prosecution for assault, the defense being that it was merely resistance to an unlawful arrest, for the purpose of corroborating other evidence that defendant was a vagrant, to the personal knowledge of the officer arresting, so as to justify the arrest without a warrant, testimony of another as to how frequently, during the preceding month, defendant visited a disreputable saloon in the officer's beat, is admissible.

10. Same.

As bearing on the question of the knowledge of an officer that defendant was a vagrant, justifying him in arresting defendant without a warrant, his testimony that defendant, during the preceding three months, had no business that he knew of, is admissible.

11. Witnesses—Cross-Examination of Accused.

Defendant, for the purpose of rebutting the evidence of his vagrancy, which was claimed to have existed to the knowledge of the officer arresting him, so as to justify the arrest without a warrant, having testified that he had a lease, covering several months prior and up to the time of the arrest, of a certain tenement, which he had sublet to prostitutes, and that he had in the meantime purchased a mining location, on which he intended to go as soon as the lease expired, may, for the purpose of showing that he had no lawful business, which fact, in connection with his wandering about the streets at late and unusual hours of the night, would constitute him a vagrant under Pen. Code, § 647, subd. 6, be required on cross-examination to testify that during the running of his lease he had no other business except gambling.

12. Arrest — Necessity of Warrant — Offense Committed in Presence of Officer.

An officer who, in aiding in an arrest for a misdemeanor, is acting under the order of his superior officer, who is present, is justified in so doing without a warrant, though the offense was not committed in his presence, but in that of the superior officer.

13. Assault—Defense—Aiding Another in Resisting Arrest.

Under Pen. Code, § 694, providing that one, in aid or defense of a person about to be injured, may make resistance sufficient to prevent the offense, he can interfere only in aid of a lawful resistance by the person threatened, and, that resistance not being confined to lawful means when he comes to the rescue, he may not aid it.

14. Criminal Law—Province of Jury—Instruction.

An instruction that the jury assume a fact to be conclusively proven is erroneous, even where the evidence is without conflict; and it therefore cannot be required to give such an instruction, though the giving thereof might be harmless.

15. Same — Harmless Error — Argument of Prosecuting Attorney.

The recollection of the jury as to what the testimony was will be deemed a sufficient protection to defendant, where the prosecuting attorney in his argument claimed the defendant's testimony showed a certain matter, damaging to him, as to which there was no evidence, and, on the court's admonishing him to confine himself to the testimony, he still contended such evidence had been given by another witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3127.]

In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Charles Craig was convicted of assault with a deadly weapon, and appeals. Affirmed.

R. Porter Ashe, Gaston M. Ashe and E. S. Wachhorst, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for respondent.

BEATTY, C. J. The defendant and one Charles Mack were jointly accused by information of the crime of assault with a deadly weapon with intent to commit murder. Upon a separate trial defendant was convicted of the crime of assault with a deadly weapon. He appealed from the judgment, and from an order denying his motion for a new trial, to the District Court of Appeal, where, by reason of a difference of opinion among the judges, there was a failure to decide the cause, and it has accordingly been transferred to this court for hearing and decision.

There is an objection by the Attorney General to any consideration of the appeal from the order, upon the ground that it does not appear from the bill of exceptions that any motion for a new trial was made. The objection seems to be well founded according to the decision of this court in People v. Ruiz, 144 Cal. 251, 77 Pac. 907, and that of the District Court of Appeal in People v. Frank, 2 Cal. App. 283, 83 Pac. 578; but in this case it is of no practical consequence whether the objection be sustained or not, since every assignment of error urged by counsel for appellant is reviewable on the appeal from the judgment.

Such facts as are essential to a clear understanding of the questions to be considered on that appeal may be briefly stated as follows: About 3 o'clock in the morning of December 25, 1905, Sergeant Wilson and Officer Ryan, of the Sacramento police, entered a saloon in what appears to have been an exceedingly disreputable quarter of that city for the purpose of arresting the appellant and his codefendant Mack. They found them drinking at the bar in company with a number of women and other men. Wilson arrested Craig, and took him to the sidewalk in front of the saloon, while Ryan, by Wilson's direction, was attempting to arrest Mack, who, with the aid of some bystanders, violently resisted the attempt. Wilson, attracted by the noise, left Craig on the sidewalk and hurried to Ryan's assistance, closely followed by Craig. The evidence as to what ensued is conflicting and confusing, but there was testimony which would warrant a jury in finding that several of the men present in the saloon made common cause with appellant and Mack in resisting the arrest, and in vicious assaults upon the officers, who were speedily overpowered, deprived of their clubs, and otherwise roughly handled. Appellant and Mack, who had gained possession of the clubs, at one period of the affray concentrated their attack upon Ryan, who was then on the floor, encouraging each other by such suggestions as "kick the son of a bitch's head off, Buff!" (the "Buff Kid" was a familiar nickname of Mack). The result of the fracas was that Ryan was very badly beaten, both officers disabled, and their prisoners enlarged. The information against the defendants was based upon the assault on Officer Ryan.

There seems to have been some attempt made at the trial to show that the club with which Ryan was beaten by appellant was not a deadly weapon, but the state of the record does not warrant a consideration of that point, and it is not pressed.

The principal defense in the trial court was that the attempted arrest of the defendants was illegal, and that they were justified in such resistance as they made. The appellant, at least, defends his acts upon the ground that he was justified in resisting his own arrest, and in aiding Mack to resist an unlawful attempt to arrest him. The facts as to this matter are that the officers had no warrant of arrest for either party, and neither had committed or been suspected of committing any felony. The only justification which could be alleged for the action of the officers was that the defendants had committed a misdemeanor in their presence. Pen. Code, §§ 836–840. This the prosecution undertook to show as a part of their case in chief, by proving acts constituting the crime of vagrancy; and the main contention on the part of appellant is that the superior court erred in admitting evidence of these acts. Since the right of a person to resist an unlawful attempt to subject him to arrest cannot be denied, we think there can be no question, in view of the circumstances of this case, that the prosecution were right in submitting such evidence as they could to show that the attempted arrest of appellant and Mack was strictly legal, and certainly the fact that it was put in as a part of their main case, rather than in rebuttal, affords the appellant no ground of complaint. The only question is whether the evidence offered and admitted was relevant to the issue; for, the fact that the offense was committed in the presence of the arresting officer being material, if the evidence offered to prove it was relevant, the fact that it also tended to prove that the appellant had committed other substantive offenses, distinct from the assault upon Ryan, was not a ground of objection to it. We think the evidence was clearly relevant, as tending to prove that the arresting officers were personally cognizant of facts constituting the appellant a vagrant within the statutory definition of vagrancy. Pen. Code, § 647, and especially subdivisions 5 and 6. It was to the effect that for a period of three months prior to the assault charged he had been seen by Sergeant Wilson at all hours of the night, from 9 p. m. to 3 a. m., in and about the saloons clustering around Second and L streets, "McCarthy's," "The Art," "The Palm," and "The Casino," and in the immediate neighborhood of the "Concentration Camps" (a local euphemism for houses of ill fame). It was to the further effect that he had no visible or lawful business and that he associated with a reputed prostitute. This was vagrancy, and, if vagrancy of this species is a misdemeanor which can be committed "in the presence" of an observer, this misdemeanor, supposing the evidence to be true, was committed in the presence of the arresting officer. If, as a witness, he could testify from actual knowledge to every element of the offense, the offense must have been committed in his presence. And it makes no difference that this species of vagrancy cannot be committed by a single act observable at one point of time. A series of acts extending over a considerable period of time, and only constituting a criminal offense because of their continuance and repetition, alone or in conjunction with other circumstances, being capable of observation and actual knowledge by a peace officer, will justify him, when the series of acts is complete, in making an arrest without a warrant as fully as in the case of any other misdemeanor committed or attempted in his presence. The only thing decided in People v. Denby, 108 Cal. 54, 40 Pac. 1051, is that the solicitation of alms by a healthy beggar on one occasion does not make him a vagrant, or justify a citizen in arresting him. The case did not involve the question here presented; but the implication from what was decided is that habitual begging, known to the citizen, would have made the arrest legal, a point as to which we have no doubt.

A more doubtful question is raised by the uncontradicted evidence of the officers themselves that the real motive of the arrest was not the fact that the defendants were vagrants, but was a report brought to their knowledge that at an earlier hour in the night the defendants had assaulted and beaten a man passing along the street. This offense they had not seen, and upon consultation they concluded that, as they could not arrest them for the battery without a warrant, they would arrest them as vagrants, known to them to be such. It seems to be generally held that an arrest for a misdemeanor without a warrant cannot be justified, if made after the occasion has passed, though committed in the presence of the arresting officer; and it is contended here that according to Sergeant Wilson's own testimony the occasion for arresting appellant as a vagrant had long passed, since, if he knew him to be a vagrant at all, he had known it for some time prior to December 25th. On cross-examination Wilson was asked why he had not sooner arrested him for vagrancy, and he made this answer: "I was told by a former administration to not bother these fellows as long as they behaved themselves. On this morning I was notified that this man and Mack had beat up a man by Officer Ryan, and I says: 'Well, the only thing we can do—we didn't see it—we will will go and vag them.'" Whether this is an entirely commendable attitude towards the appellant's class of misdemeanants we need not stop to consider; but we think the admitted fact that the appellant would not have been arrested if he had confined himself to vagrancy did not render his arrest for that offense illegal. Vagrancy differs from most other offenses in the fact that it is chronic, rather than acute; that it continues after it is complete, and thereby subjects the offender to arrest at any time before he reforms. Here there was no evidence of reformation, but the reverse; for, according to the evidence, the appellant was comporting himself quite consistently with his usual line of conduct at the moment of his arrest. All this Sergeant Wilson knew, and, having heard that he had ceased to conduct himself peaceably, he had a sufficient reason, as he had a perfect right, to make the arrest at that time.

The appellant assigns another error in this connection. He moved to strike out the above-quoted answer of Sergeant Wilson upon the ground that it was not responsive to his question, and that it was incompetent, irrelevant, and immaterial. It is contended that the court erred in overruling this motion. The answer of the witness certainly did contain matter which was not strictly responsive to the question. He was not asked why he arrested appellant on the 25th, but only to explain why he had not arrested him sooner, and that part of his answer relating to the reported beating of a man by appellant and Mack went beyond the scope of the question, and was hearsay, and therefore incompetent. It was necessary, however, for the appellant, in moving to strike out, to specify the objectionable part of the answer and confine his motion to that, and a part of the answer being strictly responsive, and his motion embracing the whole, the court was technically correct in overruling it. People v. Rodley, 131 Cal. 242, 63 Pac. 351. We are satisfied, moreover, in view of all the other testimony in the case, that the jury could have come to but one conclusion as to the guilt of appellant, and that the ruling was harmless.

May Graves, a woman employed in the "Art Saloon," was called as a witness for the prosecution, and, after answering that she knew the appellant, was asked by the district attorney: "How frequently during that time [the month of December] did you see the defendant?" The question was objected to as incompetent, irrelevant, and immaterial, and the objection overruled. The witness answered: "Oh, he would come in the house four or five times during the week, I should imagine." It is contended that this answer was seriously prejudicial to the appellant, as tending to degrade his character, and that the district attorney called it out for no other purpose. It seems probable that the district attorney was seeking by this testimony to corroborate the other evidence as to vagrancy; and, if so, it is by no means clear that the question was objectionable, for, if it was material to show that the officers knew that appellant was a vagrant, it was permissible to prove that he was comporting himself as a vagrant in that part of the city comprised in their beat. But, whether technically objectionable or not, it is clear that the evidence could not have been prejudicial.

Ryan, the prosecuting witness, was asked, "Do you know what business he [appellant] was engaged in, if any, during that time?" and answered without objection, "None that I know of." There would have been no error in permitting this question and answer, even if they had been objected to. The evidence bore directly upon the question as to the officer's knowledge that appellant was a vagrant.

Called as a witness in his own behalf, the appellant, evidently for the purpose of rebutting the evidence as to vagrancy, testified that in July, 1905, he had taken a lease of a certain tenement on Second street, covering the months from August to December, inclusive, which he had sublet to women for purposes of prostitution at a very considerable profit, and that he had in the meantime purchased a mining location in the state of Nevada, upon which he intended to go to work as soon as the Second street lease expired. On cross-examination he was asked if, during the running of his lease, he had any other business besides letting rooms to prostitutes, and answered that he had other business. He was then asked what his other business was, and compelled, over his objection, to answer that it was gambling. The court did not err in requiring him to answer. His effort was to show that he was not a vagrant, and it was permissible to show out of his own mouth that he had no lawful business.

It is scarcely necessary to add that the court did not err in refusing to instruct the jury as matter of law that under the evidence appellant at the time of the assault was not a vagrant. There was evidence of every element of that species of vagrancy defined in subdivision 6 of section 647 of the Penal Code. Appellant wandered about the streets at late and unusual hours, and his only business—gambling and subletting for purposes of prostitution—was not a lawful business. Pen. Code, §§ 316–330.

Neither did the court err in refusing to give the following instruction requested by appellant: "The witness Ryan has testified that he arrested Charles Mack for a misdemeanor, to wit, vagrancy, and that said misdemeanor was not committed in his (Ryan's) presence, and that he had no warrant for such arrest. If you believe said evidence, then you must find that said arrest, or attempted arrest, was illegal and unlawful; and I instruct you that the defendant Craig, or any third person, was justified in lawfully interfering to prevent the said Mack's illegal arrest, provided that they did no more than was necessary for that purpose." In arresting Mack, Ryan acted under the orders of his superior officer there present, and the legality of the arrest depended upon Wilson's right to give the order which would not have been conclusively determined by that portion of Ryan's testimony quoted in the instruction, even if it had been entirely unqualified by other portions of his testimony; but, in fact, Ryan testified on redirect examination that he had known Mack to be a vagrant all the time. In view of all his testimony, the portion quoted in the instruction may have meant no more than that the beating of a man on the street (which was the real occasion, though not ground, of the arrest) had not occurred in his presence. Besides, the instruction, as requested, was not strictly correct in point of law. The right of one person to aid another in defending against a threatened injury is defined by our statute (Pen. Code, § 694), and does not differ substantially from the right as it existed under the common law. He cannot interfere, except in aid of a lawful resistance by the person threatened. Here the evidence shows very clearly that Mack was resisting; but it is far from clear that his resistance was confined to lawful means at the time appellant came to his rescue. A court cannot, in instructing a jury, assume any fact to have been conclusively proven, even where the evidence is without conflict. Such a state of the case might render an erroneous instruction harmless; but a court is not required to give an erroneous instruction, no matter how harmless it may be.

The alleged misconduct of the district attorney does not call for extended notice. He did in one instance claim in his argument to the jury that appellant had shown by his own testimony that he was living off the earnings of women who had consorted with Japanese. There was no evidence as to consorting with Japanese; but, on the objection of counsel, the court admonished the district attorney to confine himself to the evidence. He, however, still contended that such evidence had been given by Sergeant Wilson. He appears to have been mistaken; but there is no reason to suppose that he had purposely misrepresented the testimony. In such a case the recollection of the jury as to what the testimony of a witness was must be deemed a sufficient protection to the accused. It is not like the case where a prosecuting officer deliberately and purposely imputes to the accused a distinct and infamous offense regarding which there has been no evidence, and where the court approves his conduct. As to the terms in which the district attorney chose to characterize the offenses of the defendant, we cannot see that they passed the bounds of legitimate censure.

We find no prejudicial error in the record, and accordingly the judgment and order of the superior court are affirmed.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.

(152 Cal. 17)

## DOAK v. BRUSON (ELECTRIC IRON & STEEL CO., Intervener). (Sac. 1,428.)

(Supreme Court of California. Sept. 19, 1907.)

1. Appeal—Review—Questions of Facts—Conflicting Affidavits.

On appeal from an order made on affidavits, involving the decision of a question of fact, there being a conflict in the affidavits, those in favor of the prevailing party are to be taken as true and to establish not only the facts directly stated therein, but also all facts which may reasonably be inferred or presumed from the direct and positive statements.

2. Tender—Offer in Writing—Good Faith and Ability to Perform.

Code Civ. Proc. § 2074, providing that an offer in writing to pay a particular sum, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property, and Civ. Code, § 1496, making a similar provision with regard to offers of performance in general, have the effect only, where a written offer to pay money is made and not accepted, to excuse the actual production and tender of the money, and do not dispense with the requirement of Civ. Code, § 1493, that a tender shall be made in good faith, or with that of section 1495, that, in order for an offer of performance to be of effect, the person making it must be able and willing to perform according to the offer, and such a written tender not being made in good faith, and the person making it not being able to perform, it is ineffectual, though pursuant to the provision of section 1498, that one making a tender may make it depend on the due performance of a concurrent condition, it is conditioned on the other party giving a deed, and he is unprepared to give it.

In Bank. Appeal from Superior Court, Shasta County; C. M. Head, Judge.

Action by David P. Doak against Willard C. Bruson; the Electric Iron & Steel Company intervening. From an adverse order, defendant appeals. Affirmed.

Aylett R. Cotton and W. H. H. Hart, for appellant. S. C. Denson, for respondent.

SHAW, J. On January 21, 1905, the plaintiff obtained a decree that all the equitable rights of the defendant and of the intervener, under a certain contract, in certain lands, were thereby foreclosed and declared null and void, but further providing that the defendant, or the intervener, might at any time within 120 days thereafter pay to the plaintiff or his attorney the sum of $11,711.64, with interest at 8 per centum per annum from January 21, 1902, to the date of such payment, and that, if payment was so made within the same time so specified, the said plaintiff should execute to the party making the payment a deed conveying to him or it, as the case might be, all the right, title, and interest of the plaintiff in the lands, and that, if they failed to make such payment within said time, they be enjoined from asserting any right, title, or interest in the land, and the plaintiff was, in that event, adjudged to be the owner thereof free from all and any claims of Bruson or the intervener. The decree also provided as follows: "At any time after the 21st day of May, 1905, upon ten days' previous notice given to the attorneys of the adverse parties, any party to this action may, on motion, have an order and judgment entered in this court, adjudging whether or not payment in redemption has been made in accordance with this decree, and such order or judgment shall be binding and conclusive upon all the parties." In pursuance of this provision, the plaintiff, upon due notice, moved for an order adjudging that payment of the $11,711.64 had not been made within the time allowed. The motion was heard on June 10, 1905, and, after hearing the affidavits offered, the court made an order in favor of the plaintiff. From this order the defendant, Bruson, appeals.

In the consideration of an appeal from an order made upon affidavits, involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established. Ludwig v. Harry, 126 Cal. 378, 58 Pac. 858; Daniels v. Church, 96 Cal. 13, 30 Pac. 798; Hastings v. Keller, 69 Cal. 606, 11 Pac. 218; Creditors v. Welch, 55 Cal. 469; Hyde v. Boyle, 105 Cal. 107, 38 Pac. 643; Barrett v. Graham, 19 Cal. 635; In re Fisher, 75 Cal. 524, 17 Pac. 640; Fanning v. Leviston, 93 Cal. 188, 28 Pac. 943; Savings Bank v. Schell, 142 Cal. 507, 76 Pac. 250. And as error is not presumed, and all intendments are in favor of the action of the lower court, it follows that the affidavits in behalf of the successful party are to be deemed to establish not only the facts directly stated therein, but also all facts which may reasonably be inferred or presumed from the direct and positive statements.

The claim of Bruson that the payment had been made within the time allowed is based entirely upon a written offer to pay the money, made on his behalf to S. C. Denson, the attorney for the plaintiff, at his office in San Francisco, after 4 o'clock, in the afternoon of May 22, 1905, which was the last day on which payment could be made. It is contended that the effect of such an offer is in all respects equivalent to an actual payment of the money. Section 2074 of the Code of Civil Procedure declares that "an offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property." Section 1496 of the Civil Code makes a similar provision with regard to offers of performance in general. The only effect of these sections, where an offer to pay money is made and not accepted, is to excuse the actual production and tender of the money. They do not absolve the party from the observance of any other requirement of the law necessary to a valid tender. In Hyams v. Bamberger, 10 Utah, 3, 36 Pac. 203, the court, speaking of a similar statute, says: "Ordinarily where a party makes a tender, independent of statute, he must actually produce the money to the creditor. It must be in sight, capable of immediate delivery. * * * Where a person makes a tender in writing, the statute excuses him from actually producing the money at the time of making the tender, but it excuses no other act or requirement on his part which would be necessary in order to make a valid tender, independent of statute. To hold otherwise would be to turn the statute, which was intended as a mere convenience, into an instrument of fraud." The cases of Ladd v. Mason, 10 Or. 314, Holladay v. Holladay, 13 Or. 523, 11 Pac. 260, and McCourt v. Johns, 33 Or. 561, 53 Pac. 601, are to the same effect, and construe a statute identical in language with ours.

The facts concerning the written offer in controversy were as follows: Mr. Denson, the attorney for the plaintiff, Doak, had on several occasions, after the entry of the judgment, and before the offer was made, informed Bruson and his attorney that Doak would grant no further extension of time, and that the money would have to be paid within the time fixed by the judgment. A few days prior to May 20, 1905, Denson told Bruson that Doak was then in San Francisco, and was ready to make the deed if the money was paid, but was going to Mexico in a few days to be gone several weeks, and urged upon Bruson the necessity of getting the money to make the payment before the time was up and while Doak was here to sign the deed. On May 20, 1905, two days before the offer, Denson told Bruson that Doak had left the city, and had not left with him, Denson, any deed to be delivered if payment should be made. On May 22, 1905, at the hour stated, two men, unknown to Denson, appeared in his office, and one of them, who said his name was Albert Batz, served upon Denson the written offer in question. It was signed by Bruson and purported to offer to pay to "Denson, as attorney for said David P. Doak, and for said Doak," the sum required, stating it, and to demand of Doak, through Denson, a deed as provided in the decree, and declared that the tender was dependent on the delivery of a duly executed deed. Denson thereupon inquired, "Where is the money?" to which Batz answered, "They did not give me any, and I did not bring any." Denson then asked: "Have you no money or any check with which to make this tender?" Batz said he had not. Denson then told him he was ready and willing to receive the money, and would see that Bruson got a deed if the money was paid within the time. Batz said he was furnished with no money and was not authorized to pay any. Nothing further occurred at the time, and no other offer was ever made. At the hearing Denson filed a counter affidavit, stating that he had prepared the form of a deed, but that, as it was not known whether Bruson or the intervener would pay the money, it was not signed, and that he was informed and believed that Bruson had tried to get the money to make the payment, but had not succeeded and had not the money and was unable to pay. The notice of motion was served on May 31, 1905. In opposition to the motion, the affidavits of Bruson, James Camp, and Aylett R. Cotton, attorney for the intervener, were read. It was not stated or claimed in either of these affidavits that Bruson, at the time of the tender, or at any time afterward, had the money wherewith to pay the sum required, or was or had been able, ready, or willing to make such payment. No money was produced or offered at the hearing. The affidavits for the defendant appear to have been intended to show that the deed was not ready for delivery at the time of the offer. The defendant did not profess to be then able, ready, or willing to pay, but claimed that, by reason of the failure of Doak to have the deed ready, he was entitled to further time in which to make the payment. One of the essential requirements of a tender is that it must be made in good faith. Civ. Code, § 1493; Horan v. Harrington, 130 Cal. 142, 62 Pac. 400; Potts v. Plaisted, 30 Mich. 149; McPherson v. Wiswell, 16 Neb. 625, 21 N. W. 391. It is also provided by the Code that "an offer of performance is of no effect if the person making it is not able and willing to perform according to the offer." Civ. Code, § 1495. The provisions of section 2074, Code Civ. Proc., and section 1496, Civ. Code, do not dispense with these requirements. In Ladd v. Mason, supra, the court says: "Surely the justice and good sense of the Legislature should not be impugned by such a construction of this provision as would place its framers in the position of having intended to provide a mode whereby a party might make a valid tender if his offer should not be accepted, without the readiness or ability to make it good, in the event of its acceptance." And in Holladay v. Holladay, supra, it is said that this statute dispenses with the necessity of actually producing the money with the offer, "but this does not dispense with the necessity of the party having the money in fact." See, also, Kuhns v. Chicago, etc., Co., 65 Iowa, 528, 22 N. W. 661; Shugart v. Potter, 37 Iowa, 422; Ladd v. Mason, supra; Holladay v. Holladay, supra; McCourt v. Johns, supra. We are of the opinion that the court may well have concluded, from the facts shown, that, at the time the offer was made, the defendant Bruson did not have the money he offered and was not able or willing to perform, and that the offer was made with knowledge, or in the belief, that Doak had left the city without providing a deed for delivery, and for the purpose of taking advantage of his absence to make an offer on paper to his attorney, Denson, without the ability to make it real. The fact that the offer was in terms directed to Denson, as attorney for Doak, after information that he had no deed and that Doak was absent, the fact that the agent who made the paper offer was provided with neither money, check, nor authority to pay, the fact that no offer was made at the hearing, nor any showing made of ability to pay them, or at any other time, in the face of the objections, suggested by the affidavits served with the notice, and stated on information and belief, that the money did not accompany the offer and that the offer itself was a sham, all tend strongly to this conclusion. The court was therefore justified in making the order complained of.

The rule stated in section 1498 of the Civil Code, that one making a tender may make it depend upon the due performance of a concurrent condition, does not affect the case, for nevertheless the party must act in good faith and be able and willing to perform, else, under sections 1493 and 1495, and the authorities above cited, his written offer will be of no avail. Nor does the fact that the other party was also unprepared to perform furnish any justification for his own inability, nor change what would otherwise be an ineffectual and shadow form into a substantial, bona fide, and effective tender.

The order is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

(152 Cal. 51)

## FOX v. TOWNSEND et al. (L. A. 1,702.)

(Supreme Court of California. Sept. 20, 1907. Rehearing Denied Oct. 19, 1907.)

TAXATION—ASSESSMENT BOOKS—DESCRIPTION OF REALTY—SUFFICIENCY.

A description of property in an assessment as: "In Los Angeles County. In Electric Ry. Homestead Assn. Tr. Lot 17 Block 20"—is prima facie insufficient to identify the land, and, though it might be shown that the description was in fact sufficient, in the absence of such showing, the assessment will be held void.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Edwin R. Fox against W. R. Townsend, Robert S. Carter and others. From an order refusing a new trial, plaintiff appeals. Affirmed.

See 87 Pac. 82.

E. R. Fox, in pro. per., and Cole & Cole, for appellant. O. B. Carter, for respondent.

ANGELLOTTI, J. This action to quiet title to certain lots of land in Los Angeles county was brought by plaintiff, claiming title under certain tax sales to the state of California, and deeds from the state to him, against various persons who were the owners thereof if the tax proceedings were ineffectual to vest title in plaintiff. The lots involved were parts of the Electric Railway Homestead Association tract in Los Angeles county. As to four of these lots, viz., lot 11 in block 5 and lot 19 in block 26, claimed by defendant Taylor, and lot 17 in block 20 and lot 17 in block 24, claimed by defendant Carter, judgment went for said defendants, and motions for new trial made by plaintiff were denied. Plaintiff appealed from the order denying his motion. This court, on such appeal, affirmed the order as to lot 19 in block 26, and reversed it as to the remaining three lots.[1] As to the Carter lots, lot 17 in block 20 and lot 17 in block 24, the objection that the description of property in the assessment was insufficient to make a valid assessment (the description being: "In Los Angeles County. In Electric Ry. Homestead Assn. Tr. Lot 17 Block 20," and the same practically as to lot 17 block 24) was answered by stating that a map of the Electric Railway Homestead Association Tract, recorded in book 14, p. 17, of Miscellaneous Records, showing the location of the lots, was introduced in evidence on the trial, in aid of the assessment description, and that the case in this respect was therefore the same as that of Baird v. Monroe, 89 Pac. 352. Upon petition by defendant Carter for a rehearing, it was developed that the record available to plaintiff as against said Carter did not show the introduction of any map in evidence, or that there was any map of any kind in existence at any time during the tax proceedings. The map mentioned was introduced in evidence on the separate trial had between plaintiff and defendant Taylor, and is shown only in the bill of exceptions settled between plaintiff and Taylor, and that bill of exceptions specifies only lot 19, block 26, and lot 11 in block 5, as shown on said map. Under these circumstances, it was considered proper to grant a rehearing as to defendant Carter, and an order was made accordingly. The matter is now before us on such rehearing.

The question remaining for determination is as to the legal sufficiency of the descriptions of property contained in the assessment. Were such descriptions sufficient to identify the land? We have already stated the nature of the descriptions. They were in all vital respects the same as the descriptions contained in the assessments of property considered in Miller v. Williams, 135 Cal. 183, 67 Pac. 788, Best v. Wohlford, 144 Cal. 733, 78 Pac. 293, and Baird v. Monroe, supra, namely, a designation of a parcel of land as a portion of a larger tract simply by number and block, without any reference to a map. In Miller v. Williams, supra, an action to quiet title, it was held that such a description in an assessment is not sufficient prima facie to identify the portion assessed. In that case, as in this, there was no attempt to supplement the assessment description by evidence showing that it did sufficiently identify the land. The theory of the decision apparently is that a description of this kind is of such a nature as to indicate that the property can ordinarily be located only by reference to some map or plat, and, no such map or plat being referred to as being in existence, the description is prima facie insufficient. There is no presumption, in the absence of such a reference, that there is such a map in existence. Labs v. Cooper, 107 Cal. 656, 658, 40 Pac. 1042. Under this theory, there is a distinction between such a description, and a description of a tract of land by name, such as "Forks House Ranch," as to which it has been held that "a description of a tract of land by name is sufficient, as it is presumed that the tract, and the extent of its boundaries, is well known by name." People v. Leet, 23 Cal. 161, 163. We cannot say that this distinction is not well based. The rule in Miller v. Williams in this regard, namely, that such a description is prima facie insufficient, has not been impaired by any later case, but has always been accepted as correct. Nor can it reasonably be said that the change in our revenue laws under which all property delinquent for taxes is sold to the state affords sufficient warrant for declaring a different rule from that laid down in Miller v. Williams. Such change eliminates some of the reasoning in support of the requirements of a certain description of the assessed property, for the purchaser who should know the exact location of the property offered for sale is no longer present, but the owner who is entitled to know with certainty what property is assessed to him still remains. The later cases of Best v. Wohlford, supra, and Baird v. Monroe, supra, accepting the rule of Miller v. Williams as correct, establish the doctrine that, while such description is prima facie insufficient, it may be, in fact, sufficient to identify the property, and that whether or not it is so sufficient is a question of fact to be determined by the trial court upon such evidence as may be presented on that issue. The party relying on an assessment containing such a description may therefore supplement his case by showing that the description in the assessment was, in fact, sufficient to identify the land. Thus, in Baird v. Monroe, supra, it was made to appear to the satisfaction of the trial court that there existed as a public record a map of the tract named, and but one such map, and that this map showed lot 5 in block K of that tract named in the assessment there involved. It was held that there was enough in this, in the absence of other evidence tending to impeach it, to justify the conclusion of the trial court that the description in the assessment was sufficient to identify the land to the owner. But, in the absence of any evidence tending to show the sufficiency of such a description to identify the land, it must be held insufficient, unless we are to disregard the doctrine of Miller v. Williams, to the effect that such a description is prima facie insufficient. This we do not feel warranted in doing. In the case at bar, the record fails to make it appear that any evidence whatever was introduced tending to show that the descriptions were, in fact, sufficient to identify the land. It follows that the conclusion of the trial court that the descriptions in the assessment were insufficient and the assessment void must be upheld.

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[1] See note to 91 Pac. 1007.

The order denying plaintiff's motion for a new trial as to the defendant Carter, and the land claimed by him, viz., lot 17 in block 20 and lot 17 in block 24, is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.

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152 Cal. 59

## FOX v. WRIGHT et al. (L. A. 1,734.)

(Supreme Court of California. May 13, 1907. Rehearing Denied June 10, 1907.)

1. Taxation—Sale for Nonpayment of Tax —Omission of Dollar Sign in Delinquent Tax List.

Where the dollar mark was not prefixed to the numerals representing the dollars and cents in a published delinquent tax list, but the meaning and use of the numerals were fully explained in the publication itself, the meaning was as fully explained as though the figures had been preceded by the dollar sign.

2. Same — Tax Deeds — Notice — Names of Former Owners.

In view of Pol. Code, § 3787, making a deed conclusive evidence of nonessential details in matters relating to taxation, failure of the tax collector to give the name of the person to whom the property was assessed for the years for which taxes were delinquent in the notice of sale by the state will not invalidate a deed on sale by the state, notwithstanding Pol. Code, § 3897, requiring such statement in the notice, since after the sale to the state further notice to the former owner is not necessary.

3. Same—Notice by Publication.

Under Pol. Code, § 3897, requiring publication for three weeks prior to resale of land purchased by the state at tax sale, publication once a week for three weeks in a daily paper is a good publication.

4. Evidence—Presumptions — "Daily" Paper.

The court will not presume that a paper was published daily from the mere fact that the word "Daily" is a part of the name of the paper.

5. Taxation—Tax Sale—Statutory Provisions—"Highest Bidder."

Under Pol. Code, § 3897, providing that, when the state shall become the owner of property sold for taxes, in reselling it, the tax collector shall sell the property to the highest bidder for cash, etc., the term "highest bidder" means the one who will make the highest cash bid for all the property, and not the person who will pay all the tax for the least amount of the land.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Edwin R. Fox against W. S. Wright and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Cole & Cole, for appellant. Charles Lantz, for respondents.

HENSHAW, J. This is an action to quiet title, wherein plaintiff relied upon a tax deed to himself from the state of California. It is in all vital respects like the case of Fox v. Townsend et al., L. A. No. 1702 (this day decided).[1] In the published delinquent list numerals were employed to represent dollars and cents, without having prefixed thereto the dollar mark. But the meaning and use of these numerals were fully explained in the publication itself. The case is therefore not at all the one where nothing appears to explain the intended meaning of the figures (People v. Hastings, 34 Cal. 571), but, to the contrary, is a case where the meaning of the figures is quite as fully and elaborately explained as though they had been preceded in each instance by the dollar sign. Nor was the property sold for an excessive amount. Without entering into the computations, which were fully and accurately set forth in the respondents' brief, the sums for which the properties were sold were accurately made up of taxes, 15 per cent. delinquency, 5 per cent. penalty, and the added cost of advertising.

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[1] See note at end of opinion.

Reference is made to the notice of sale by the state contemplated by section 3897 of the Political Code, and it is said that these notices are void, as they do not contain the name of the delinquent owner. This, however, is a requirement of section 3764 of the Political Code, which provides for the notice of sale to be given by the tax collector where the property is to be sold to the state, and not by it. It has been held in Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301, that a notice which fails to give the name of the delinquent owner is insufficient. Such requirement, however, is not found in section 3897 of the Political Code. In this the only requirement is that the tax collector's notice shall contain the description of the property sold, a detailed statement of all delinquent taxes, penalties, costs, and expenses up to the date of sale, "and shall give the name of the person to whom the property was assessed for each year on which there may be delinquent taxes against said property, or any part thereof." The notices here in question seem to be deficient in this respect. It is made to appear that the properties were sold for delinquent taxes, penalties, costs, and charges for the years 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, and 1895. The name of the person or persons to whom the property was assessed during these years is not given. But, upon the other hand, since the owner had received due notice by publication of the fact that his taxes were delinquent and the property had been sold to the state for such delinquency, it was not necessary to the validity of the proceedings that any notice of the intended sale by the state should be given to him at all. Indeed, the state might have provided that such sales could be made in private. And under section 3787, by the issuance of the deed, the presumption of the regularity and sufficiency of this notice of sale became conclusive. See Bank of Lemoore v. Fulgham (Sac. No. 1,338) 90 Pac. 936.

The publication of the notice of sale required by section 3897 of the Political Code must be for three weeks. The publication as recited in the deeds was made in a paper designated "The Los Angeles Daily Journal." It is argued from this, without any proof, that the paper was in fact a daily journal, and that the notice should have been published as often as the paper was issued during the specified period. But the court will not presume, merely from the title of the paper, that it was published daily, and, moreover, a publication under this law once a week for the prescribed period is a good publication, even if it appear in a newspaper published daily. People v. Reclamation Dis., 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

Section 3897 of the Political Code declares that "at the time set for such sale the tax collector must sell the property described in the Controller's authorization and said notices at public auction to the highest bidder for cash in lawful money of the United States." Respondent argues from this, under the earlier system of taxation which prevailed in this state, and which elsewhere at present prevails, that it was the duty of the tax collector to have sold the property for the amount of the tax to the person who would pay the tax for the least quantity of land, and such is what is meant by the phrase "highest bidder" as now employed. If the law in fact contemplates that all the property must be sold, and the phrase "highest bidder" means him who will pay the largest cash sum for the property, it must result that the state will receive from its sales of such lands amounts far in excess of its accrued taxes, charges, and penalties. And (so runs respondents' argument) as there is no provision in our law for repayment to the original owner of this surplus, the law operates inequitably and unjustly in compelling such unfortunate delinquent owners to bear an excessive burden for the support of the government, and such a law violates the fundamental, equitable principle which is at the basis of all of our systems of taxation, namely, that, in the apportionment of taxes, due regard shall be had to making taxes uniform, and compelling every person to bear only his proportionate share of them. It may at once be admitted that in the statutes of sister states, as well as of the United States, where the law requires the sale of all the property, there is commonly found a provision whereby the excess over the demands of the state is made over to the owner. It also may be admitted that in our system of revenue collection a like provision might have been inserted. But such a provision is not found. The owner of the property who has permitted his taxes to become delinquent receives notice that, unless the taxes be paid by a given date, his land will be sold to the state. From the date of the sale, for the full period of five years, the owner has an absolute right of redemption from the state, and after that period of five years this right of redemption is still his until the state shall have actually sold the property. For two reasons it is to the benefit of the state that property so acquired should by it be resold into private ownership. The first, because it is inexpedient that the state should be charged with the burden of the care of many such parcels of property, its administrative machinery not being adapted to such end. In the second place, it is desirable always that the ownership of state lands, saving those which are necessary for its governmental functions, should be transferred to its citizens, whereby follow increasing population and the higher development, betterment, and improvement of the land, thus adding greatly to the wealth of the state. It must be concluded, therefore, that, when the law speaks of the sale of "the property," it means all of the land, and, when it says that the land shall be sold to the "highest bidder," it means him who will make the highest cash bid for all the property. It will not be questioned but that the state might have provided that the surplus moneys received by it from such sales should be paid over to the former owners of the properties sold. But the single question which is to be considered is that of the power of the state to decree such sales and retain the money. If there be no violence done to the Constitution of this state or of the United States by a law whereby under the indicated circumstances the state retains such excess moneys to its own use, no equitable considerations may move a court to declare void that which the Legislature has the power to decree. It is to be noted, then, in considering this, that the delinquent owner is given process of law in the notice of the sale to the state of which he is advertised by publication. It is to be noted, moreover, that the liberal period of redemption of full five years is accorded him as an absolute right. At the end of this five years the deed to the state is made, and the title of the state becomes absolute. We are unable to discover any constitutional objection which interposes and invalidates the state's title, and none has been pointed out. We are unable to see why the state may not obtain a title free from all equities in the former owner at the expiration of five years as may a private citizen after foreclosure upon the mortgage when the period of redemption following such foreclosure has passed. That in other states the laws provide for a payment to the owner of the surplus moneys after the state's exactions have been met we can regard only as an act of generosity upon the part of the state, and not as the performance by it of a constitutional duty to its citizens. For these reasons, we conclude that the law in this respect is constitutional.

The other propositions advanced by respondent are sufficiently answered by the cases of Fox v. Townsend, supra, Bank of Lemoore v. Fulgham (L. A. No. 1,338) 90 Pac. 936, and Baird v. Monroe (Cal.) 89 Pac. 352, and no particular mention of them is, therefore, necessary.

For the foregoing reasons, the judgment and order appealed from are reversed, and the cause remanded.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; SHAW, J.; McFARLAND, J.

(152 Cal. 51)

NOTE.—The following opinion, per Henshaw, J., was reversed in part on rehearing (91 Pac. 1004):

Plaintiff sued to quiet title to certain lots of land, claiming title thereto under and by virtue of certain tax sales to the state of California and deeds from the state of California to him. The court gave its decree against the claim of plaintiff, and he appeals from the order denying his motion for a new trial.

One of the lots in question was lot 19 in block 26. The assessment of this lot, upon which the tax sale was based, shows that there was no dollar mark, or other mark, sign, word, abbreviation or explanation on the assessment roll to indicate what was meant by the figures in the column designed to show the value of the property and the amount of the taxes. This being the case, the assessment was void and the sale and deeds made thereunder are likewise void. Hurlbutt v. Butenop, 27 Cal. 54; Braly v. Seaman, 30 Cal. 611; People v. S. F. Sav. Union, 31 Cal. 132; People v. Hastings, 34 Cal. 571; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356. This omission appearing in the assessment itself necessarily invalidates the proceedings. In this respect this case is to be distinguished from the case of Carter v. Osborn (L. A. 1,735, filed March 7, 1907), 89 Pac. 608, where the omission of the dollar mark or sign was in the delinquent list and not in the assessment. The decree as to lot 19, block 26, was therefore correct. The other lands whose titles are in controversy are lot 17, block 20, lot 17, block 24, and lot 11, block 5. The assessments of these lots were in all vital respects the same as the assessment set forth and discussed in Baird v. Monroe (Cal.) 89 Pac. 352, saving only that, instead of being described as "in Pellissier Tr.," they were described as "in Electric Railway Homestead Assn. Tr." As in Baird v. Monroe, a map of the Electric Railway Homestead Association, recorded in book 14, p. 17, of Miscellaneous Records of the County of Los Angeles, was introduced in evidence, which map showed the location of the lots in controversy. The assessments therefore in this respect are identical with that discussed in Baird v. Monroe, and aided by the map which was introduced in evidence, the descriptions contained in these assessments were "sufficient to identify" the land. McCullough v. Olds, 108 Cal. 529, 41 Pac. 420.

Certain propositions are urged against the validity of the deeds made by the tax collector to the state. Section 3776 of the Political Code provides for a certificate of sale, and declares what that certificate must contain. Section 3785 provides for a deed from the tax collector to the state when the time for redemption has expired, and sets forth what such deed must contain; the recitals being identical with those called for in the certificate of sale. Section 3786 declares "that the matters recited in the certificate of sale must be recited in the deed." By reason of legislative oversight, there was at the date of these sales no law providing for the issuance of certificates of sale. It is contended that, as there was no law for a certificate of sale, there could in these deeds be no compliance with the requirement of section 3786, to the effect that the deed must contain a recital of the matters contained in the certificate. To this, however, it must be answered that, when the law requiring a certificate was repealed, there fell with it the requirement that the deed must contain the matters recited in the certificate. Moreover, section 3785 requires in the deed a recital of all the matters and things which the certificate contains, and those matters were in fact fully set forth in the deed. The only imperfection that can be charged in this regard was an imperfection in stating the time when the right of redemption had expired. But this irregularity was cured by the confirmatory act of February 28, 1903, fully discussed in Baird v. Monroe.

Certain correction deeds were made by the tax collector to the state, and it is urged that these deeds were without authority and void. The general principles governing such correction deeds are well settled. When a tax deed does not conform in its recitals to the facts, the officer is authorized to execute a second and corrected deed, but he has no power to execute a second deed which shall misstate the facts respecting any proceedings prior to its execution. Such a deed would be void. The power and the duty of the proper officer is not exhausted by the execution of an irregular or imperfect tax deed. Douglass v. Nuzum, 16 Kan. 515; McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep.

214; Woodman v. Clapp, 21 Wis. 350. Section 3805b of the Political Code, dealing with the subject of misstatement of facts or clerical errors occurring in the tax collector's deeds, declares that these may be corrected by the tax collector upon an order of the board of supervisors entered upon its minutes directing correction by the issuance of a new or amended tax deed. If, as respondent here contends, such an order of the board of supervisors was necessary and was not made, it was incumbent upon him to have shown it. As the record is here presented, the presumption will be that the deeds were executed by the officer under proper direction and authority. Moreover, these correction deeds seemed to have been made for the sole purpose of making a more certain statement of the time when the right of redemption had expired, and for the reasons above given the original deeds themselves were sufficient upon this point. Nor do we perceive any force in the objection that the correction deeds to the state were made after the state had parted with the title. No reason is discernible why the state, like a private individual, may not obtain a proper correction deed for the betterment of the title to property which it has conveyed, and, if this be done after conveyance, why, as in the case of an individual, it should not serve to perfect the title granted.

The deed contained a description of the property as "situate, lying and being in the county of Los Angeles, state of California, and described thus: Mortgage interest in the following described property, Electric Ry. Homestead Association Tract, lot 17, block 24." It is contended that the deed here purports to convey only a mortgage interest in the lot, without any explanation, and that the deed is therefore void. But article 13, § 4, declares that "a mortgage for the purposes of assessment and taxation shall be deemed and treated as an interest in the property affected thereby." The further recitals in the tax deed make this case parallel with that of Doland v. Mooney, 72 Cal. 34, 13 Pac. 71, where such a deed was held to be sufficient. This property was sold for taxes for the year 1894. It is objected that, upon the assessment book for 1895, there was not stamped an entry of the fact "that said lot had been sold for taxes, and the date of such sale," as required by section 3801 of the Political Code as it read in 1905. Only the words, "sold to the state," were so stamped. But it is the assessment and sale for taxes for 1894 which are involved in this case, and a clerical misprision of the year after cannot affect the validity of such proceeding. Moreover, if the purpose of the requirement is to give notice to the fiscal officers, certainly a notice, "Sold to the state," is sufficient to put them on inquiry, and the same is true if it be said that the requirement was designed to give notice of the sale to the owner.

For the foregoing reasons, the order refusing to grant a new trial was proper as to lot 19, block 26, and the judgment stands affirmed as to this lot. The order is reversed as to lot 17, block 20, lot 17, block 24, and lot 11, block 5.

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152 Cal. 64

## LOFSTAD v. MURASKY, Judge. (S. F. 4,776.)

(Supreme Court of California. Sept. 20, 1907.)

1. RECORDS — LOSS OF RECORDS — ESTABLISHMENT OF TITLE.

St. Ex. Sess. 1906, p. 78, c. 59 (the McEnerney act), creating a system of procedure for establishing title to real property where the public records thereof have been destroyed, provides that an action may be brought by any person claiming an estate in real property who by himself or his tenant is in the actual possession thereof, and requires an affidavit showing the character of the estate claimed and of the possession. *Held*, that an affidavit alleging that plaintiff had no physical possession of the premises, that his only possession was the constructive possession accompanying the legal title, and that such constructive possession had never been disturbed, did not show the actual possession required.

2. WORDS AND PHRASES—"CONSTRUCTIVE POSSESSION."

"Constructive possession" is that which exists in contemplation of law without actual personal occupation of the property.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1474–1475.]

3. SAME—"ACTUAL POSSESSION."

To constitute actual possession of land, there must be such an appropriation of the land by the claimant as will convey to the community where it is situated visible notice that the land is in his exclusive use and enjoyment, an appropriation manifested by either inclosing, cultivating, improving, or adapting it to such uses as it is capable of.

4. STATUTES—SPECIAL LEGISLATION—RECORDS — LOSS OF RECORDS — ESTABLISHMENT OF TITLE.

St. Ex. Sess. 1906, p. 78, c. 59 (the McEnerney act), creating a system of procedure for establishing title to real property where the public records thereof have been destroyed, and providing that an action may be brought by any person claiming an estate in real property who by himself or his tenant is in the actual possession thereof, is not unconstitutional as special legislation, in that it divides property owners into two classes, one having actual and the other only constructive possession of their property, without any constitutional basis for the distinction.

In Bank. Application by John N. Lofstad for writ of mandamus against Hon. F. J. Murasky, as judge of the superior court. Petition denied.

Edward C. Harrison, for petitioner. Page, McCutchen & Knight, for respondent.

LORIGAN, J. This is an application for a writ of mandate. The petitioner commenced an action, under the provisions of what is familiarly known as the "McEnerney act" (St. Ex. Sess. 1906, p. 78, c. 59), to establish and quiet his title to certain lots in the city and county of San Francisco, being part of outside land blocks Nos. 270, 299, and 701. This act, which creates a system of judicial procedure for the establishing of title to real property where the public records which would otherwise establish it have been destroyed, provides that an action may be brought under it by any person who claims an estate in real property, and "who by himself or his tenant, or any other person holding under him, is in the actual and peaceable possession thereof," and requires that the complaint filed shall be accompanied by an affidavit which shall show the character of the estate which the plaintiff claims in, and the possession he has of, the real property described in the complaint. The affidavit filed by the petitioner with his complaint stated that he was the owner in fee simple of the said property, having derived title thereto under sundry conveyances to him made in 1897 and 1898, and duly recorded in the recorder's office of the city and county of San Francisco, and, as to the character of his possession of said property, declared that "there is no physical possession of said premises by said petitioner for the reason that the plaintiff has not been able to occupy the same personally, or to find any person to whom he can lease the same, and the same are uninclosed and vacant; that the only possession thereof is therefore the constructive possession which accompanies the legal title in it; that this constructive possession of plaintiff has never been disturbed by any claim or any occupation, intrusion, or trespass of any other person, and said plaintiff therefore alleges the same to be both actual and peaceable within the meaning of the 'act to provide for the establishment and quieting of title to real property in case of loss or destruction of public records,' approved June 16, 1906." Upon the filing of his complaint and affidavit, the petitioner applied to the respondent, as judge of the superior court in which the action was pending, for an order, required by section 4 of the act, designating the newspaper in which publication of summons in the suit should be made. The respondent refused to make the order, and petitioner now applies to this court for a writ of mandate requiring him to do so.

The refusal of the respondent to make the order in question was based upon the ground that the character of the possession of petitioner of said property, as stated in his affidavit, was not such as to give the superior court jurisdiction to proceed in the action or to grant the relief provided for in the act; that the court could only acquire jurisdiction to proceed when the affidavit showed that the party bringing the action was in the actual possession of the property, title to which was sought to be established by him, and that the affidavit of petitioner showed that he was not in such actual possession, and, at most, was only in constructive possession of the property. We do not think there can be any doubt but that the action of the respondent in refusing to make the order was correct.

The position of the petitioner seems to be, as stated in his affidavit, that because it appears therefrom that he has the legal title to the property, and hence in contemplation of law is in constructive possession of it, and as there is no adverse claim to the property or any adverse occupancy thereof, he is, therefore, to be deemed in the actual possession of it within the intent and meaning of the McEnerney act. This process of reasoning, while possibly warranted by the exigency of the situation confronting petitioner when endeavoring to avail himself of the benefit of the act, is obnoxious to the objection that it obliterates the well-recognized distinction between actual and constructive possession, while at the same time it attempts to force upon a phrase well recognized in law a meaning entirely different from what it usually possesses, and the ordinary meaning of which the Legislature is supposed to have understood when it employed it in the act. It must be assumed that when the Legislature required, as a prerequisite to the right to invoke the remedy which it provided, that the party should be in the actual possession of real property, it understood the distinction between the legal classes of actual and constructive possession, and that it used the term "actual possession" advisedly and as generally understood. When the petitioner stated in his affidavit that he was not in the physical possession of the property himself or by any one else, and that it was uninclosed and vacant, he showed that he was not in the actual possession under any definition of what constitutes actual possession, and stated himself out of court, unless, as he claims, the further facts stated by him amounted to a showing of actual possession. But that they do not we think it quite apparent. These facts relied on consist of the conveyances by which he acquired the property, that he is the owner in fee simple, and that no person makes any claim to it beside himself, nor is any one in adverse occupancy of it. Treating the affidavit as proof of these facts which it states, and for the purpose of obtaining the order required under the act it must be so treated, it only shows legal title to the property in petitioner, from which it follows as a fiction of law that he is constructively in possession of it. The further fact stated by him that there is no adverse claim or adverse occupancy of the property by any one does not affect this constructive possession one way or the other. The mere fact that there is no adverse possession of the premises to which one holds the legal title does not make the possession of such holder anything more than a constructive one. It only tends to show that there is no actual possession of it by any one, and hence his constructive possession is undisturbed. For the purpose of this proceeding, it does not have the effect of changing petitioner's constructive possession into actual possession within the intent of the act under any possible theory. All the possession he has, even if there be no adverse possession, is constructive possession, the possession which in contemplation of law followed his legal title to the property, while what the act required him to have, in order to avail himself of its provisions, is actual possession—possession in fact.

While it is true that the act in question is of a remedial nature and should be liberally construed so as to effect the purpose contemplated by it, a court is not warranted under the guise of liberal construction in giving to a term or phrase a different meaning than such as it is generally understood to possess. "Actual possession" is a term of well-understood legal meaning, and is used in opposition to the other term "constructive possession" or "possession in law." The distinction between these classes of possession is so well defined and so generally recognized that it is hardly necessary to proceed to any great extent in pointing it out. In a general way, it may be said that constructive possession is that which exists in contemplation of law without actual personal occupancy of the property, such a possession as in contemplation of law proceeds from the vesting of the paramount title or follows in the wake of the legal title, or, as more exactly defined, "constructive possession, or possession in law as it is sometimes called, is that possession which the law annexes to the legal title or ownership of property when there is a right to the immediate actual possession of such property, but no actual possession." 28 Am. & Eng. Ency. of Law (2d Ed.) 239. This is the possession, and the only possession, which it appears from the affidavit of petitioner he had of the land described in his complaint, constructive possession which the law connects with his ownership of the legal title. Opposed to this constructive possession is actual possession, the character of the possession which the act requires in order that its provisions may be availed of. What constitutes such possession was early defined by this court, and some of the cases doing so are found quoted from in Brumagim v. Bradshaw, 39 Cal. 24–44. It is there said: "In Coryell v. Cain, 16 Cal. 573, which is a leading case in this state on that point, we define actual possession to be 'a subjection to the will and dominion of the claimant, and it is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property.' In Plume v. Seward, 4 Cal. 96, 60 Am. Dec. 599, it is said that, to maintain an action on the ground of prior possession, 'there must be an actual bona fide occupation, a possessio pedis, a subjection to the will and control, as contradistinguished from the mere assertion of title and the exercise of casual acts of ownership, such as recording deeds, paying taxes,' etc. In Wolf v. Baldwin, 19 Cal. 313, in stating what kind of 'actual occupation' was required under the Van Ness Ordinance, the court says it was a 'possession which is accompanied with the real and effectual enjoyment of the property. It is the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others; and this possession must be evidenced by occupation, or cultivation, or other appropriate use, according to the locality and character of the particular premises. * * * It must, in other words, be an open, unequivocal, actual possession—notorious, apparent, uninterrupted, and exclusive—carrying with it marks and evidences of ownership, which apply in ordinary cases to the possession of real property.'"

We do not think it necessary to further refer to the authorities defining actual possession. They are agreed that, in order to constitute such possession, there must be an appropriation of the land by the claimant such as will convey to the community where it is situated visible notice that the land is in his exclusive use and enjoyment and appropriation manifested by either inclosing it, or cultivating it, or improving it, or adapting it to such uses as it is capable of. This rule announced in the authorities cited, which is the general rule in respect to what constitutes actual possession, is embodied in our Code (Code Civ. Proc. §§ 322, 323) as the one which shall prevail when accompanied by payment of taxes (Code Civ. Proc. § 325), in order to sustain title by adverse possession when such title is founded upon a written instrument, and we see no reason why it should not be applicable as defining the actual possession required to be had in order to invoke the benefit of the McEnerney act.

It is insisted by the petitioner that the actual possession required by that act is not to be construed as strictly as it is in the authorities defining the phrase for the purpose of constituting adverse possession under the statute of limitations referred to, as the reasons and objects of the two statutes are different. But the rule as to what constitutes actual possession when title by adverse possession is asserted under the statute is no different from the general rule which obtained before the statutory enactment, so that the statute lays down really no stringent rule upon the subject. It simply embodies the general rule. Nor do we discover any purpose disclosed by the term as used in the McEnerney act which would justify us in making the distinction suggested, or any reason why we should define actual possession as used in that act to mean something different from actual possession when asserted to support a claim of title by adverse possession. What constitutes actual possession in respect to such claim, or whenever the meaning of the term has been in question, has been sharply and clearly defined by the authorities in this state, and, as we say, is really the general rule on the subject, and, in the absence of any disclosed intention on the part of the Legislature to give it a different meaning than its general one, we cannot assume that it so intended. We are referred to no authorities in this state where, when the meaning of the term "actual possession" was under consideration, any different meaning was given to it than the authorities cited by us disclose. It may be said, too, in passing, as accentuating the proposition that when the Legislature used the term "actual possession" it employed it as generally defined and to require possession in fact, that it declares in the act that such possession shall be by the party or his tenant or other person. Possession by tenant or other person could have no relevancy except as applied to actual possession. Aside from this, we do not discover anything in the affidavit of petitioner which could invoke making a distinction, if it were permissible. His affidavit states no facts showing that he is in the actual possession under the most liberal rule that might be indulged in short of defining actual possession to be synonymous with constructive possession, which, of course, would be absurd. We are therefore of the opinion that the actual possession of property required to be had in order to give the court jurisdiction under the McEnerney act must be such an actual possession as defined by the general rule, and embodied in the Code sections referred to, as necessary to sustain title by adverse possession if maintained and continued for the period required by law. All petitioner shows in his affidavit is that he had constructive possession of the property. Before he is entitled to avail himself of the benefit of the McEnerney act, he must be in the actual possession of the property as that term is defined by the authorities cited, and the fact that he is in actual possession must be stated or shown in his affidavit. And, upon the hearing before the court for the purpose of obtaining the decree authorized under the act, he must prove actual possession of the property at the time of filing his complaint and making his affidavit, as it is defined by these authorities.

It is further claimed by petitioner that, if the phrase "actual possession" is to be given the construction which we here give it, then the act is unconstitutional as special legislation, in this: that it divides property owners into two classes, one having actual possession of their property, the other only constructive possession, without any natural intrinsic or constitutional basis for the distinction. This is not a new point. This act was attacked in Title, etc., Co. v. Kerrigan (Cal. Sup.) 88 Pac. 356, as unconstitutional, on all the grounds to which it was deemed vulnerable in that respect, and the point made now was made there, but was not pressed, probably because on reflection it was deemed untenable, as we are satisfied it is.

The petition for the writ is denied.

We concur: BEATTY, C. J.; HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; SHAW, J.

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6 Cal. App. 251

## JOHNSTON v. BEADLE et al. (Civ. 259.)

(Court of Appeal, First District, California. Aug. 19, 1907.)

1. TRIAL—INSTRUCTIONS — SEVERAL INSTRUCTIONS ON SAME SUBJECT—EFFECT.

The giving of several instructions on the question of damages has not a tendency to lead the jury to think the court believes plaintiff should have a verdict; the court cautioning them that they are to make no such deduction, and all but one of the instructions being worded to prevent the giving of excessive damages in the event of a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 513.]

2. DAMAGES—PERSONAL INJURIES — EVIDENCE OF FINANCIAL CONDITION.

The general financial condition of plaintiff in an action for personal injuries is immaterial and irrelevant on the question of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 499.]

3. TRIAL—STRIKING OUT ANSWERS.

An irresponsive answer putting before the jury what the court had properly ruled could not be shown should be stricken out on motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 238.]

4. SAME—NECESSITY OF OBJECTING TO QUESTION.

Where it is not apparent from a question that the answer will be inadmissible, the question need not be objected to, to entitle the opposing party to move to strike out the answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 242.]

5. SAME—INSTRUCTIONS—ASSUMING FACTS.

The conclusion to a requested instruction on contributory negligence that plaintiff had no right, on the happening of some trivial occurrence, to bring injury on herself, is objectionable as assuming that plaintiff did, on the happening of a trivial occurrence, bring injury on herself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 430.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Frances H. Johnston against C. B. Beadle, and others. From a judgment for plaintiff and from an order denying a motion for new trial, defendants appeal. Reversed.

C. H. Wilson, for appellants. Maguire, Lindsay & Wyckoff and Houx & Barrett, for respondent.

HALL, J. Appeal from judgment and order denying defendants' motion for a new trial. The action was brought to recover damages for injuries received by plaintiff while a passenger on the steamer Point Arena, and the verdict and judgment were in favor of plaintiff.

While the plaintiff was a passenger on the steamer Point Arena, voyaging from San Francisco to Little River, in Mendocino county, the steamer struck on the rocks near Point Fort Ross, and plaintiff, while attempting to get out of her berth, was thrown or fell to the floor and was injured. It is insisted by appellants "that there is absolutely no evidence of negligence on the part of the defendants to sustain the verdict and judgment," and also that "the evidence did not show any negligent act on the part of the defendants which was the proximate cause of the injuries complained of." After a careful examination and consideration of the evidence in the record, we are satisfied that neither of these contentions of appellants can be sustained. The evidence is sufficient to justify the conclusion that the vessel ran on the rocks because of the negligence of defendants, and that such running on the rocks was the proximate cause of the injuries to plaintiff; but, as we are of the opinion that the judgment and order must be reversed, and the action remanded for a new trial, for reasons hereinafter stated, we do not think it necessary or expedient to discuss in detail the evidence in the record.

The court repeated in substance several instructions on the question of damages. It is not claimed that any of these are not correct statements of the law, but it is urged that the court, by thus laying stress on the question of damages, led the jury to think that the court believed a verdict should be rendered in favor of plaintiff. But the court in express words cautioned the jury against any such result. It said: "But the jury are not to understand that, because the court instructs them upon the question of damages, it thereby means to convey any intimation that in its opinion the plaintiff is or is not entitled to damages." Besides, an examination of the instructions on the subject of damages discloses that all but one were manifestly intended and so worded as to prevent the jury from giving excessive or unreasonable damages in the event that they gave a verdict for the plaintiff.

We now come to a matter that necessitates a new trial. The plaintiff pleaded special damages through loss of time and earnings as a dressmaker, and at the trial gave evidence in support thereof, to the effect that she had been steadily employed prior to the injury complained of as a dressmaker, and earned at such employment $2.50 per day and her board. She was then asked by her counsel: "Are you a woman of means?" Defendants objected to the question as immaterial, and the court sustained the objection. Thereupon her counsel asked this question: "During the period you have been a dressmaker, state the means by which you have supported yourself?" And she answered: "I have no other means or resources." Whereupon counsel for defendants at once moved to strike out the answer as not responsive, and on the ground that her means and resources are immaterial and irrelevant. The court denied the motion, and in so doing, we think, committed error, for which a new trial must be ordered. The ruling of the court to the first question above quoted was correct. The general financial condition of the plaintiff was immaterial and irrelevant to the question of damages, or to any issue in the case. Shea v. Railway, 44 Cal. 414; Malone v. Hawley, 46 Cal. 409; Green v. Southern Pacific Co., 122 Cal. 563, 55 Pac. 577; Mahoney v. San Francisco, etc., Ry. Co., 110 Cal. 471, 42 Pac. 968. The answer of the witness (plaintiff) to the second question went beyond the legitimate scope of the question, and put before the jury the fact that she was not only not a woman of means, but had no means or resources other than her earnings as a dressmaker, and was thus a flagrant evasion of the ruling of the court to the first question above quoted. It is no answer to the contention or to the motion of counsel for appellants to say that he should have objected to the question before it was answered. The answer actually given is not a direct answer to the question put, as would have been such an answer as "I have supported myself by my earnings as a dressmaker." The question put was susceptible of an answer that would have been in accord with the previous ruling of the court. Counsel for defendants were not obliged to assume that counsel for plaintiff was attempting to intentionally get an answer that would contravene the ruling of the court that had just been made any more than we will impute any such purpose to counsel. It was only when the answer had been given that it could be known that it was immaterial and in violation of the previous ruling of the court. The proper practice in such a case is to move to strike out the answer. "When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to strike out comes too late, unless preceded by an objection to the question, but the rule is otherwise where the evidence may or may not be admissible." People v. Williams, 127 Cal. 212, 59 Pac. 581; People v. Lawrence, 143 Cal. 148, 76 Pac. 893, 68 L. R. A. 193. The court erred in refusing to strike out the answer, "I have no other means or resources."

It is also urged that the court erred in refusing to give two instructions requested by defendants upon the defense of contributory negligence. The first of these instructions, we think, is open to the objection that it assumes that plaintiff, upon the happening of a trivial occurrence, brought the injury on herself, and for that reason was properly refused. It concludes in these words: "The plaintiff had no right, upon the happening of some trivial occurrence, or such an occurrence as would not create fear or apprehension of injury in the mind of an ordinarily prudent person, to bring injury on herself." To say that a person had no right to do a certain thing strongly suggests that such person did do that thing. The second of these instructions is in these words: "If you find from the evidence in the case that the plaintiff, in attempting to get out of and descend from her berth on the steamer Point Arena at the time complained of, did not act with ordinary care and prudence, and hold and guard herself from falling and injuring herself as a result of any motion of the vessel that might have been expected at the time by an ordinarily prudent person, and that such want of ordinary care and prudence contributed to or caused the accident, then and in that case your verdict must be for the defendant." This instruction is correct in its statement of principles of law, and the only reason suggested by respondent why it should not have been given is that the court sufficiently instructed the jury upon the subject of contributory negligence, and, in substance, gave the instruction under discussion. An examination of the instructions given upon the subject, however, discloses that they were all couched in very general terms, and it is at least doubtful whether they fully cover the ground of the requested instruction. Inasmuch as the judgment and order must be reversed for the error heretofore pointed out, it is sufficient for us to say that it would have been the better practice to have given the requested instruction.

The judgment and order are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

6 Cal. App. 255

## PEOPLE v. GONZALEZ. (Cr. 55.)

(Court of Appeal, Second District, California. Aug. 20, 1907.)

1. Criminal Law—Appeal—Verdict—Conclusiveness.

Where the evidence in a criminal case is conflicting, the verdict will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3076.]

2. Rape—Evidence—Sufficiency—Proof of Nonmarriage.

Where on a trial for rape, there is ample opportunity for the state to prove directly that the accused and the prosecutrix were not husband and wife, indirect evidence of that fact will not suffice.

3. Same—Complaint—Admissibility.

The complaint made by the victim of a rape on her return home a month and a half after the occurrence testified to by her is inadmissible, though she is under the age of consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 67.]

4. Same.

On a trial for rape on a child under the age of consent, the prosecution asked the mother of the child as to whether the child on the date of the offense, or shortly thereafter, made complaint. On cross-examination, she testified that it was made about a month and a half after the occurrence. On redirect examination the mother disclaimed knowledge of the exact time, but stated that it was a short time after the occurrence. *Held*, the proof of the complaint was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 67.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Juan Gonzalez was convicted of rape, and he appeals. Reversed.

James D. Reymert, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Defendant was convicted of the crime of rape alleged to have been committed by having sexual intercourse with a female child under the age of 16 years who was not his wife. He appeals from the judgment of the superior court sentencing him to 10 years' imprisonment in the state prison at Folsom, and from the order of the court denying his motion for a new trial.

In support of these appeals he urges that the verdict is not sustained by the evidence; that there is no proof that the prosecutrix is not the wife of defendant; that the court erred in the instruction relating to this matter, and in not striking out certain testimony of the mother of the prosecutrix as to the complaint said to have been made by the latter.

In so far as the first matter urged is not covered by the second, the presentation thereof brings it clearly within the rule so often announced by appellate courts that, where the evidence is conflicting, the verdict of the jury will not be disturbed. The probability of the story told by the prosecutrix is a matter for the jury. People v. O'Brien, 130 Cal. 1, 5, 62 Pac. 297. It is admitted that there is no direct evidence that the prosecutrix is not the wife of the defendant. There was no attempt to establish this element of the case, but there is some testimony from which the inference might be drawn that the parties were not married. On the other hand, all the testimony of this character introduced by the prosecution might have been true, and yet such a marriage exist. The case is to be distinguished from that of Lewis v. People, 37 Mich. 518, relied upon by the Attorney General, in this: That the objection is a part of the record on the motion for a new trial here, while in the Michigan case the point was not made in the court below, and the appellate court refused to consider "the lack of evidence direct in form, there being abundance of other evidence," because it was too late to make this objection in the appellate court for the first time. Page 520. The age of the girl as testified to by the defendant (13) was not such as to compel the assumption that there was no valid marriage between the parties for this reason. Marriage under the age of legal consent without consent of parent or guardian is made voidable only under our statute, and, if followed by cohabitation freely and voluntarily after attaining the age of consent, cannot even be annulled. Civ. Code, § 82; People v. Beevers, 99 Cal. 286, 33 Pac. 844. It is apparent either that the prosecution overlooked this element of the case, or tried it on the theory that the presumption of the innocence of the defendant was overcome by the presumption that a marriage contracted by a girl under the age of consent was void. The age of the girl as shown by her own and her mother's testimony (11) might well justify this assumption of nonmarriage. This was further strengthened by the testimony of the physician who examined the child and found that the menses had not yet appeared. The circumstances and evidence strongly support the inference that there was no marriage, but we cannot accept or indorse the view that, where there is ample opportunity for the prosecution to prove this element of the crime directly, indirect evidence will suffice. We feel particularly disinclined to this view as applied to this case, owing to the unsatisfactory character of the evidence upon which the conviction rests. It is not the province of this court to deal with the weight of the evidence where there is any conflict, but where the sole evidence of the commission of the crime of rape rests upon the testimony of a child who says the act was committed while she was asleep, that she woke up and found that something was inserted in her body wrong, and the defendant was at the foot of the bed, that this was the only time she had intercourse with the defendant, though she left her mother's house, and, the evidence shows, was gone for a month and a half, with him, it seems imperative that every element of the crime should be clearly and legally established.

The complaint made by the child to her mother upon her return home a month and a half after the occurrence testified to by her was improperly admitted in evidence, and this must have been largely responsible for the verdict of guilty found by the jury. The complaint by the victim of rape which the law permits to be introduced in evidence is one which follows so closely upon the occurrence as to be practically the first opportunity available to tell one in whom she has confidence. It is the fact of complaint immediately that is supposed to show that she was an unwilling victim; it being presumed that an innocent woman, so assaulted and outraged, will complain of the injury at the earliest practicable moment. What she may say is hearsay, but the act of complaining is original evidence. People v. Mayes, 66 Cal. 599, 6 Pac. 691; People v. Stewart, 97 Cal. 238, 32 Pac. 8; People v. Lambert, 120 Cal. 170, 52 Pac. 307. The same rule is applied in those cases in which the female child is under the age of consent. People v. Baldwin, 117 Cal. 244, 49 Pac. 186; People v. Wilmot, 139 Cal. 103, 72 Pac. 838. The evidence asked to be stricken out, the failure of the court to do which is assigned as error here, is the following answer to a question propounded by the district attorney to the mother of the prosecutrix: "I know that he did wrong. She told me that he did wrong. I examined her, and found her condition such that she had been wronged." The question was: "I will ask you whether or not Carmen on or about May 15, 1906 (the date of the alleged occurrence), or shortly afterwards, made any complaint to you that Juan Gonzalez had had sexual intercourse with her?" The court instructed the witness to answer "yes or no." She did not do so. The defendant immediately cross-examined the witness as to the time of this complaint, and elicited the statement that the complaint was about a month and a half after the occurrence, whereupon he made the motion to strike out, which was denied. The question was not objected to, and, as limited by the court, should have elicited an unobjectionable answer. A motion to strike out the answer as not responsive would have cleared the record, but, assuming that the witness attempted to answer the questions asked, the most than can be said is that she appears to have answered that "on or about May 15th, 1906, or shortly thereafter," the child told her mother that "he did wrong." On cross-examination she modified this by saying that it was a month and a half after the occurrence. On redirect examination by the district attorney the witness disclaimed exact knowledge of the time, but says it was a short time after the occurrence. The only definite fixed time mentioned by the witness is "about a month and a half after the happening." This in the witness' mind might be, and perhaps was, entirely reconcilable with the term "shortly thereafter" of the direct examination, or the "short time" of the redirect. The only definite time to be considered by the court in ruling upon the motion to strike out the testimony was that given on cross-examination. The remarks of the court in making the ruling justify the inference that the testimony was admitted on the theory that the jury might determine the question of time as a fact. This was error. The time of the complaint was material to the determination of the question of law affecting the admissibility of the evidence, and it was the duty of the court to make its own finding of fact as to the time shown by the testimony. Conceding that the admission of the evidence by the trial court was an implied finding that the complaint was made immediately, such a finding is not conclusive upon this court, as there is no conflict in the evidence. The various statements of the witness are all compatible with each other, and, when properly reconciled each with the others, show that the complaint was made a month and a half after the occurrence. This being true, it should not have been admitted.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are reversed, and the cause remanded for a new trial.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. Unrep. 338

## ROTHROCK v. BALDWIN. (Civ. 318.)

(Court of Appeal, Second District, California. Aug. 20, 1907.)

APPEAL — RECORD — ERRORS — DISPOSITION OF CASE.

Where an examination of the record on appeal suggests no error, and the attention of the court is called to none by reason of the failure of appellant to file points and authorities, the judgment will be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3109.]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Mandamus proceedings by A. B. Rothrock against Fred P. Baldwin, as clerk, and another, as president of the board of trustees of the city of Long Beach, to compel defendants to issue and deliver a warrant for labor performed for the city. From a judgment for plaintiff, defendants appeal. Affirmed.

John E. Daly and Carl Monk, for appellants. F. A. Knight, for respondent.

ALLEN, P. J. This is a proceeding in mandamus commenced by plaintiff to obtain an order of the superior court commanding defendant Downs, as president of the board of trustees, and defendant Baldwin, as clerk of the city of Long Beach, to draw, sign, countersign, and deliver a certain warrant on account of labor done and performed by plaintiff for said city at its request, which payment had not theretofore been made. A demurrer was interposed to the petition and overruled. The cause was subsequently tried upon its merits, findings of fact and conclusions of law filed and judgment entered in favor of plaintiff. From the judgment, so entered, this appeal is taken.

The transcript on appeal was filed November 2, 1906. Stipulations were filed for an extension of time within which appellants should file points and authorities. This time expired in December, 1906, and no points or authorities have ever been filed in the case.

An examination of the record suggests no error, and, our attention being called to none, the judgment is ordered affirmed.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 242

## BEAULIEU VINEYARD et al. v. SUPERIOR COURT OF NAPA COUNTY et al.

(Civ. 383.)

(Court of Appeal, Third District, California. Aug. 19, 1907.)

1. Prohibition—Grounds for Relief—Want or Excess of Jurisdiction—Statutes.

Under Code Civ. Proc. § 1102, the writ of prohibition is issued to restrain subordinate courts acting without or in excess of jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 37.]

2. Eminent Domain—Proceedings to Take Property—Jurisdiction of Courts.

Under Code Civ. Proc. § 1243, the superior court has jurisdiction of proceedings to condemn land situated in the county.

3. Prohibition—Grounds for Relief.

The regularity of the proceedings of an inferior court acting within its jurisdiction cannot be reviewed on prohibition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, § 37.]

4. Eminent Domain—Proceedings to Take Property—Issues.

Where, in proceedings to condemn land for a railway right of way, the allegations of the complaint were put in issue and the necessity for the taking was denied, it was necessary to find on every material averment of the complaint before judgment for the taking of the land could be awarded.

5. Same—Trial by Court.

Where, in proceedings to condemn land for a railway right of way, the allegations of the complaint were put in issue and the necessity for the taking was denied, and defendant did not demand that the issue of necessity should be submitted to the jury, the right to submit the issue to the jury was waived and the court must find on it.

6. Prohibition — Grounds for Relief — Irregularity in Proceedings.

In proceedings to condemn land for a railway right of way, the court left to the jury the determination of the value per acre of a tract, and reserved for itself the determination of the question of necessity, after the jury had rendered a verdict. The jury awarded damages by finding the value per acre, and the court subsequently made findings on the question of necessity. *Held* that, though the more orderly procedure required a finding on the question of necessity before leaving to the jury the determination of the amount of damages to be awarded, the action of the court was not in excess of jurisdiction, and was not reviewable on prohibition.

7. Same.

The action of the court in denying to defendant in proceedings to condemn land for a railway right of way the benefit of a jury trial is not in excess of the jurisdiction of the court, and is not reviewable by writ of prohibition.

8. Same—Issues.

The court on application for writ of prohibition cannot impeach the verity of the recitals of the findings and judgment of the trial court, as any error in the decision based on the insufficiency of the evidence may be disposed of by appeal.

Application for a writ of prohibition by the Beaulieu Vineyard and others against the superior court of Napa county and another to prohibit the superior court and the judge thereof from enforcing an order and to prohibit proceedings under or in furtherance of a judgment. An alternative writ was issued, the order to show cause discharged, and a peremptory writ denied.

Carlton W. Greene, for petitioners. John T. York, for respondents.

BURNETT, J. The proceeding is for a writ of prohibition. An alternative writ was issued upon a verified petition. On the return day respondent filed a demurrer and also an answer, denying many of the allegations of the petition. Thereafter petitioners filed a traverse of the answer; and respondent—not to be outdone in volume of asseveration and denial—replied with a "rejoinder to the traverse." We do not deem it necessary to give special consideration to the demurrer of respondent. It is true that a sharp issue is presented as to some of the facts, but, notwithstanding this want of agreement between the parties, the record is sufficient to enable us to determine the controversy.

This proceeding grew out of an action brought by the San Francisco, Vallejo & Napa Valley Railroad Company against petitioners, in the superior court of Napa county, to condemn certain lands of the defendants for a right of way for the railroad of the plaintiff in that action. Petitioners state that "the object of this application is particularly to prohibit the superior court of Napa county and the judge thereof from enforcing an order made July 1, 1907, authorizing the said plaintiff to take possession and use said lands during the pendency of and until the final conclusion of the litigation, and to prohibit all other proceedings under or in furtherance of the judgment; and incidentally to annul all the proceedings subsequent to the verdict of the jury." The proceedings of the trial are set out in extenso in the pleadings before us. It is not claimed that the court acted in excess of its jurisdiction until after the verdict of the jury was rendered. The said verdict, in response to the only issues submitted to said jury, was as follows: "We, the jury in the above entitled cause, find for the defendants as our verdict, in this case, and answer the questions submitted as follows: (1) What was the value per acre on the 13th day of November, 1906, of the first or smaller tract or parcel including the improvements thereon sought to be condemned? Answer: 0.354 acres at $400 per acre—$141.60. (2) What was the value per acre on the 13th day of November, 1906, of the second or larger tract or parcel of land sought to be condemned? Answer: 2.723 acres at $500 per acre, $1,361.50. (3) What damages, if any, will accrue to the larger tract not sought to be condemned by reason of the deprival of a site for a wine cellar? Answer: $2,000. (4) What will be the damages, if any, accruing to the larger tract not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff, accruing from all sources other than the deprival of a site for a wine cellar? Answer: $500. (5) What will be the cost of a good and sufficient fence along the line of the proposed railroad? Answer: $1,025.00. (6) Total value of land $1,503.10. Total damages, $2,300."

Neither party demanded that any other issue be submitted to the jury, and it is claimed by respondent that no objection was made by petitioners to the form of the issue. Petitioners, however, aver that they objected to the segregation of the damages to the portion not to be taken as provided in questions 3 and 4. This conflict in the pleadings as to the objection must be considered of no importance on an application for a writ of prohibition. The peculiar method of presenting the question of damages to the land not to be taken, though, has a bearing of some significance upon the determination of the question before us. It was claimed by the defendants in the condemnation proceeding that, if the portion of tract No. 2 described in the complaint and sought to be condemned should be taken, they would be deprived of a site for a wine cellar of great value for that purpose on account of its peculiar location. During the trial, after the plaintiff became apprised of this contention of the defendant, it sought to abandon any claim to a portion of said tract and to withdraw it from condemnation, and thereby leaving a sufficient area of said tract 2, according to the testimony of some of the witnesses and the subsequent finding of the court, for every purpose of a wine cellar. It asked permission of the court to so amend its complaint as to eliminate the element of damage on account of the deprival of the site for a wine cellar. Defendants objected to the proposed abandonment or to any amendment to the complaint, and their objection was sustained. The judge of the court, however, remarked: "At the conclusion of the case, if the plaintiff sees fit to abandon the piece now under discussion, the court will consider that proposition, and, if the plaintiff asks the court to instruct the jury to eliminate from their estimate of damages and values that caused by this piece, the court will consider that proposition. * * * I will consider those propositions at the conclusion of the case." There is some controversy as to what took place subsequently and before the verdict of the jury was rendered, but respondent avers that when the evidence was closed plaintiff, through its attorneys, stated to the court that it abandoned that proportion of the proposed right of way described in the complaint as tract No. 2 and constituting the so-called wine cellar site, and that the court instructed the jury that the motion to amend the complaint and all proceedings under that motion were for the court, and not for the jury, "and that during the course of the opening argument of plaintiff's attorney to the jury he was proceeding to state that this portion of the land was not necessary for plaintiff's use, and for that reason plaintiff had abandoned it, and that thereupon the attorneys for defendants objected to this line of argument upon the ground that it was a matter for the action of the court alone. Whereupon the court sustained the objection, and instructed the jury to disregard the matter objected to, and that the question of the necessity of the taking of said land and of the abandonment by plaintiff of one portion of the land sought and described in the amended complaint was wholly reserved for the court, and that the court would attend to that matter, after the verdict of the jury upon the issues of value of land taken and damages sustained was rendered. Some time after the jury was discharged the court filed its findings." These covered the various allegations of the amended complaint as to the incorporation of the plaintiff, and the location and general route of its railroad. They contained, also, the verdict of the jury and a declaration that it is necessary that plaintiff shall acquire a right of way over tract No. 1 as described in the amended complaint, and that it is not necessary for said purpose that plaintiff should acquire a certain portion of the second tract described in paragraph 6 of the amended complaint. It is also found that at the trial in open court plaintiff abandoned, waived, and relinquished any right to acquire or condemn said portion of lot No.

2, and admitted and declared, and the evidence adduced by plaintiff established the fact, that said piece of land is not required, and that the sum of $500 comprises the entire damages to the portion of the land not taken and that the residue of the land adjacent to a certain spur track of the Southern Pacific Railroad Company is available for a site for a wine cellar for the deprival of which site the jury assessed the damage at $2,000. Then follow the specific findings of damage in accordance with the verdict of the jury, except that the $2,000 for the said site is eliminated, and the value of the land found necessary to be taken is substituted for that of the whole tract at the price per acre found by the jury. Judgment was entered accordingly. Afterwards the defendants gave notice of a motion to set aside the judgment as provided in section 663, Code Civ. Proc. The court sustained an objection of the plaintiff to the hearing of said motion on the ground that proper notice was not given as required by section 663½, Code Civ. Proc. The court afterwards made and entered its final judgment of condemnation authorizing the plaintiff to take possession of the land after reciting that the money due the defendants had been deposited in court as provided in section 1253, Code Civ. Proc. Petitioners maintain that the court exceeded its jurisdiction in finding that a portion of the land described in the complaint was not required and in its modification of the verdict of the jury accordingly, in its refusal to hear the motion to set aside said judgment, and also in rendering its final decree of condemnation.

Respondent insists that a case for prohibition is not presented for three reasons: (1) Petitioners have a plain, speedy, and adequate remedy at law under the authority of many cases, among which are the following: Murphy v. Superior Court, 84 Cal. 594, 24 Pac. 310; Mines D'Or, etc., Soc. v. Superior Court, 91 Cal. 101, 27 Pac. 532; White v. Superior Court, 110 Cal. 58, 42 Pac. 471; Valentine v. Police Court, 141 Cal. 616, 75 Pac. 336; McAdoo v. Sayre, 145 Cal. 351, 78 Pac. 874; Carr v. Superior Court, 147 Cal. 227, 81 Pac. 515. (2) The acts challenged have already been consummated and the writ of prohibition is a preventive, and not a corrective, remedy. Valentine v. Superior Court, supra, and cases therein cited. (3) It does not appear that the court was without jurisdiction or acted in excess of its jurisdiction in any of the matters of which complaint is made by petitioners.

We pass by a consideration of the first two grounds above stated, as we feel satisfied that the record as presented would not justify us in holding that the court either has exceeded or is about to exceed its jurisdiction in the premises. We are not left in any uncertainty as to the nature and scope of the writ of prohibition. In section 1102, Code Civ. Proc., it is defined as follows: "The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or ministerial when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." The significance and scope of this legislative declaration have been considered many times by the higher courts. Among the cases the following will be found of interest: Raine v. Lawlor, 1 Cal. App. Dec. 352, 82 Pac. 688; Kinard v. Police Court, 1 Cal. App. Dec. 682, 83 Pac. 175; Maurer v. Mitchell, 53 Cal. 289; Talbot v. Pirkey, 139 Cal. 326, 73 Pac. 858. In the Maurer Case, supra, it is said: "At the common law the writ of prohibition was issued to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction. * * * We are of the opinion that the writ mentioned in the Constitution is the writ of prohibition as known to the common law. Nor does the language of section 1102 of the Code of Civil Procedure require of us to hold that the office of the writ has been extended or that it should now issue in cases in which it could not have been resorted to prior to the statute." The foregoing decision was rendered under the old Constitution and prior to the amendment of 1881 to said section 1102, adding the words: "Whether exercising functions judicial or ministerial." The scope of said writ, however, has not been enlarged by said amendment. Camron v. Kenfield, 57 Cal. 550. The question under this application, then, is whether the superior court had the legal power to hear and determine the matters in the manner disclosed by the record. Ex parte Bennett, 44 Cal. 84; Sherer v. Superior Court, 96 Cal. 653, 31 Pac. 565. It cannot be controverted that the court had jurisdiction of the subject-matter and of the parties. Section 1243, Code Civ. Proc.; Bishop v. Superior Court, 87 Cal. 226, 25 Pac. 435; Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585. Again, the regularity of the proceedings of the court, if within its jurisdiction, cannot be reviewed on prohibition. Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143; Goddard v. Superior Court, 90 Cal. 367, 27 Pac. 298; Talbot v. Pirkey, supra.

All the allegations of the amended complaint were put in issue by the answer. Hence it was necessary to find upon every material averment. The necessity for the taking of the land or any portion of it was denied by the defendants. Petitioners made no demand that this issue should be submitted to the jury. In fact, petitioners are here contending that the only issue to be decided was as to the value of the land to be condemned and the damage to the residue, but we determine what the issues are by an inspection of the pleadings. As the privilege of submitting to the jury the other questions is deemed to have been waived, it became the duty of the court to find upon them. Shepherd v. Jones, 71 Cal. 224, 16 Pac. 711; Montgomery v. Sayre, 91 Cal. 210, 27 Pac. 648; Reclamation District v. Thisby, 131 Cal. 574, 63 Pac. 918; San Francisco & S. J. V. R. R. Co. v. Leviston, 134 Cal. 418, 66 Pac. 473. Under the circumstances shown by the record the court not only had the jurisdiction, but it was its duty to determine the question of fact—whether any, and, if so, what, portion of the land was necessary for the purpose of plaintiff. So. Pac. R. R. Co. v. Raymond, 53 Cal. 223; City of Pasadena v. Stimson, 91 Cal. 253, 27 Pac. 604; Spring Valley W. W. v. Drinkhouse, 92 Cal. 528, 28 Pac. 681; City of Santa Ana v. Gildmacher, 133 Cal. 399, 65 Pac. 883. At most, petitioners might contend that the action of the court was irregular in reserving the question of necessity until after the jury rendered its verdict. The more orderly procedure would be for the court to have allowed the amendment proposed by plaintiff during the progress of the trial, or to have found upon the question of necessity before the issue of compensation was submitted to the jury. But, if the jury have sufficient information as to the proposed action of the court to enable it to act intelligently upon the issue of compensation and without prejudice to the substantial rights of the defendant, the reservation by the court of the decision of the question of necessity until after the verdict is rendered is not even erroneous, much less in excess of jurisdiction. Of course, no one would contend for the absurd proposition that the jury could determine the total value of the land to be taken without knowing its area, but there is no insuperable objection to a course that would leave to the jury the determination of the value per acre of a tract and to the court the number of acres necessary to be taken.

In reference to the procedure in similar matters, in the case of City of Los Angeles v. Pomeroy, supra, the court, speaking through the learned chief justice, said: "All other issues were tried by the court, and it was of no importance in what order they were decided, except in so far as a determination of one point was necessary as a basis for the determination of another. Undoubtedly it was necessary that the jury should be correctly instructed as to the quantity and extent of the estate and interest of the defendants in the land in order that they might correctly estimate its value, and, since * * * that point was to be decided by the court, it was necessary that the jury should be informed before retiring what the conclusion of the court was, but that conclusion could be stated as well before as after the filing of formal findings of fact and conclusions of law." But if the court, deeming it unnecessary to announce its conclusion before the jury rendered a verdict on the question of value, should fail to do so, it would not be a case for prohibition. Error might be predicated upon such action and a review be had of it in the proper proceeding, but it would not show excess of jurisdiction because the court has the legal power to make a wrong, as well as a right, decision upon the question whether it is necessary for the guidance of the jury for the court to decide the issue submitted to it or to announce its conclusion before the jury retires. The matter is one of expediency and orderly procedure rather than of jurisdiction.

Petitioners argue that the effect of the action of the court was to deny to defendants the benefit of a jury trial. Even so, under the decisions of the Supreme Court, a question of jurisdiction would not be involved nor would it constitute the occasion for prohibition. Clark v. Superior Court, 55 Cal. 199; Curtis v. Superior Court, 63 Cal. 436; Ex parte Miller, 82 Cal. 454, 22 Pac. 1113; Powelson v. Lockwood, supra; In re Fife, 110 Cal. 8, 42 Pac. 299. But petitioners are entirely mistaken in their construction of the action of the court below, and they seem to misapprehend the rule that must govern us in this proceeding in our examination of the record. We cannot impeach the verity of the recitals in the findings and judgment of the trial court, at least, unless it appears that there was no evidence to support them. But the verified answer of respondent discloses such support in the evidence. It is true that the pleadings of petitioners, verified by their attorney, makes emphatic denial of these representations, but that furnishes no justification here for annulling the judgment or pursuing the inquiry any further. The function of prohibition is not to determine the sufficiency of the evidence to support the findings. As said in Wreden v. Superior Court of Stanislaus County, 55 Cal. 504: "Any error committed in the decision of a motion can be saved by a bill of exceptions and be disposed of by appeal or any other method of review known to the law; but judicial acts which are the subject of review by these ordinary and adequate remedies are not the subject of prohibition." We are nevertheless asked to issue the writ, although we must accept as true the facts found by the court that the jury was fully informed that the plaintiff had abandoned any claim to a certain portion of tract No. 2, and that the court would pass upon the question of the amount of said tract that was necessary to be taken; that in view of this contingency the issue of compensation was submitted to the jury as embodied in propositions 3 and 4; that the residue of said tract 2 was amply sufficient for a wine cellar as desired by the defendants; that there was substantial evidence to support the ruling of the court that the motion of defendants to vacate the judgment was not made as required by the statute; and that upon a sufficient showing the court determined that notice of the final judgment of condemnation was properly given. This we cannot do.

Many cases are cited by petitioners relating to the different phases of the subject before us. We have examined them and we find nothing in any of them necessary to the decision militating against the views we have herein expresed.

The order to show cause is discharged, and the peremptory writ is denied.

We concur: CHIPMAN, P. J.; HART, J.

6 Cal. App. 272

## FINCH v. McVEAN et al. (Civ. 253.)

(Court of Appeal, Second District, California. Aug. 23, 1907.)

1. Attachment — Dissolution — Motions — Notice.

Code Civ. Proc. § 1005, provides that notice of a motion must be given if the court be held in the same county with both parties five days before the hearing, otherwise ten days. Section 1015 provides that, where a party has an attorney, the service of papers must be on the attorney. A nonresident plaintiff procured an attachment, and defendant moved for a dissolution thereof. *Held*, that plaintiff was not entitled to ten days' notice of the hearing of the motion; service of the notice on the attorney being sufficient.

2. Same — Proceedings to Procure — Affidavits—Averments as to Indebtedness.

Under Code Civ. Proc. § 540, providing that the writ of attachment must require the sheriff to attach so much of defendant's property "as may be sufficient to satisfy the demand, the amount of which must be stated in conformity with the complaint," the basis for a writ of attachment is the affidavit therefor, which must specifically state the amount of the indebtedness, and, where a complaint in an action on notes set out the notes, and demanded judgment for the principal with interest according to their terms, and the affidavit for attachment stated the amount of the indebtedness to be the principal of the notes "besides interest," and the writ of attachment recited the amount claimed in the complaint, the writ was issued for an amount in excess of the amount imported by the affidavit, and was properly dissolved on motion.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by John A. Finch against A. J. McVean and another. From an order dissolving an attachment, plaintiff appeals. Affirmed.

W. W. Kaye, for appellant. Fred E. Borton, for respondents.

TAGGART, J. Appeal from an order dissolving an attachment.

The action was on two promissory notes of $4,000 and $3,500, bearing interest, respectively, at the rates of 10 and 7 per cent. per annum. Both are set out in extenso in the complaint, and the prayer of the complaint is for $7,500, "with interest thereon according to the terms of said promissory notes, and costs of suit." In the affidavit for the attachment the indebtedness is stated to be "in the sum of seven thousand five hundred dollars, besides interest." The writ of attachment recites that the action was commenced to recover $7,500, "besides interest at the rate of 10 per cent. per annum from the 19th day of March, A. D. 1904, on the sum of $4,000, and interest at the rate of 7 per cent. per annum from the 30th day of December, 1904, on the sum of $3,500, and costs of suit." These are in accordance with the terms of the notes as pleaded in the complaint.

The ground of the motion to dissolve is that the writ of attachment was issued for a greater amount than that stated in the affidavit. Plaintiff objected to the hearing of the motion to dissolve on the ground that proper notice of the motion had not been given. In support of this objection, an affidavit showing that plaintiff was a nonresident was presented. It is claimed that the court was not held in the same county "with both parties," and therefore the plaintiff was entitled to 10 days under the provisions of section 1005, Code Civ. Proc., as that section stood prior to its amendment in 1907. This objection was properly overruled. Section 1015, Code Civ. Proc., provides that service of notices of this character shall be upon the attorney instead of the party, and it would be idle for the law to measure the time of notice by the residence of the litigant when the service is to be made upon his attorney. After the appearance of the party by attorney, only such writs and process as affect the party as distinguished from the litigation are required to be served upon the party personally. Section 1015, Code Civ. Proc. Section 540, Code Civ. Proc., provides that the writ of attachment directed to the sheriff must require him to attach so much of the defendant's property "as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint," etc. "The basis for the writ is the affidavit, and the clerk must look to that alone for the purpose of determining the amount for which the sheriff is to levy under the writ, as well as the amount for which an undertaking is given." Baldwin v. Napa Wine Co., 137 Cal. 649, 70 Pac. 732. The apparent inconsistency between this construction of the law and the provisions of section 540, Code Civ. Proc., above quoted, is conceded by the Supreme Court in the opinion in the case of De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718, and the language of the section reconciled by a construction there given to it. The word "conform" as used in the section is held not to be the equivalent of "identical," but rather to mean "in correspondence in character and in harmony or congruity." Page 415 of 120 Cal., and page 721 of 52 Pac. This construction is approved in Baldwin v. Napa, supra, and considered in declaring the rule to be that the clerk must look to the affidavit alone. In the case at bar, the amount of the plaintiff's demand is stated in the writ in strict conformity with the allegations of the complaint. In this statement the rates of interest and the dates from which it is to be computed are set out specifically, while neither rates nor time appear in the affidavit. There is nothing in the affidavit by which the amount of interest due can be determined, and the only indebtedness the amount of which is expressly set forth therein is the principal sum of $7,500. On the other hand, the sheriff is required by the writ to attach enough of defendant's property to satisfy a demand of $7,500, principal, and, as ascertained by computation, about $475 interest. While the same particularity of statement is not required in an affidavit for attachment that is required in a pleading, this rule does not extend to the matter of the indebtedness. The amount of the indebtedness to the plaintiff is the principal and all important element in the affidavit. Bank v. Boyd, 86 Cal. 388, 25 Pac. 20. The amount stated therein determines how much of defendant's property the sheriff is to seize, and this, in turn, limits the amount for which an undertaking may be demanded by the sheriff to prevent or release the attachment. Baldwin v. Napa, supra; section 540, Code Civ. Proc. Under the construction given to the statute by the case last cited, we do not think the interest can be treated as a mere incident to the principal. Nor can an attachment be sustained which requires the taking of more of a defendant's property than is requisite to secure the indebtedness stated in the affidavit.

An attachment proceeding is not a part of every civil action brought to recover on a contract for the direct payment of money. It is a provisional remedy to be used by the creditor at his election to make the property of the debtor available for the execution of any judgment that may be obtained in the action. It is initiated by an affidavit (in case of residents) setting forth the amount of the indebtedness due to plaintiff from defendant over and above all legal setoffs or counterclaims, upon a contract, for the direct payment of money, payable in this state, which has not been secured by mortgage, pledge, or lien, or, if secured, the security has become valueless. In stating a cause of action in a complaint, it is not necessary to state under oath the amount due, nor to allege that the amount of indebtedness stated is over and above all legal set-offs or counterclaims, or that the indebtedness has not been secured, but only indebtedness so qualified under oath can authorize the issuance of an attachment. The clerk, before issuing the writ, must see that the affidavit complies with the provisions of the statute and that the indebtedness therein stated, and so qualified, is supported by the statement in the complaint of an attachable cause of action for the direct payment of money, in an amount equal to or greater than the amount stated in the affidavit. Upon receiving the proper undertaking, he must then issue the writ for the amount stated in the affidavit. No indebtedness not covered by the affidavit can be included in that for which the writ issues.

There is nothing in O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465, in conflict with the view here taken. In the statement of the contract in the affidavit for an attachment in that case there appeared the date of maturity of the obligation upon which the attachment rested, and the amount stated would be presumed to draw the legal rate of seven per cent. from that date. The demand set forth in the writ was well within that averment of the affidavit, and stated the amount demanded in the complaint. Conceding, for the sake of argument, that in the affidavit in the case at bar the words "with interest" imply the legal rate, and that we may look to the complaint to ascertain the date of maturity, there yet remains the variance and excess over the amount stated in the affidavit caused by one of the notes bearing interest at the rate of 10 per cent. per annum.

The writ, therefore, issued for an amount in excess of that stated in the affidavit, and in excess of any amount that might be imported into the affidavit by any of the theories suggested. The ruling of the superior court was proper, and should be sustained.

Order appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(6 Cal. App. 261)

## SCHAMBLIN v. MEANS et al. (Civ. 349.)

(Court of Appeal, Second District, California. Aug. 20, 1907.)

1. STATUTES—AMENDMENTS—REPEALED STATUTES.

An attempt to amend sections of the Code after their repeal at the same session of the Legislature is ineffectual.

2. TAXATION—SALES FOR DELINQUENT TAXES—DEEDS—VALIDITY.

Where the law did not require a certificate of sale for taxes, the provision that the recitals in the certificate should be embodied in the tax deed was inoperative, and a compliance therewith was unnecessary.

3. SAME—VALIDATING TAX DEEDS—STATUTES.

The act of 1903, legalizing tax certificates and deeds to the state for nonpayment of taxes, is applicable to a tax deed executed June 28, 1901, and showing in its recitals that the tax sale was made on June 27, 1896.

4. SAME.

Land was sold to the state for nonpayment of taxes on June 27, 1896. The deed to the state was made June 28, 1901, and the deed from the state to a purchaser was dated January 14, 1902. *Held*, that the act of 1903, validating tax certificates and deeds, operated to make good the tax deed as of the date it was made, and cured defective proceedings prior thereto.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Gus Schamblin against T. A. Means and others. From a judgment for defendants and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

W. W. Kaye, for appellant. Chas. N. Sears (O. B. Carter, amicus curiæ), for respondents.

TAGGART, J. This is an action to quiet title. Defendant relied upon a deed from the state of California. The only title of the state to the property in dispute was vested by tax sale and deed. The deeds and tax sales were held valid, and judgment was in favor of defendant. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

Appellant contends that the deed from the tax collector to the state is void because (1) it does not recite the amount for which the property was sold; (2) it does not recite when the right of redemption expired; (3) it does not correctly recite the date of sale; (4) it incorrectly recites that the time for redemption had expired; and (5) it was issued before the expiration of the time for redemption. The validity of the deed from the state to defendant is also assailed on the grounds that it was issued before a valid deed to the state had been filed with the controller as required by section 3897, Pol. Code, and it is not executed in accordance with the provisions of section 14, art. 5, of the Constitution of the state. The questions raised on this appeal are all substantially answered by the opinions of the Supreme Court in the case of Baird v. Monroe (Cal.) 89 Pac. 352, and the recent cases citing and approving that case. Carter v. Osborn (Cal.) 89 Pac. 608; Fox v. Wright, (Cal.) 91 Pac. 1005; Fox v. Townsend (Cal.) 91 Pac. 1007; Bank of Lemoore v. Fulgham (Cal.) 90 Pac. 936.

It is contended, further, by appellant that the validating act of 1903 does not apply to the tax deed in this case, because it appears upon the face of the tax deed that "five years have not elapsed between the date of sale of the property to the state for nonpayment of taxes and the date of the execution of such deed." The tax deed is dated June 28, 1901, and contains the following recital: "And, whereas, the certificate stated that, unless the said real estate was redeemed within five years from the date of the sale to the state, the purchaser thereof would be entitled to a deed thereof, on the 27th day of June, 1901, that said certificate of sale bears date the 22d day of August, 1896, the day of said sale." The certificate of sale is dated August 22, 1896, and certifies that the sale of the property was made "on the 27th day of June, 1896," and that "the purchaser thereof will be entitled to a deed thereof, on the 27th day of June, 1901." Sections 3776 and 3777 of the Political Code, which provide for the execution and recordation of a certificate of sale for taxes, were not in force at the time of making of the sale here under consideration. Those sections were repealed on February 25, 1895 (St. 1895, p. 19, c. 11), and re-enacted April 1, 1897 (St. 1897, p. 432, c. 267), in an amended form. An attempt to amend these sections after their repeal in 1895 at the same session of the Legislature (St. 1895, pp. 327, 328, c. 218) was ineffective. In so, far, then, as the objection rests upon the certificate of sale, it may be disregarded (Carter v. Osborn, supra), and it becomes immaterial when the certificate of sale was made, whether upon the date of sale or at some other time. Any ambiguity in the recital in the deed of what the certificate of sale contained or stated was also immaterial. As the law did not require a certificate of sale at all, the provision that the recitals in the certificate should be embodied in the deed became inoperative and a compliance therewith unnecessary. Fox v. Townsend, supra. This ambiguity eliminated, there is no doubt as to the application of the act of 1903 to the tax deed here under consideration. It was made on the 28th day of June, 1901, and shows by its recitals that the tax sale was made on June 27, 1896, and the finding of the court is that five years had elapsed between the date of sale and the date of the execution of the deed. All of the objections to the validity of the tax deed may therefore be summarily disposed of in favor of respondent on the authority of the cases cited above, and applying the act of 1903 to that deed.

Appellant contends that the cases mentioned do not cover all the objections made to respondents' title; that, admitting that their application to the case at bar disposes of the questions of the validity of the deed to the state, and the constitutionality of the act empowering the tax collector to execute, in the name of the state, deeds conveying property acquired by the state in the enforcement of the revenue laws, there is another question necessary for this court to determine before it can affirm the judgment of the lower court that was not decided by the cases cited nor either of them. Appellant's position, stated in full, is as follows: The property was sold to the state June 27, 1896, the deed to the state was made June 28, 1901, the deed from the state to defendant bears date January 14, 1902, and the validating act, which took effect immediately, was approved February 28, 1903. The act purports to confirm, validate, and legalize the tax certificates and deeds to the state only. At the time the deed was made from the state to defendant, the defective tax proceeding had not been cured and the deed of January 14, 1902, could and did convey such title, and only such title, as the state then had to the property in question; that any additional title acquired by the state by virtue of the act of 1903 did not feed the void title acquired by the defendant by the deed from the state. In none of the cases cited was this question directly presented and urged. In the case of Baird v. Monroe it appears from the language of the opinion that it was expressly admitted that the defendant regularly succeeded to whatever title the state acquired by virtue of the tax proceedings. From the opinion in this case we derive the principles upon and the rules by which the Supreme Court considered the act in question. It is said of the act of 1903: "It is essentially a curative act, intended to give effect to past acts or transactions which are ineffective because of neglect to comply with some requirement of law." It was intended to operate retroactively. 89 Pac. 354. Again: "At the time of the execution of the deed, the five years from the date of sale within which the owner had the absolute right of redemption having expired (section 3780, Pol. Code), the state was entitled to the deed from the tax collector, and it was then the duty of the tax collector to execute such deed in the manner prescribed by law. *The state was then equitably the owner of the property.* [The italics are ours.] * * * The deed to the state provided for by the statute, though designated a 'deed,' is nothing more, in effect, than formal written evidence of the various facts essential to vest the property in the state. * * * It is the evidence, primary in some particulars, and conclusive in others, of those facts from which the vesting of the title to the property in the state necessarily follows as a matter of law, and prima facie operates as a muniment of title. Political Code, §§ 3786, 3787." Page 355. In other words, given a valid assessment of his property and a reasonable opportunity to pay his taxes, it is the duty of the property owner to do so. Failing to do this for five years after a sale in accordance with the statute has been made, his property passes to the state. The recitals in the deed are but evidence that the steps provided by law have been followed, and it is the acts themselves which vest the title in the state. From the opinion in Fox v. Wright, 91 Pac. 1005, we quote: "At the end of this five years the deed to the state is made, and the title of the state becomes absolute. * * * We are unable to see why the state may not obtain a title free from all equities in the former owner at the expiration of five years as may a private citizen after foreclosure upon the mortgage when the period of redemption following such foreclosure has passed." In Fox v. Townsend, 91 Pac. 578, it is said: "No reason is discernible why the state, like a private individual, may not obtain a proper correction deed for the betterment of the title to property which it has conveyed, and, if this be done after conveyance, why, as in the case of an individual, it should not serve to perfect the title granted." It seems to us the cases mentioned fully cover the question, and that no further authorities need be cited to show that the curative act operated to make good the tax deed as of the date it was made. The state, at the end of the five-year period of redemption, acquired an absolute title to the property by a deed which was subsequently confirmed and made valid. There was no right or property taken away from the appellant or his predecessor in title, as the absolute right of redemption expired at the end of the five-year period. Taking the view, however, that the curative act operated to make good only the title to the state as of the date of its passage, such additionally acquired title went to feed and validate the title of defendant.

Judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(6 Cal. App. 266)

## PEOPLE v. McPHERSON. (Cr. 58.)

(Court of Appeal, Second District, California. August 23, 1907.)

1. CRIMINAL LAW—APPEAL—RECORD—FILING OF PAPERS CONSTITUTING RECORD.

Under the express provisions of Pen. Code, §§ 1207, 1246, on appeal from a conviction, the clerk must transmit to the appellate court the indictment or information, a copy of the minutes of the plea or demurrer, a copy of the minutes of the trial, the written instructions given, modified, or refused, with the indorsements thereon, a certified transcript of the court's charge, and a copy of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2782–2802.]

2. SAME—REVIEW—APPEAL FROM JUDGMENT ALONE.

An appeal from the judgment alone, without a bill of exceptions, brings up the judgment roll and presents for review the sufficiency of the indictment or information, any errors declared in the minutes, and the propriety of the instructions.

3. SAME.

Under the express provisions of Pen. Code, § 1259, upon an appeal by defendant from the judgment, the court may review any intermediate order or ruling involving the merits or which may have affected the judgment.

4. FORGERY—ELEMENTS OF OFFENSE.

The essential elements of forgery are a false making of some instrument, a fraudulent intent, and that, if genuine, the writing might injure another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, §§ 1–7.]

5. SAME—INFORMATION—ALLEGATIONS — EFFECT OF FORGERY.

Where a forged instrument is valid on its face, it is not necessary to allege in the information matters aliunde to show in what manner the person alleged to have been injured could be affected by the forgery, nor to show that he owned property that would be affected thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, §§ 77–81.]

6. SAME—SUFFICIENCY OF INFORMATION.

In a prosecution for forgery, an information is not defective because it cannot be determined therefrom whether the charge is for forging a fictitious deed or signing a person's name to a deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, §§ 66–73.]

7. SAME—STATUTORY PROVISIONS.

An information for forging a deed is properly brought under Pen. Code, § 470, respecting the forgery of conveyances, and not under section 476, on the passing or uttering of fictitious bills.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, §§ 2, 10, 14.]

8. SAME — SUFFICIENCY OF ALLEGATIONS — OWNERSHIP OF PROPERTY.

It is not necessary to allege, in an information for forging a deed, that the person whose name was forged to it was the owner of the property described in the deed at the time of the forgery; that being a matter of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 81.]

9. CRIMINAL LAW — LIMITATION — COMPUTATION OF TIME.

For the purpose of testing the sufficiency of an information for forgery under the statute of limitations, the date of the commission of the offense alone can be considered; the date of the forged instrument being immaterial.

10. SAME — TRIAL — ADMISSIBILITY OF EVIDENCE—EVIDENCE OF ANOTHER CRIME.

On a forgery trial, evidence that accused procured the return of the forged instrument to him under an assumed name was not rendered inadmissible because it tended also to show that he was guilty of the crime of impersonating another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 823.]

11. SAME—TRIAL—RECEPTION OF EVIDENCE—REOPENING CASE—DISCRETION OF COURT.

The court acted within its discretion in reopening the case for further evidence in a prosecution for forgery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1619–1627.]

12. SAME—INSTRUCTION ASSUMING FACTS NOT IN EVIDENCE.

On a forgery trial, an instruction which assumes that an expert witness had been paid for his services, in addition to the fees allowed ordinary witnesses, was properly refused; there being no evidence thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1754–1764.]

13. SAME.

On a forgery trial, an instruction which calls an expert a "hired witness" was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1889–1894.]

14. SAME—INSTRUCTIONS NOT SUSTAINED BY EVIDENCE.

On a forgery trial, an instruction dealing with witnesses who were "persons interested in or employed to find evidence against accused" was properly refused, where there was no evidence that such witnesses had testified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980–1985.]

15. SAME.

On a forgery trial, an instruction that the same rules applicable to persons interested in or employed to find evidence against accused, when witnesses should be applied to detectives, was properly refused; there being no evidence to show that a detective who testified as an expert was a hired witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980–1985.]

16. SAME—APPEAL—MATTERS NOT APPARENT OF RECORD.

On appeal in a criminal prosecution, matters not shown by the record, but only appearing by statements of counsel in argument, cannot be considered by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2953.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

C. F. McPherson was convicted of forgery, and appeals. Affirmed.

Wallace W. Wideman, Benj. C. Welch, and J. C. Crouch, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Appeal from a judgment upon conviction of forgery, and from an order of the trial court denying defendant's motion for a new trial.

The information is attacked by demurrer, and the same objections are urged upon motion in arrest of judgment. The other errors assigned by appellant, and upon which he bases his appeal from the order denying his motion for a new trial, are: (1) The introduction of evidence tending to show that the defendant had committed another and different crime; (2) the reopening of the case to permit the prosecution to introduce additional evidence after the people had rested and the defendant moved to dismiss the action; and (3) the refusal of the court to give certain instructions requested by defendant.

The Attorney General objects to the consideration of the ruling of the court on the demurrer to the information, because no bill of exceptions appears in the record preserving the exceptions to the ruling and identifying the papers used upon the hearing. This objection is based upon the decision of the Supreme Court in People v. Long, 121 Cal. 494, 53 Pac. 1097, subsequently followed by the Appellate Court in two cases. People v. Druffel, and People v. McPherson, 86 Pac. 907. These were all appeals by the people from orders sustaining demurrers to indictments. In such cases, as said in the opinion in the leading case, there is no provision for a judgment roll or record of any kind, and, if the matter be heard by an appellate court at all, it must be upon a bill of exceptions under sections 1172 and 1174 of the Penal Code.

When a judgment is rendered against a defendant, upon conviction the clerk of the trial court is required (within five days) to "annex together and file the following papers, which constitute a record of the action: (1) The indictment or information, and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the written instructions given, modified, or refused, with the indorsements thereon, and the certified transcript of the charge of the court; and (4) a copy of the judgment." Section 1207, Pen. Code. An appeal being taken, the clerk must transmit to the Appellate Court, among other matters, the foregoing record. Section 1246, Pen. Code. The appeal from the judgment alone, without a bill of exceptions, brings up the judgment roll (called in section 1207 "a record of the action"), and presents for review the sufficiency of the information, any errors disclosed in the minutes, and the propriety of the instructions given, and refused. People v. Clark, 121 Cal. 634, 54 Pac. 147.

"Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment." Section 1259, Pen. Code. We have before us in the transcript, among the papers properly transmitted by the clerk, the information, and the minutes of the demurrer. These show the ruling of the court and defendant's exception to the ruling upon the information. It is apparent from an examination of these that the information is sufficient. The essential ingredients of the crime of forgery are: A false making of some instrument; a fraudulent intent; and, if genuine, that the writing might injure another. People v. Frank, 28 Cal. 514; Ex parte Finley, 66 Cal 263, 5 Pac. 222. Whatever the character of the writing, the true test is the intent to defraud. People v. Munroe, 100 Cal. 664, 35 Pac. 326, 24 L. R. A. 33, 38 Am. St. Rep. 323. If the forged instrument be valid on its face, it is not necessary to allege matters aliunde to show in what manner the person alleged to have been injured could be affected by the forgery, nor show that he owned property that would be affected thereby. People v. Todd, 77 Cal. 464, 19 Pac. 883; People v. Bibby, 91 Cal. 474, 27 Pac. 781; People v. Leonard, 103 Cal. 203, 37 Pac. 222.

The information is not defective because it cannot be determined therefrom whether the charge is for forging a fictitious deed or signing the name of James Wallace to the deed. The information is to be considered with reference to the provisions of section 470 of the Penal Code, and not section 476. It is not necessary to allege that James Wallace was the owner of the property described in the deed at the time of the alleged forgery. This was a mere matter of evidence.

Equally untenable is the position taken by appellant upon the oral presentation of the case. The crime is alleged by the information to have been committed on or about the 7th day of June, 1906. The instrument said to have been forged is set out in the information in extenso and bears date of March 18, 1889. It is urged that the prosecution is barred by the statute of limitations, because the information was not filed within three years after the date of the deed. In other words, the contention is made that by judiciously dating the forged instrument more than three years prior to its utterance the forger may protect himself from prosecution for the crime. To state the proposition is sufficient reason for refusing to adopt it. For the purpose of testing the sufficiency of the information the date of the alleged commission of the offense (June 7, 1906) alone can be considered, and the date of the forged instrument is immaterial.

The evidence of the witness Green, introduced to show that the defendant procured the return to him of the forged deed under the name of Ben M. Bell, was properly admitted. That it tended also to show that he was guilty of another crime, that of impersonating another, did not affect its admissibility. People v. Sanders, 114 Cal. 216, 230, 46 Pac. 153; People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

The reopening of the case for further evidence was within the discretion of the trial court, and the record here discloses no abuse of that discretion. This has been held to be the rule even after the defendant has closed his case. Cousins v. Partridge, 79 Cal. 228, 21 Pac. 745; People v. Lewis, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783.

The testimony for the prosecution included that of an expert on handwriting, and that of a police detective. The court gave the usual general instruction as to how the credibility of a witness is to be determined, to wit: "By his character and conduct, his manner on the stand, his relation to the controversy and to the parties, if any, his hopes or his fears, his bias or impartiality, the reasonableness or unreasonableness of the statement he makes, the strength or weakness of his recollection, viewed in the light of all the other testimony and facts and circumstances in proof in the case." No special instructions were given in relation to expert or detective testimony. Six instructions along this line were requested by defendant, but were refused. Most of these were framed upon the theory that the testimony showed, or tended to show, that the expert had been paid. The only testimony bearing upon this question appears in the cross-examination of the witness Lackey, the handwriting expert, who testified that he had no contract to be paid for testifying in the case, but expected to be paid for it; that no price was set; he didn't know what his bill would be; and hadn't given the matter any consideration. There is no direct evidence in the record that he expected anything more than his witness fee. Had the court been requested to give the jury properly framed instructions embodying the law of evidence applicable to expert and detective testimony, it would have been its duty to do so, notwithstanding it had given a general instruction relative to the consideration of the bias, interest, and impartiality of the witnesses and their relations to the parties, and controversy, but we do not think any error was committed by refusing to give the instructions the refusal of which is assigned as error by appellant.

Instruction "No. 2" assumes that it was shown that the expert had been "paid for his evidence"; "No. 3" that he had been paid for his services in addition to the legal fees allowed ordinary witnesses; "No. 4" contains the same assumption; "No. 5" deals with a "hired witness" in general; "No. 6" with "persons interested in or employed to find evidence against the accused"; and "charge 7" instructs the jury to apply the same rules above stated to the testimony of detectives. Without any evidence whatever to indicate that the police detective was in any manner a "hired witness," the court is asked to apply the same rules to him. For the court to assume for the purpose of instructing the jury that because a person who acted as an expert testified that he expected to be paid for testifying, that the pay spoken of must of necessity be other than his ordinary witness fees, would, in the absence of evidence to this effect, be unwarranted and improper. So it would also be improper to characterize such a person to the jury as a "hired witness." There was no evidence that either the expert or the detective, or any one else, was employed to find evidence against the accused in this case. That the detective received a regular compensation for discharging his duties as a public officer might be assumed, and in so far as he aided in securing the evidence upon which the conviction rested he was employed to find evidence but instruction No. 6 was not framed on that theory. Charge 7 is too vague and indefinite, and must stand or fall with the foregoing instructions, which were properly refused.

On the oral presentation of this case, it was urged, in support of the appeal, that the defendant was imprisoned in the jail of Los Angeles county upon this charge and not indicted, at the time the grand jury of the county were in session, and that body failed to inquire into the case, as provided by section 923 of the Penal Code. The transcript contains no reference to this matter, and we cannot accept the oral statement of facts by counsel in argument, in lieu of the printed or written record required by the rules of this court. If it were a matter that might be considered upon a proper record, it is not before us now.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.